

January 2008

# Developing a Municipal Fair Housing and Land Use Curriculum

Ethan Parsons

*University of Massachusetts Amherst*, [eparsons@larp.umass.edu](mailto:eparsons@larp.umass.edu)

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DEVELOPING A MUNICIPAL FAIR HOUSING  
AND LAND USE CURRICULUM

A Thesis Presented  
by  
ETHAN F. W. PARSONS

Submitted to the Graduate School of the  
University of Massachusetts Amherst in partial fulfillment  
of the requirements for the degree of

MASTER OF REGIONAL PLANNING

May 2008

Department of Landscape Architecture and Regional Planning

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ETHAN F. W. PARSONS

Approved as to style and content by:

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Ellen J. Pader, Chair

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Jamie R. Williamson, Member

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Robert L. Ryan, Member

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Elizabeth A. Brabec, Department Head  
Department of Landscape Architecture and  
Regional Planning

## ACKNOWLEDGMENTS

I would like to thank the Massachusetts Fair Housing Center and the Fair Housing Center of Greater Boston for inviting me to work with them in 2007.

I would like to thank my committee: Ellen Pader, Robert Ryan, and Jamie Williamson, for their support during the development of this thesis and during my graduate studies at UMass.

I would like to thank Stella for her support and for being so interested in my ideas, whether over a cup of tea or a hike around the nearby hills. I would also like to thank my mother Becky and my father Roger; my brothers Ben and Simon for their academic inspiration; and countless other academic and non-academic advisors and friends that have been with me on this journey.

## ABSTRACT

### DEVELOPING A MUNICIPAL FAIR HOUSING AND LAND USE CURRICULUM

MAY 2008

ETHAN F. W. PARSONS, B.A. SAINT MICHAEL'S COLLEGE  
M.R.P., UNIVERSITY OF MASSACHUSETTS AMHERST

Directed by: Dr. Ellen J. Pader

This research focuses on the applicability of the federal Fair Housing Act to the practice of municipal land use planning and zoning and examines how this relationship can inform a curriculum intended for municipal authorities on their responsibilities under the Act. The purpose of the Fair Housing Act is to provide equal access to housing through desegregation and non-discrimination. Historically, many municipal governments have used zoning to segregate communities based on race, ethnicity, national origin and disability, among other traits. Today, scholars point to exclusionary zoning tactics and unfair treatment of housing for the disabled, for example, as barriers to equal housing opportunity. Strategies for affirmatively furthering fair housing exist and their implementation is feasible.

Municipalities throughout the country implement these strategies through a variety of practices, however emerging cases suggest that not all practice non-discrimination. Through instruction, many more municipal authorities might learn about strategies to affirmatively further fair housing in addition to fulfilling their legal responsibilities as housing regulators. Fair housing advocates and professionals are poised to assume instructional leadership because of their experience working with municipal authorities and their understanding of the Fair Housing Act and its relationship to land use planning and zoning.

## EXECUTIVE SUMMARY

Fair housing means equal opportunity to housing wherever one wants it as long as they can afford it. The federal Fair Housing Act (FHA) makes it unlawful to discriminate against home seekers and others based on their color, race, national origin, sex, religion, a disability, or whether there are children under 18 in the household. Massachusetts's laws extend protections, prohibiting discrimination based on marital status, age, sexual orientation, military or veteran status, ancestry, public assistance, housing subsidies or rental assistance, and genetic information. The FHA not only applies to private sector real estate transactions, but it also applies to municipal governments in their capacity as housing regulators.

Seemingly neutral policies can have the effect of discriminating against persons protected by the FHA. Municipal governments, including planning and zoning boards, city councils, mayors and professional staff, have responsibilities to promote fair housing by ensuring their policies do not have a disproportionate impact on protected categories. Fair housing advocate-trainers that wish to develop a curriculum and instruct municipalities on their responsibilities of promoting fair housing can do so by understanding the content of such a curriculum as well as the learning needs of the municipal audience.

Chapter 1 discusses the dual purpose of this thesis: to explore the connection between municipal land use planning and zoning, and the provisions of the FHA that make it unlawful to discriminate through these practices; and to understand how fair housing advocates could develop and implement a curriculum designed to instruct municipal authorities on their fair housing roles and responsibilities. Fair housing advocates are logical instructors of this subject matter because of their experience working with municipalities and their capacity as educators. Municipal government authorities and boards are consistently involved with fair

housing conflicts, and there is a clear learning need for this audience pertaining to fair housing. The policies and decisions of municipalities are commonly identified as barriers to housing opportunity and could violate the FHA. In addition to a clear value for teaching the course, basic considerations for effective instruction include understanding the subject matter and the learners' needs.

Chapter 2 discusses the significance of legal developments in fair housing, especially the Fair Housing Act of 1968 and the Fair Housing Act as Amended 1988 (collectively the FHA). The purpose of the 1968 FHA was to desegregate cities throughout the country, by prohibiting discrimination on the grounds of race, color, national origin, religion and sex. In 1988 protections were expanded to cover the disabled and families with children under 18 in the household. Massachusetts's laws extend protections to more categories of people. Complaints against municipalities emerge often; recent complaints in MA involve alleged discrimination because of race, color, national origin (Agawam), and because of disability. The Supreme Court has decided significant fair housing cases, establishing legal tests for proving discrimination and establishing laws surrounding occupancy standards. The courts apply tests to determine whether policies have the effect of discriminating against protected categories under the FHA.

The legal framework of the FHA is described in Chapter 3. Parties who believe they are victims of discrimination have standing to sue or file complaints against municipalities, including individuals, operators of substance abuse homes and developers. In cases where policies are not facially discriminatory (overt), courts can apply a disparate impact, or effects test, to determine whether seemingly neutral policies have a discriminatory impact on the

protected categories. In other words, it is not necessary for a complainant or plaintiff to prove discriminatory intent, for intent can be shown through significant adverse effect.

A series of legal cases presented in Chapter 4 illustrate various practices that are typically challenged under the FHA. The cases are selected to highlight how different courts view different practices under a similar microscope. Certain practices are consistently challenged under the FHA, such as setting burdensome requirements on group homes for the disabled that are not set on other single-family homes and wavering from standard review procedure when presented with a proposal or application for a housing development where prospective residents could belong to a protected category. Fair housing advocates often connect fair housing with exclusionary zoning, arguing that exclusionary regulations can have the effect of discriminating against protected categories. In the case of *Dews v. Town of Sunnyvale, TX* (2000), a court considered exclusionary zoning regulations in its holding that the town used its land use planning and zoning authority to exclude African Americans.

Strategies that municipalities can employ to build and maintain inclusive communities are discussed in Chapter 5. Fair housing planning requires taking proactive measures to ensure non-discrimination, examining potential impediments to fair housing, and implementing strategies to overcome the impediments. Certain activities are consistently challenged under the FHA, including discussions of officials about who might live in a particular development rather than whether it meets zoning requirements. Advocate-instructors make fair housing information accessible to municipalities through a variety of media in order to instruct them of their obligations to promote fair housing. The FHA applies to all municipalities.



Chapter 6 details the survey methods I employed to learn about the experiences of advocates as instructors of municipalities. A second survey, designed to learn about municipal planning and zoning boards' knowledge of the FHA, received few responses and was therefore not included (see Appendix). The results of the advocate survey are discussed in Chapter 7. Advocates, including staff and board members of fair housing centers and attorneys, indicated there is at least some value in training municipal authorities, and they would target planning boards and zoning boards for fair housing training (19 of 21 and 18 of 21, respectively), followed by staff planners, city councils, municipal attorneys, and mayors. There is a clear learning need for municipal authorities on this subject matter, as most advocates indicated that the municipal audiences they worked with did not always fully understand the connection between the FHA and their job. To make the connection clear, advocate-instructors have warned that failure to affirmatively further fair housing results in a loss of CDBG funds, they relate fair housing to exclusionary zoning and they use an analysis of impediments as a starting point. The most important municipal-level fair housing issues identified by advocates include the basics of the FHA and its significance and the requirement to make reasonable accommodations and allow reasonable modifications. Lastly, partnering with other agencies and joining other training sessions increases outreach potential.

Chapter 8 summarizes basic considerations for beginning an instructional program or developing a fresh curriculum for particular audiences. Advancing an educational program requires some planning and collaboration. Numerous federal, state, and non-profit agencies can serve as useful resources, especially HUD. The material taught and the tone of the training is essentially a choice that each instructor or organization must make. Therefore,

this thesis is intended as an overview of considerations, not a formula for the perfect curriculum.

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## CHAPTER 1

### INTRODUCTION

The motivation for this thesis comes from my desire to understand the legal framework of the Fair Housing Act (FHA) and how this influences land use planning and zoning. This task has proved rather challenging and I have provided merely a selection of case law and legal interpretations, tailored to highlight some of the most important considerations for land use planning and zoning authorities who are not already experts on the subject. My discussion of the statutes and cases should not be taken as legal advice; they are intended as discussions of cases where the activities of municipal authorities involved with land use planning and zoning have intersected with fair housing. I intend for this thesis to be of value to fair housing advocates who wish to instruct, or are currently instructing, municipal authorities on their roles and responsibilities under the FHA. I believe that municipal government plays a crucial role in promoting inclusive communities and that education is the most important factor for municipal and community development that reflects people's needs. Fair housing is a fundamental piece of planning, building and maintaining inclusive communities.

The rationale behind any fair housing curriculum designed for municipal authorities involved with land use planning and zoning depends upon the assumption that these authorities, especially volunteer planning and zoning boards, understand the concepts and have the will and skill to prevent housing discrimination. Fair housing advocates commonly address other issues of housing access and how land use and zoning policies affect housing opportunity in general, which forms part of an important conversation on inclusion. However, this thesis' primary goal is to explore the specific relationship between fair

housing, land use and zoning, in order to ascertain the most important concepts to be addressed in a curriculum.

There is a distinction between the legal responsibilities of municipalities under the FHA, such as making reasonable accommodations in policies for the disabled, and the broader roles and responsibilities of municipalities to promote housing access to all residents of a community, and the distinction is not always clear. Therefore, exclusively large-lot residential zoning, having the effect of limiting affordable housing, could be understood as one way of limiting housing opportunity, however depending on the larger context it might not be challenged under the FHA. A second activity, such as stating discriminatory reasons for denying an application for a multifamily dwelling that could potentially be occupied by a minority group, would also limit housing opportunity, and would clearly violate the FHA. Although large residential lot size requirements may not alone be challenged under the FHA, as would discriminatory statements made by officials, followed by the denial of a permit, federal courts have considered both the effect of exclusionary zoning practices, for example, and the discriminatory comments of neighbors and officials in hearing FHA claims. Fair housing advocates (fair housing center organizations, their staff, attorneys, and others) often do not distinguish clearly, either intentionally or unintentionally, between affordable housing and the requirements of municipalities under the FHA, even though economic status is not a protected category under the law. Fair housing, in the legal sense, means equal housing opportunity, free from discrimination, as long as one can afford it. To some, fair housing and inclusiveness means providing opportunities for anybody to live wherever they choose, regardless their economic status.



The first and most essential task of this thesis is to explore the relationship among land use, municipal government and fair housing so that it is possible to develop a curriculum based on this information. While there are legal cases and research pointing to a relationship between fair housing and municipal government, there is a lack of research detailing curriculum design for training municipal government authorities, especially volunteer planning and zoning boards, in this subject matter. Clear and concise information, which advises municipal governments how to prevent illegal housing discrimination and which details the reach of the FHA, is lacking. There is also no apparent coordination among fair housing advocates with regard to training municipal officials and others on their roles and responsibilities under fair housing laws, although HUD provides leadership on affirmatively furthering fair housing (see Chapter 5).

A significant portion of this thesis discusses the content of a curriculum by discussing the legal framework surrounding fair housing, land use and zoning based on a description of interpretations of the FHA and case law. A selection of legal cases presents the reader with a variety of examples of the intersection of municipal government, land use planning and zoning and the FHA. Once I establish the relationship between municipal government, land use planning, zoning and fair housing, I compare the legal framework with that of several fair housing advocates and organizations that affirmatively further fair housing to determine what issues are most consistently presented. Therefore this thesis has two purposes: *1) To explore the connection between municipal land use planning, zoning and the provisions of the Fair Housing Act; and 2) to understand how fair housing advocates can develop and implement an effective curriculum in order to enable key municipal authorities to promote fair housing and avoid violating fair housing laws.*

Designing a curriculum implies that there is an instructor who has some information they feel is of value to a particular audience and there is an audience that should learn something from it. In this case, the FHA material could be taught by anyone familiar with it and who has the capacity and will to teach. Any municipal authority involved with land use planning and zoning decisions could benefit from learning about their roles and responsibilities under the FHA; however, in this thesis I focus on the general practices of planning and zoning boards. As a graduate student in Massachusetts, I have had the opportunity to learn about the characteristics of municipal government and land use in this state and I have learned something of the activities of the Massachusetts Fair Housing Center in Holyoke and the Fair Housing Center of Greater Boston; therefore I pay particular attention to the conditions in Massachusetts.

### Why Fair Housing?

In this section I explain why promoting fair housing education for municipal authorities, particularly volunteer planning and zoning boards, is an important pursuit and how adult curriculum development theory provides a helpful framework for discussing the content on the relationship between fair housing, land use and zoning.

Housing discrimination prevents individuals and families from living in the communities and housing they want and can afford (Lamb, 2005, p. 9). Federal fair housing laws prohibit discrimination in housing on the basis of race, color, sex, national origin, religion, a disability, or whether there are children under 18 in the household (42 U.S.C. 3604). Massachusetts laws extend protections to more people, making it illegal to discriminate based on marital status, age, sexual orientation, military or veteran status,

ancestry, public assistance, housing subsidies or rental assistance, and genetic information (M.G.L. Ch. 151B). Illegal discrimination in housing affects everyone. Fair housing differs from other types of housing issues that municipalities have some influence over, such as public housing, subsidized housing, and affordable housing (a distinction made by the Vermont Association of Planning and Development Agencies, 2002, p.1). Fair housing does not refer to structures or buildings but to *effects* of decisions made. For example, it is illegal for a zoning or planning board to treat groups of persons who are physically or mentally disabled less favorably than non-disabled persons, resulting in making housing unavailable to this protected class of people.

### Fair Housing Advocates

Fair housing advocates may include the U.S. Department of Housing and Urban Development (HUD), state housing agencies, such as the Massachusetts Department of Housing and Community Development (DHCD), nonprofit fair housing centers, legal organizations, and others. Collectively, they fight illegal housing discrimination through a variety of strategies.

The Massachusetts DHCD, with the support of other fair housing advocates, has the reach to coordinate statewide fair housing education. The DHCD has developed an analysis of impediments to fair housing within the Commonwealth during the previous several years and has proposed an action plan for promoting fair housing, utilizing the resources available at partner agencies and organizations (see Chapter 5).

Nonprofit fair housing centers such as the Fair Housing Center of Greater Boston (FHCGB) and the Massachusetts Fair Housing Center (MFHC) are key contributors to efforts

to promote fair housing throughout the state. These organizations seek to eliminate discriminatory barriers to housing opportunity, in both the private and public sectors. The FHCGB, for example, pursues its mission in the areas of testing, case advocacy, training, community outreach, public policy advocacy and research (FHCGB, 2005). Fair housing organizations that receive funding through HUD's Fair Housing Initiatives Program (FHIP), such as the FHCGB and the MFHC, assist people who are victims of discrimination. These fair housing organizations conduct preliminary testing to determine whether indeed discrimination has occurred and they provide victims with legal representation. The Housing Discrimination Project (now the MFHC), for instance, represented guest farm workers in a complaint brought against the City of Agawam, MA that ended in a Settlement Agreement and Consent Order during 2005 (see Chapter 4 for discussion).

FHIP assistance for fair housing centers currently includes the following initiatives: Fair Housing Organizations Initiative, to strengthen fair housing enforcement and education; the Private Enforcement Initiative, testing and enforcement; and the Education and Outreach Initiative, for teaching about fair housing and the requirements of housing providers under the FHA. Additional support of fair housing center activities may come from the Community Development Block Grant (CDBG) program, discussed in Chapter 3.

In addition to educating landlords, realtors and others involved in real estate transactions, the fair housing centers in Massachusetts aim to educate municipal decision-makers who influence fair housing at the local level. Presumably, many fair housing centers have the capacity to develop and conduct education and outreach that effectively promotes their mission to volunteer planning and zoning boards, while many others might not. This thesis primarily serves those fair housing centers that either currently conduct training on this

subject matter and would like additional information to improve or modify their approach, or those fair housing centers that do not currently conduct training but would like a starting point for curriculum design and a programmatic framework.

This research allows fair housing advocates to identify methods needed to better educate municipal authorities, thus enabling municipal decision makers, such as planning and zoning boards, to help prevent housing discrimination. An improved program could contribute to efforts to promote fair housing opportunity, protect people's rights and achieve countless other goals, such as economic, social, and environmental vitality.

This research is important to the MFHC in Holyoke and the FHCGB in Boston because it incorporates the particularities of the legal framework in Massachusetts and draws examples from within the state. Persistent fair housing issues within Massachusetts involving municipalities reinforce the importance of education on this topic. Conflicts involving neighbors, property owners, municipalities and others continuously arise, indicating that municipalities should, at the very least, understand fair housing and their role in promoting it, thus avoiding potentially expensive lawsuits and other negative ramifications. Furthermore, municipalities equipped with adequate knowledge on fair housing will be advantageously positioned to work with constituents who oppose particular projects on discriminatory grounds.

### Municipal Governments

Towns and cities play an important role in providing different types of housing, most notably through zoning and land use policies and decisions but also through the administration of grant monies and oversight of housing issues generally. In addition to regulatory activities,

municipalities can violate fair housing laws through the provision of subsidies, services and proprietary activities (especially real estate transactions) (Vermont Association of Planning and Development Agencies, 2002, p. 2). However, this thesis focuses on the land use planning and zoning activities.

Historically zoning has been a tool for excluding undesirable uses from living areas, as well as certain types of people and living arrangements, while permitting them elsewhere (Silver, 1997, p. 24; Loewen, 2005, pp. 251-253). Little evidence exists to suggest that the principles of zoning have changed drastically since it was first implemented at the beginning of the 20<sup>th</sup> Century. The Massachusetts DHCD recently found that local zoning restrictions remain a major impediment to fair housing (Analysis of Impediments, 2007, p. 107). In Chapter 4, I discuss how zoning regulations themselves are not solely responsible for impeding fair housing; the actions, inactions and decisions of zoning and land use boards and other municipal authorities are also complicit. For instance, courts have considered actions taken by officials and/or board members that are a response to discriminatory sentiments of opponents of a particular proposed housing development as evidence in fair housing cases.

### Considerations for Training Municipal Authorities on Their Responsibilities of Promoting Fair Housing

The first assumption that guides my research is that fair housing advocates and municipal government authorities involved with planning and zoning could cooperatively fight against housing discrimination. Second, the method for training and outreach by fair housing advocates for municipal authorities is a good approach for promoting fair housing at the municipal level and an effective fair housing curriculum benefits instructors and learners.

## Curriculum Design

Two main research objectives guide my discussion of a potential curriculum: (1) to learn how fair housing advocates could reach out to the municipal audience; and (2) to learn what an effective training module could look like. Researchers suggest there is a special training need for individuals who make land use decisions at the local level but who lack formal planning education. Kaplan, Kaplan and Austin (2008) have studied how experience might affect how planning officials view their tasks and comprehend the implications of their decisions. They note that experts, those with considerable knowledge and experience in a certain field, have the ability to grasp the future implications of their decisions. Although their study is primarily concerned with open space planning, this is an important consideration in the context of understanding fair housing, and how today's planning decisions affect future opportunities for individuals seeking housing. Research participants in their study indicated that the primary way they learned the necessary information for conducting their job was through on-the-job experience and conversations with other individuals (59). Nearly half of the research participants also indicated that they felt reading and reviewing written materials from their area was useful. Other means of learning included attending workshops and seminars, reviewing planning publications, textbooks, multimedia and the Internet (60).

The authors concluded that it takes a long time to build confidence and understand long-term implications through experience alone. This is troubling because officials need to make decisions from the day they begin their new position, decisions that can have important long-term implications. The study reinforces the need to continue to teach non-expert planners and municipal decision makers so they gain the knowledge necessary to understand

the long-term implications of their decisions. The immediate decisions of municipal zoning and land use boards have an effect on the provision of housing and often have fair housing implications. Understanding how decision makers learn is a necessary piece for developing a curriculum intended to teach these learners the information necessary to carry out their jobs.

Many studies have been devoted to curriculum development, and basic models are an appropriate starting point for designing a fair housing curriculum. According to Davis, “Assessing learning needs is perhaps the most difficult and important part of the adult educator’s job. If no learning need can be found, there should be no workshop” (1974, p. 35). Davis’ assertion supports the assumption of this thesis; without an identifiable learning need there would be no training rationale. As the cases and legal interpretations demonstrate, there is a clear, but complex, connection among fair housing and land use planning, zoning and municipal government; therefore there is a clear need for education in this area.

An effective instructional design model, such as that proposed by Dean (1994, p. 2) allows instructors to teach material in a way that will produce the greatest likelihood of success. First, Dean’s model begins with an assessment and development of instructional skills. Second, instructors develop content knowledge, skill, and expertise. Third, successful instructors learn about their learners. Fourth, instructors must understand the learning environment. Once the instructor has satisfied these requirements he/she may proceed to designing instruction. Adult educational or instructional models such as Dean’s are an important consideration when designing a fair housing curriculum. The basic educational model reinforces the importance of effective teaching and understanding the learners’ unique needs.



Dean's model is a straightforward guide to creating effective curriculum. Posner and Rudnitsky (2006, p. 8) develop upon this model by emphasizing that curriculum is essentially a set of learning intentions and outcomes. Curriculum must reflect learning goals, or "what the learning should lead to" (9). Because each course is shaped by unique intended learning outcomes, Posner and Rudnitsky suggest that these intended learning outcomes can be understood in terms of two categories, what they call "skills and understandings" (46). "Understandings comprise the information and beliefs with which we think...Skills can be thought of as 'knowing how'" (46). The intended learning outcome may differ depending upon the instructor's or the organization's rationale for the training, but regardless the intention it is necessary to attempt to understand the extent of the learner's existing knowledge of a subject matter (70). Learners, in this case municipal officials and board members, nearly always harbor preconceptions about an unfamiliar subject matter. Understanding their preconceptions about fair housing may allow an instructor to determine which of the learning outcome categories fit the learners. "Meaningful learning occurs when new and existing knowledge are related" (Posner and Rudnitsky, 2006, p. 169).

A course rationale is a fundamental aspect of curriculum design; it clarifies the problem that the course addresses and why learning about how to address this problem is valuable (79). A piece of a fair housing training program rationale may resemble the following: *This course is designed for adults who serve their communities on planning, zoning, and land use boards. It is geared toward expanding their understanding of fair housing and its application to zoning and land use so that they may recognize fair housing issues and promote inclusive communities* (based on an example provided in Posner and Rudnitsky, 2006, p. 87).

Evaluating the effectiveness of a course can be a challenging endeavor but it is perhaps equally important as the course rationale. An instructor must be able to observe evidence of learning to determine whether learning actually took place (Posner and Rudnitsky, 2006, p. 96). In general, indicators include recognition, explaining, comparing, describing, distinguishing and “choosing an appropriate course of action based on specific information” (201). Indicators used to evaluate the effectiveness of a fair housing training for municipal officials may include whether the official or board member understands how their decisions, actions, or inactions affect fair housing; how they may have a disparate impact on different individuals or groups; protections of the FHA; their responsibilities under the FHA; and why it is in their community’s interest to be inclusive. An instructor should consider these indicators when evaluating the learning outcomes.

Studies suggest that there is a special learning need for non-expert planners and municipal officials because expertise enhances the ability to understand implications of future decisions (Kaplan et al., 2008). Fundamental course design considerations include a clearly stated rationale that identifies a problem and reinforces the value of learning how to address it. Instructors must grasp content knowledge, skill and expertise; they must know what preconceptions the learners have prior to the course; they must develop intended learning outcomes; and evaluate learning based on indicators that reflect the intended learning outcomes (Posner and Rudnitsky, 2006).

### Creating Curriculum Content

How does fair housing involve land use planning, zoning and municipal government? How can municipalities avoid fair housing lawsuits? How can fair housing advocates inform

municipalities of their roles and responsibilities for promoting fair housing more effectively? How do cases throughout the United States involving planning, zoning and the FHA inform the content of the curriculum? These broad questions, and others, inform the goals of this research, detailed below.

### Curriculum Goals

1. Explain the relationship between fair housing, land use planning and zoning and how the relationship can be incorporated effectively into a curriculum.
  - a. Synthesize pertinent information about housing discrimination and fair housing laws, especially the FHA.
  - b. Discuss a selection of instructive housing discrimination cases involving municipalities.
  - c. Determine what municipalities can do to promote fair housing.
2. Learn what fair housing advocates can do to strengthen the educational relationship (environment) with municipalities.
  - a. Explore the importance of training zoning and land use boards on their fair housing responsibilities.
  - b. Identify training goals and objectives of fair housing advocates.
  - c. Learn what has been successful and unsuccessful for other fair housing advocates in training planning and zoning boards.
3. Determine the most effective design of a training curriculum.
  - a. Explore theories of curriculum development and apply them to the design of a fair housing curriculum.

- b. Discover effective methods of teaching volunteer planning and zoning board members.

Fair housing refers to protection of people's rights to secure the housing they want wherever they are able to afford it. Municipal governments play an important role in providing housing and promoting inclusive communities. Fair housing laws and municipal government's role in providing for and regulating housing intersects when policies and practices affect opportunities of home seekers to find the housing of their choice because they are discriminated against. There is a clear need for municipal government authorities to learn about the significance of fair housing laws and their responsibilities under these laws. The most significant fair housing law is the Fair Housing Act. Chapter 2 discusses how the Fair Housing Act prohibits discrimination through land use planning, zoning and other municipal government activities and it discusses the legal developments in housing discrimination.

## CHAPTER 2

### SIGNIFICANCE OF THE FAIR HOUSING ACT

“A sad and sordid aspect of the American experience has been the nation’s unshakable commitment to racial discrimination” (Kushner, 1995, p. 1).

#### Housing Discrimination

The Vermont Association of Planning and Development Agencies distinguishes fair housing from public housing, subsidized housing, affordable or low-income housing, and homeless programs (2002). As indicated on HUD’s Fair Housing and Equal Opportunity Web site (2007, para. 2), the concept of fair housing does not refer to a particular type of housing but to laws and policies that “make sure all Americans have equal access to the housing of their choice.” The FHA does *not* give all Americans equal access to housing they cannot afford.

There have been a number of significant legal developments in the fight against housing discrimination; two notable developments include the federal Fair Housing Act of 1968 (Title VIII) and the Fair Housing Amendments Act of 1988 (collectively referred to as the FHA). The Fair Housing Act of 1968 prohibits housing providers, including municipalities and political jurisdictions, from discriminating against individuals and families because of certain characteristics: race, color, religion, sex and national origin. In 1988 the Fair Housing Amendments Act extended protections to persons with handicaps and families with children under 18 years old present in the household.

Is Discrimination in General, and in Massachusetts in Particular, Really that Big an Issue?

Housing discrimination remains an issue even after the passage of the FHA and other laws prohibiting discrimination in housing. In an article published on September 28, 2007, in *USA Today*, Deborah Barfield Barry and Robert Benincasa discuss the rise in housing discrimination complaints. The authors reported that in 2006 HUD agencies recorded 10,328 complaints, the highest number since HUD started keeping track in 1990. Discrimination certainly affects home seekers in Massachusetts, where “almost 70 percent of Hispanics and an overwhelming 85 percent of African Americans believe that members of their group miss out on good housing because they fear they will not be welcome in a particular community” (Louie, 2005, p. i). Not feeling welcome is but one manifestation of the subtle yet damaging effects of discrimination.

In 2002 the Department of Justice entered a Complaint against the City of Agawam, MA and two members of the Agawam Board of Appeals (*U.S. v. City of Agawam Complaint*) after the MFHC represented a group of black Jamaican and Puerto Rican farm workers who were denied housing within the city because of their race, color and national origin. In 2005 the United States District Court, District of Massachusetts, Western Division, entered a Settlement Agreement and Consent Order resolving the case. The Settlement Agreement and Consent Order required the city to pay \$250,000 for damages, as well as \$10,000 in civil penalties and ordered the city to allow the housing to be built.

Fair housing complaints and/or violations do not only involve race, color or national origin; other cases in Massachusetts further highlight the tension surrounding housing for the mentally disabled. In 2006 District Judge Zobel ordered Weymouth, MA town officials to issue Spectrum Health Services the permits it needed to relocate a drug and alcohol treatment

facility to the town (*Spectrum Health Services, Inc. v. Town of Weymouth*, 2006). The project was blocked because the operator needed a special permit from the Zoning Board of Appeals due to inadequate parking supply. The court order followed a federal complaint filed by the center's operator who cited the Dover Amendment (M.G.L. Ch. 40A, Sec. 3; right to establish homes for handicapped in residential neighborhoods where homes are deemed educational uses) and the FHA, claiming that the FHA protected recovering addicts and alcoholics as disabled (handicapped).

In an article published in the *Boston Globe* on July 29, 2007, Christine McConville discussed a dispute in Medford, MA over a home for recovering drug addicts and alcoholics. The dispute arose when the city took the operator to court for allegedly operating an illegal rooming house because the home exceeded the allowable occupancy limits under the local zoning laws. The owner's lawyer claimed federal laws, which designate recovering drug addicts and alcoholics as handicapped, protected the owner and the home's residents. The lawyer claimed that reasonable accommodations must be made in local zoning laws to permit the operation of the home, as provided in the FHA. McConville reported on February 6, 2008 that the dispute eventually ended in foreclosure.

#### How is Discrimination Recognized?

Housing discrimination can occur in the public sector or in the private sector. Discrimination in the private sector can take the form of misrepresenting the availability of housing; real estate agents, landlords, or owners steering home seekers to neighborhoods with people who share similar race, ethnicity, religion, etc.; refusal to rent or sell; discrimination in terms or conditions; discriminatory advertising; and the use of threats, intimidation, or coercion

(MFHC, Have You Found Closed Doors? 2008). The distinction between public and private sector discrimination is important because the role of municipalities in promoting fair housing and their responsibilities under the FHA are different than those of private sector housing agents. This thesis focuses almost exclusively on the roles and responsibilities of municipalities and therefore is centered on public sector discrimination.

### Legal Developments in Housing Discrimination

#### Federal Laws

Legal developments in housing discrimination date back to the late 19<sup>th</sup> Century, are based on Constitutional grounds, and have been established through the judicial system in a number of court cases. Charles Lamb described the major legal developments in housing discrimination, in the table reproduced as Table 1 (2005, pp. 18-19). Additional legal developments from HUD’s FHEO (2008) are indicated with an asterisk (\*).

**Table 1: Major Federal Legal Developments in Housing Discrimination (Lamb, 2005)**

| <b>Federal Action</b>                            | <b>Legal Standard</b>  |
|--|--|
| Thirteenth Amendment (1865)                      | Slavery is prohibited in the U.S.  |
| The Civil Rights Act of 1866                     | All U.S. citizens have equal rights to inherit, purchase, lease, sell, hold, or convey real and personal property.   |
| The Fourteenth Amendment (1868)                  | States may not deprive any person of life, liberty, or property without due process of law, or deny any person within their jurisdiction the equal protection of laws.   |
| <i>Buchanan v. Warley</i> (1917)                 | Local zoning ordinances that deny housing to African Americans on white blocks violate the due process rights of white property owners.  |
| <i>Shelley v. Kraemer</i> (1948)                 | State court enforcement of private restrictive covenants violates the equal protection clause of the Fourteenth Amendment.   |
| President Kennedy’s Executive Order 11063 (1962) | Federal Agencies with housing-related activities must prevent discrimination based on race, color, religion, or national origin in the sale or rental of housing owned, operated, or assisted by the federal government. |



| <b>Federal Action</b>  | <b>Legal Standard</b>   |
|--|---|
| The Civil Rights Act of 1964, Title VI                                       | There shall be no discrimination on grounds of race, color, or national origin in any federal or federally assisted programs.   |
| The Civil Rights Act of 1968, Title VIII (The Fair Housing Act of 1968)      | National policy for the first time prohibits discrimination in the rental, sale, and financing of housing, and in brokerage services, on the basis of race, color, religion, sex, or national origin.       |
| <i>Jones v. Alfred H. Mayer Co.</i> (1968)                                   | The Civil Rights Act of 1866 prohibits racial discrimination in all housing, public and private.  |
| <i>James v. Valtierra</i> (1971)   | A community may exclude publicly assisted housing through referenda.  |
| President Nixon's fair housing policy (1971)                                 | Federal law requires nondiscrimination in housing, but government cannot force economic integration on the suburbs through subsidized housing programs.   |
| <i>Trafficante v. Metropolitan Life Insurance Co.</i> (1972)                 | The Fair Housing Act prohibits both discrimination and segregation in the private housing market.   |
| *Section 504 of the Rehabilitation Act of 1973                               | Prohibits discrimination based on disability.   |
| The Housing and Community Development Act of 1974                            | Congress creates the Community Development Block Grant and Section 8 programs and requires the spatial deconcentration of housing opportunities for the poor.   |
| The Equal Credit Opportunity Act of 1974                                     | Creditors may not discriminate against any applicant on the basis of sex, marital status, race, color, religion, national origin, or age.   |
| *Section 109 of Title I of the Housing and Community Development Act of 1974 | Prohibits discrimination on basis of race, color, national origin, sex or religion in programs or activities receiving financial assistance from HUD's CDBG program.  |
| The Home Mortgage Disclosure Act of 1975                                     | Financial institutions that provide federally related mortgage loans are required to disclose annually, by census tracts or zip code, the total number and aggregate dollar amount of their mortgage loans. |
| *Age Discrimination Act of 1975  | Prohibits discrimination on the basis of age in programs or activities receiving federal financial assistance.  |
| <i>Hills v. Gautreaux</i> (1976)   | A federal court may order an areawide remedy in a metropolitan area where HUD knowingly funds a city housing authority that discriminates on grounds of race.   |
| <i>Village of Arlington Heights v. MHDC</i> (1977)                           | Intent to discriminate must be proven in a housing discrimination case in order to win a constitutional claim.  |
| The Fair Housing Amendments Act of 1988                                      | Title VIII enforcement is strengthened, and its coverage is expanded to protect the handicapped and families with children.   |
| *Title II of the Americans with Disabilities Act of 1990                     | Prohibits discrimination based on disability in programs, services and activities provided or made available by public entities.  |

Federal courts have interpreted the Thirteenth Amendment to suggest that segregation is a result of involuntary servitude, which, along with slavery, is prohibited (Lamb, 2005, p. 19). Congress passed Section I of the Civil Rights Act of 1866 one year after the Thirteenth Amendment. It states that “All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, or convey real and personal property” (42 U.S.C. Sec. 1982). The Fourteenth Amendment states that no state shall “deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

#### Massachusetts Laws Prohibiting Discrimination in Housing

Massachusetts General Laws Ch. 151B extends protection beyond the federal categories to include age, marital status, sexual orientation, genetic information, ancestry, recipients of public or rental assistance, and military history. Chapter 151B makes it unlawful to discriminate against persons intending to occupy housing with a child or children, but, like the FHA, it doesn't preempt legitimate local, state, or federal occupancy restrictions (DHCD AI, 2007, p. 16).

Massachusetts has recognized the right to establish homes for the disabled in residential neighborhoods where these homes are deemed educational uses. Massachusetts General Laws Ch. 40A Sec. 3, referred to as the Dover Amendment, states:

No zoning ordinance or by-law shall regulate or restrict the interior area of a single family residential building nor shall any such ordinance or by-law prohibit, regulate or restrict the use of land or structures for religious purposes or for educational purposes on land owned or leased by the commonwealth or any of its agencies, subdivisions or bodies politic or by a religious sect or

denomination, or by a nonprofit educational corporation; provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements. (M.G.L. Ch. 40A, Sec. 3)

Fair housing cases might also be heard under the Dover Amendment when the persons involved in the action are residents or potential residents of a home that is considered to have an educational purpose or that is on land owned or leased by a nonprofit educational corporation, which could include homes for the disabled. M.G.L. Ch. 40A Sec. 3 also makes it unlawful to use local land use and health and safety laws and regulations to discriminate against a disabled person. “Imposition of health and safety laws or land-use requirements on congregate living arrangements among non-related persons with disabilities that are not imposed on families and groups of similar size or other unrelated persons shall constitute discrimination.” Furthermore, “No dimensional lot requirement of a zoning ordinance or by-law, including but not limited to, set back, front yard, side yard, rear yard and open space shall apply to handicapped access ramps on private property used solely for the purpose of facilitating ingress or egress of a physically handicapped person, as defined in section thirteen A of chapter twenty-two.”

#### U.S. Supreme Court Decisions Affecting Fair Housing

In 1917 the United States Supreme Court’s first fair housing decision was announced in *Buchanan v. Warley* (Lamb, 2005, p. 20). In the *Buchanan v. Warley* decision the Court struck down a local zoning ordinance in Louisville, KY, that prohibited whites and African Americans from moving onto city blocks where members of the other race owned the

majority of homes. The Court held that this zoning practice denied a white property owner the right to dispose of his property as he saw fit, violating the due process clause of the Fourteenth Amendment (Lamb, 2005, p. 20). Following the *Buchanan* decision homeowners entered into restrictive covenants that prevented the sale of homes to minorities. State courts upheld restrictive covenants until the Supreme Court held in *Shelley v. Kraemer* (1948) that state court enforcement of such covenants violated the equal protection clause of the Fourteenth Amendment. Lamb (2005, p. 23) asserts that the Supreme Court handed down its “most sweeping fair housing ruling ever” in *Jones v. Alfred H. Mayer Co.* (1968), in which it held that Congress could prohibit racial discrimination in the sale or rental of housing under Section I of the Civil Rights Act of 1866.

The Supreme Court, in *Village of Arlington Heights v. Metropolitan Housing Development Corp.* (1977) held that a constitutional claim of discrimination could only be supported by evidence of intent to discriminate. The Supreme Court has not decided a major fair housing case involving racial discrimination since its decision in *Arlington Heights*, therefore leaving the lower federal courts to make increasingly important fair housing decisions (Lamb, 2005, p. 23). However, in a non-race case, in 1995 the Supreme Court decided in *City of Edmonds v. Oxford House, Inc.* that the city’s definition of family addressed how a single-family unit was to be composed but not how many people could occupy a dwelling and therefore didn’t fall within the FHA’s exemption for occupancy limits. The decision reflects the FHA’s influence over local land use by holding that single-family zoning districts were not exempt from the FHA.

The most pertinent fair housing law discussed in this thesis is the Fair Housing Act. The FHA provides that “It is the policy of the United States to provide, within constitutional

limitations, for fair housing throughout the United States” (42 U.S.C. 3601). Frequent municipal violations of the FHA include racial discrimination and disability discrimination. Although the relationship between the FHA and municipal government is complex, the Supreme Court and lower federal courts provide evidence of the legal framework surrounding this relationship through their decisions. Furthermore, HUD and DOJ provide clues of their interpretation and enforcement through investigations, complaints and statements of their position.

The development of fair housing laws since the adoption of the Thirteenth Amendment in 1865 reflects changing attitudes about people’s rights in their pursuit of a decent home. Congress’ intent in adopting the Fair Housing Act was to prohibit discrimination in the rental, sale, and financing of housing, in brokerage services, and through government policies and practices, on the basis of race, color, religion, sex, or national origin. In 1988 the Act was amended to expand protection to the handicapped and families with children. Massachusetts’ laws prohibit discrimination based on additional traits. The Supreme Court handed down landmark fair housing cases as early as 1917, in *Buchanan v. Warley*, and as recent as 1995, in *City of Edmonds v. Oxford House*. The Supreme Court’s and lower federal courts’ fair housing decisions inform the legal framework of the FHA and its relevance to land use planning and zoning, discussed in Chapter 3.

## CHAPTER 3

### LEGAL FRAMEWORK OF THE FAIR HOUSING ACT

The legal framework of the FHA refers to the elements of claims brought under the Act by different parties and the application of legal tests to establish whether a violation has occurred. Courts must decide FHA claims by evaluating the strength of both sides of an argument. There are two tests that are used to make such an evaluation: the disparate impact and disparate treatment tests (Kushner, 1995). HUD and DOJ are primarily responsible for enforcing the FHA but other entities and private parties can file complaints and/or enter lawsuits against municipalities.

#### Standing

Under the FHA, an “aggrieved person includes any person who (1) claims to have been injured by a discriminatory housing practice; or (2) believes that such person will be injured by a discriminatory housing practice that is about to occur” [42 U.S.C. 3602 (i)]. The Massachusetts DHCD, in its 2007 Analysis of Impediments, states that any person who “suffers an injury or is about to suffer an injury” because of an illegal housing practice can file a complaint to the appropriate agency (3). An aggrieved person need not belong to a protected class of persons under the FHA nor do they need to be a home seeker (DHCD AI, 2007, pp. 3-4). For instance, fair housing organizations and developers have standing to file complaints or enter lawsuits against municipalities (discussed below).

## Proving Discrimination

FHA cases can have two variations, depending on the facts and issues of the case: disparate impact and disparate treatment (Kushner, 1995). A third type of case, called mixed motive, arises when there are two or more motivations or considerations for the alleged discriminatory act. “Proving a mixed motive requires the plaintiff to prove that a discriminatory motive played a role in the defendant’s decision making, after which the defendant must prove that it would have made the same decision regardless of the discriminatory motive” (DHCD AI, 2007, p. 5).

Disparate impact cases involve a test resulting in a showing of disproportionate impact on protected categories (Kushner, 1995, p. 131). Disparate treatment, on the other hand, involves a single act of exclusion of a protected class, “one which is isolated or not subject to measurement as part of a pattern or practice” (132). A policy or action that specifically and clearly targets a protected class is considered disparate treatment. The courts differ on their application of the two tests. Their rationale for adopting the disparate impact, or effects, test is that “Effect, and not motivation, is the touchstone, in part because clever men may easily conceal their motivations” [*United States v. City of Black Jack*, (1974) at 1185]. The burden shifts to the defendant, which must prove that the challenged action furthers “a legitimate, bona fide interest...no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact” [*Resident Advisory Bd. V. Rizzo*, (1977) at 149].

Robert Voelker (2006, p. 4) presents a clear discussion on establishing a FHA violation involving land use and zoning practices. Voelker notes that the U.S. District Court for the District of New Jersey held in *Association for Advancement of the Mentally*

*Handicapped v. City of Elizabeth* (1994) that in an intent case, “whether the motives of the drafters of a facially discriminatory ordinance are benign or evil is irrelevant to a determination of the lawfulness of the ordinance” (at 620; cited in Voelker, 2006, p. 4). In other words, the court ignores the motive and focuses on the explicit terms of the ordinance. Discriminatory effect may be proven by showing either “adverse impact on a certain protected class or harm to the community in general by the perpetuation of segregation” [*Huntington Branch NAACP v. Town of Huntington, NY*, (1988), at 937; cited in Voelker, 4]. Absent direct evidence of discriminatory intent, courts may also consider: “(1) Discriminatory impact; (2) historical background of the attacked decision; (3) the sequence of events leading up to the challenged decisions; (4) departures from normal procedural sequence; and (5) departures from normal substantive criteria [*Arlington Heights* (1977) 429 U.S. at 253].

#### Application of the Disparate Effect Test

The U.S District Court for the Northern District of Texas, Dallas Division, applied the effect, or disparate impact, test established in *Arlington Heights* (1977) in the case of *Dews v. Town of Sunnyvale, TX* (2000). Sunnyvale was a small town of about 2,000 residents in the year 2000, but within close proximity to Dallas. Zoning regulations prohibited apartments and also required one-acre zoning throughout the town for residential development. The plaintiffs challenged the zoning regulations, claiming they were one of several policies enacted to exclude African Americans, especially by prohibiting multifamily housing.

In its application of the disparate impact test, the court found that the restriction on apartments disproportionately impacted African-American families. Because there were a



disproportionately greater number of low-income African-American families than low-income white families in the Dallas area, one-acre zoning also produced discriminatory effects by increasing the cost of housing in town. The plaintiffs demonstrated that the zoning had a discriminatory effect, adverse impact on a particular protected category, and harm to the community, generally, by the perpetuation of segregation.

The defendant Sunnyvale failed to show that its actions furthered a legitimate interest, and no alternative course of action would have had less of a discriminatory effect. Through its application of the effects test the court found that the zoning and regulatory practices weighed more heavily on black households than white; Sunnyvale had a history of being exclusionary by consistently refusing advice to change policies; the town retroactively denied an application for multifamily homes and the Town Council demanded more studies be done even after the Town Administrator admitted they weren't necessary; and town planners and other officials continuously stated that one-acre zoning throughout the town did not serve its interests, nevertheless Sunnyvale refused to amend its zoning (see Chapter 4).

As illustrated in the *Dews v. Sunnyvale* case, aggrieved parties can have standing to sue where there is an alleged discriminatory impact caused by a local government zoning regulation or other policy that affects the ability of protected categories under the FHA to enjoy a dwelling. Courts may consider several factors absent evidence of direct discriminatory intent and the local government body must show that its land use planning and zoning policies furthered a legitimate interest. The courts consider cases brought under the FHA on a case-by-case basis, but land use and zoning boards and municipal governments should be aware if their actions could have a disparate impact on persons protected by the FHA given the facts and issues that will be scrutinized under the effects test.

## Enforcement

### Role of the U.S. Department of Housing and Urban Development (HUD)

HUD is charged with implementing and enforcing the FHA and civil rights laws for members of the public in search of fair housing as well as HUD-funded grant recipients, such as municipalities. The Office of Fair Housing and Equal Opportunity (FHEO) oversees fair housing matters at HUD. The mission of the FHEO is “to create equal housing opportunities for all persons living in America by administering laws that prohibit discrimination in housing on the basis of race, color, religion, sex, national origin, age, disability, and familial status” (HUD/FHEO, 2008, para. 1). Under HUD’s Community Planning and Development division, HUD aims to break down impediments to fair housing and guarantee housing choice and mobility. Included in this division is the Community Development Block Grant (CDBG) program, which requires recipients to affirmatively further fair housing. The Fair Housing Act gives HUD the power to receive and investigate claims of discrimination, including those that allege a local government has discriminated while exercising its zoning and land use authority (42 U.S.C. 3608). HUD may close an investigation when it believes that no discrimination has occurred. If HUD or DOJ chooses not to pursue a zoning or land use matter, private plaintiffs may still pursue a claim (HUD/DOJ Joint Statement, 1999).

### Role of the U.S. Department of Justice (DOJ)

The Housing and Civil Enforcement section of the Civil Rights division is responsible for the Department of Justice’s enforcement of the Fair Housing Act. Where complaints involve zoning and land use, HUD refers serious cases to DOJ, which may in turn bring action against a municipality. DOJ may also bring action against a municipality, even if not

referred by HUD, where a “denial of rights to a group of persons raises an issue of general public importance” (HUD/DOJ Joint Statement, 1999). Section 3614(a) of the Fair Housing Act states:

Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this subchapter, or that any group of persons has been denied any of the rights granted by this subchapter and such denial raises an issue of general public importance, the Attorney General may commence a civil action in any appropriate United States district court. [42 U.S.C. 3614(a)]

### Massachusetts Commission Against Discrimination

The Massachusetts Commission Against Discrimination (MCAD) is Massachusetts’ primary civil rights agency. MCAD receives and investigates discriminatory housing, employment, credit and mortgage lending practices, and enforces the appropriate laws pertaining to M.G.L. Ch. 151B. More than half of MCAD’s operating budget comes through partnerships with HUD’s Fair Housing Assistance Program (FHAP) and the federal Equal Employment Opportunity Commission (MCAD, History, 2007, para. 6).

### Fair Housing Organizations

HUD’s Fair Housing Initiatives Program funds fair housing organizations like the Fair Housing Center of Greater Boston and the Massachusetts Fair Housing Center. Fair housing organizations are responsible for education, outreach and enforcement. Through these organizations community members can file complaints. Private fair housing organizations processed at least 60 percent of the nation’s complaints in 2004 despite receiving less

funding than Fair Housing Assistance Program (FHAP) agencies, such as MCAD (National Fair Housing Alliance, 2008, p. 58).

Testing, an important service provided by fair housing organizations, is an effective way of detecting housing discrimination and plays a crucial role in enforcement. The Supreme Court's decision in *Havens Realty Corp. v. Coleman* (1982) expanded fair housing testing nationwide by finding that testers, who are investigators with no intent to rent or buy, have standing to sue where they encounter an unlawful practice. The Court held that "a tester who has been the object of a misrepresentation...has suffered injury in precisely the form the statute was intended to guard against" (at 1116-1117).

#### Private Persons

An aggrieved person can commence a civil action in a U.S. district or State court within two years of the alleged discriminatory housing practice [42 U.S.C. 3613 (a)(1)(A)]. In a civil action if the court finds that a discriminatory housing practice has occurred or is about to occur, the court may award damages and/or order an injunction from the practice [42 U.S.C. 3613 (a)(1)(C)]. Individuals can obtain private legal representation and there are a number of attorneys who specialize in fair housing cases.

#### Costs to a Municipality

If a community must defend itself against FHA claims, it is responsible for attorney fees, one-half of the court costs, lost labor performing regular duties to prepare for the defense, and the loss of respect (Vermont Association of Planning and Development Agencies, 2002,

p. 4). If the municipality is found to have violated the FHA it is responsible for damages, civil penalties, the complainant's attorney fees and court costs, loss of eligibility for federal funding of municipal projects and programs, court or HUD-supervision of municipal services and/or expenditures for fair housing objectives (Vermont Association of Planning and Development Agencies, 2002, p. 4).

Under the FHA, aggrieved parties have standing to file complaints or bring lawsuits against municipalities. Courts apply tests to determine whether a municipality has violated the FHA through its policies. Policies that have a disproportionate effect on protected categories under the FHA might violate the Act in certain instances. HUD and DOJ are the primary entities responsible for enforcing the FHA and they receive support from fair housing organizations and private parties. The consequences to a municipality for violating the FHA are serious and could result in significant financial costs. Municipalities might avoid complaints and/or lawsuits under the FHA if they understand their responsibilities and if they are able to recognize and mitigate conflicts before they arise. Chapter 4 discusses the general activities of land use and zoning boards in Massachusetts, how policies can run afoul of the FHA, and a selection of fair housing allegations against municipal entities and court decisions where municipal entities violate (or allegedly violate in the case of complaints) the FHA.

CHAPTER 4  
MUNICIPAL LAND USE PLANNING AND ZONING RESPONSIBILITIES  
UNDER THE FAIR HOUSING ACT

Municipal officials, staff and boards have responsibilities under the FHA to not discriminate. To expand upon these responsibilities, this chapter discusses the general roles of planning and zoning boards in Massachusetts, land use planning and zoning activities that affect housing, cases of racial and disability discrimination, as well as other frequent areas where the land use planning and zoning practices of municipalities intersect with the FHA.

Planning and Zoning Boards in Massachusetts

Planning boards in Massachusetts are responsible for long-range planning, zoning and subdivision administration, while zoning boards of appeals (ZBA) are responsible for administering appeals and making other important land use decisions. In addition to the regulations that govern land use decisions in a municipality, zoning decisions can include the granting of special permits (M.G.L. Ch. 40A, Sec. 9) and variances (Ch. 40A, Sec. 10). The planning board is responsible for conducting public hearings about zoning changes and conducting site plan review. The planning board has the power to approve, conditionally approve, or disapprove a preliminary plan with good reason. Municipalities can create a special permit granting authority that provides detailed review of special permit applications. These authorities can consist of members from either the planning or zoning board. Zoning boards of appeals hear appeals regarding decisions of the building inspector and/or a zoning administrator, and the ZBA has the power to grant variances. The granting of variances is

the most common activity committed by ZBA's that comes under legal scrutiny (CPTC, 2006, Planner's Toolkit).

### Background of Land Use Planning and Zoning Practices that Affect Fair Housing

Volunteer planning and zoning boards make decisions and take actions that influence the housing opportunities rightfully afforded all people regardless of whether they are protected under the FHA. Municipal government alone cannot eliminate all discriminatory barriers to housing; there are many forms of discrimination that occur beyond the reach or awareness of municipal government, such as between landlord and tenant. However, discrimination at the municipal level is a barrier to housing opportunity (Kushner, 1995; Oakley, 2002; Lamb, 2005). This is surprising given that many municipal governments in Massachusetts state in relevant planning documents that they seek to promote housing and diverse communities (Reardon, 2004). Municipal government's acknowledgement of the relationship between its activities and fair housing reflects an awareness of the issue at some level, although perhaps not an expert awareness.

Actions and decisions of municipal governments are considered discriminatory if they target any protected category of people (discriminatory intent), and in many cases, if they have a disproportionate effect or discriminatory impact on them. Examples of such actions might include purposefully targeting minority neighborhoods for demolition or enacting policies that have the effect of excluding certain types of people from communities, such as families with children. Planning and zoning activities that affect housing opportunity include setting occupancy standards, providing accessibility, providing reasonable accommodations in zoning ordinances for the location of housing for the disabled, growth moratoriums, lot

size requirements, and excluding affordable housing (Kushner, 1995, pp. 18-20). These activities are understood comprehensively as practices that might have the effect of making housing unavailable.

Land use and zoning provisions that have the effect of making housing unavailable could also include definitions such as family, group home, or boarding house (Salkin and Armentano, 1993, p. 894). Certain spatial requirements, such as setback and square footage minimums, might also make the siting of group homes more difficult or outright impossible in certain zones or communities (894). There are a number of cases that illustrate the municipal government violations of fair housing laws where decisions, activities, or omissions have been manipulated to discriminate against protected categories. Concurrently, many municipalities are taking innovative approaches to promote fair housing opportunity, such as including fair housing implementation regulations in zoning ordinances and bylaws.

One such fair housing implementation ordinance is that of the City of San Francisco, CA. The Fair Housing Ordinance (City and County of San Francisco Municipal Code, Administrative Code, Ch. 87) defines the terms of the FHA and how they relate to land use and municipal government within the city. For example, the city makes it unlawful to base a decision with respect to applications or proposals for the development, use or funding of dwellings in which protected class members are likely to reside solely on their status (also unlawful under FHA). A selection of prohibited reasons for denying an application or refusal of protected class members includes a belief that the dwellings will lower property values of surrounding parcels, there will be an increase of crime, parking demand, traffic, and service demand. Any denial based on these or other factors that are not applicable to all applications or proposals would violate the FHA and the City Code. The advantage of explicitly stating



the FHA's applicability to land use and municipal development within an ordinance is to remind residents and housing providers of their housing rights and obligations.

In 1988 the FHA was amended to prohibit discrimination against the disabled and families with children. These amendments expanded the applicability of fair housing to land use and zoning policy beyond those categories of people protected under the FHA of 1968 (Salkin and Armentano 1993, p. 893). This additional layer of applicability affects activities and decisions such as the placement of restrictions, and making reasonable accommodations, on homes for the disabled. The FHA states that, “‘Handicap’ means, with respect to a person, (1) a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment, but such term does not include current, illegal use of or addiction to a controlled substance” [as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802) (USC 42 s. 3602 (h))]. The familial status protections apply to individuals under 18 years who live with a parent or legal guardian or a person with custody over these individuals [42 U.S.C. 3602 (k)(1) and (2)]. The FHA also protects any person who is pregnant or in the process of securing legal custody of a child under 18 years.

Municipalities need to understand that the attitudes of neighbors can influence municipal-level fair housing. NIMBY, or ‘not-in-my-backyard’, is an acronym used to refer to the sentiments of neighbors opposed to a proposed dwelling, such as group homes for the disabled, housing for homeless people, or subsidized dwellings (Oakley, 2002). NIMBY attitudes may influence municipal land use and zoning boards to deny reasonable accommodations in policies as required under the FHA (HUD/DOJ Joint Statement, 1999). In certain cases there may be immense local pressure from concerned neighbors regarding a

proposed dwelling for certain protected categories. Where this is the case it is incumbent on municipal land use and zoning authorities to understand fair housing law and the importance of nondiscrimination. Refusing to make reasonable accommodations for a home for the disabled or making housing unavailable to persons protected by the FHA because of discriminatory hostility or opposition from neighbors violates the FHA.

### Racially Discriminatory Zoning

#### Background

Historically, planning and zoning measures were often used to segregate uses and segregate people based on class and race (Silver, 1997; Pendall, 2000). Some southern U.S. cities even went so far as to hire Northern planning professionals to write legal ways to segregate black residential areas through zoning during the early 20<sup>th</sup> Century (Silver, 1997, p. 25). A racial zoning ordinance in Baltimore (1910) contained black residents in certain areas to prevent infiltration into white residential areas (Silver, 1997, p. 27). Eventually this practice of racial zoning was struck down in the case of *Buchanan v. Warley* (1917).

In 1926, the Supreme Court held in the case of *Village of Euclid v. Ambler Realty Company* that a zoning ordinance excluding apartments, businesses, and industry from residential districts was valid, provided such ordinances were clearly not arbitrary and had a substantial relation to the public health, safety, morals or general welfare. This case established the power to separate uses into distinct districts in order to preserve the quality of life found in residential environments as a legitimate authority, leading to an increase of zoning ordinances throughout the country (Ritzdorf, 1997, p. 43). Typical zoning powers that have the effect of exclusion might include the “exclusion of multiple family dwellings,

restrictions on the number of bedrooms in multiple family dwellings, exclusion of mobile homes, minimum building size requirements, minimum lot size requirements, and minimum lot width requirements” (Ritzdorf, 1997, p. 46; citing Williams).

Even before *Village of Euclid v. Ambler Realty Company* zoning was used to segregate neighborhoods, and people from enjoying certain neighborhoods, based on race. In the case of *Yick Wo v. Hopkins* (1886), an ordinance operating the use of laundries was struck down because of its anti-Chinese motivation (Pendall et al., 2005, p. 220). In 1917 the U.S. Supreme Court ruled racial zoning unconstitutional in the case of *Buchanan v. Warley* but municipalities continued to adopt racial zoning, before and after both this case and *Village of Euclid v. Ambler Realty Company* (221).

By the 1960s there was a widespread belief that racial and ethnic minorities (especially African Americans) threatened property values (Pendall et al., 2005, p. 222). The Federal Housing Authority, created in 1934, provided property insurance to the most stable neighborhoods, downgrading mixed-race and minority neighborhoods (222). The Federal Housing Authority promoted subdivision controls and zoning ordinances that were thought to maintain stability and guarantee property values. Clearly, U.S. housing and land use policy promoted segregation into the 1960s. The Fair Housing Act, passed in 1968, prohibits discrimination on the basis of race, but racially discriminatory land use and zoning decisions continue to be identified as a barrier to housing opportunity, suggesting that the burden of past discrimination remains present today.

Land use regulations are widespread; they can affect housing costs by limiting its supply and controlling its quality (Pendall et al., 2005, p. 226). With this control, if local governments practice exclusion through land use and there is no direct evidence that they are

motivated by intent to discriminate, there must be some other way to determine whether the municipality has discriminated against certain people. Pendall et al. (2005, p. 231) argue that there is little to be done to prevent jurisdictions from using legitimate land use controls that happen to exclude low-income people and racial and ethnic minorities who may also be poor. However, the authors state that wider housing opportunity, such as lowering housing costs and zoning that avoids siting undesirable uses in minority neighborhoods and that provides access to jobs and services, can promote inclusiveness (232). Strategies for promoting housing affordability and affirmatively furthering fair housing are discussed in Chapter 5.

In *Village of Arlington Heights v. Metropolitan Housing Development Corp.* (1977), the Supreme Court established what Pendall et al. (2005, p. 230, fn. 41) refer to as a “nearly impossible standard” for exclusionary zoning cases brought under the equal protection clause of the Constitution. “Proof is not enough to invalidate a zoning ordinance for constitutional violations; plaintiffs are required to demonstrate intent” (230, fn. 41). However, as the cases discussed below demonstrate, lower federal courts have interpreted the test established in *Arlington Heights* to decide under the FHA whether a disproportionate effect on minorities has the *effect of discrimination* therefore providing some relief. This interpretation has provided remedy for aggrieved parties where direct intent to discriminate is less evident. The U.S. Court of Appeals, Second Circuit, in *Huntington Branch, NAACP v. Town of Huntington* (1988) and the Third Circuit in *Resident Advisory Bd. V. Rizzo* (1977) are two notable cases that illustrate the application of the effects test.

## Cases

The cases discussed below demonstrate how communities have used their zoning and land use authority to deny or otherwise make housing unavailable for people because of their race, color, ethnicity, or national origin. Tactics employed can be hostile or subvert; those that ultimately have an exclusionary effect that disproportionately impacts and harms persons protected by the FHA are illegal. *U.S. v. City of Parma, Ohio* (1981) was selected to illustrate that the FHA applies to municipalities despite the city's claim to the contrary. Deviations from standard review procedures for housing and attempts at blocking specific projects because of the race of the potential inhabitants can have a discriminatory effect on persons protected by the FHA. The case of *Huntington Branch NAACP v. Town of Huntington* (1988) illustrates that restricting development of multifamily housing to a narrow urban renewal area mainly occupied by minorities violated the FHA. The court held that the town's reasons for denying the proposed development were weak, indicating the importance of basing decisions on nondiscriminatory grounds that truly reflect the purposes of zoning. *Dews v. Sunnyvale* (2000) is a case that clearly highlights the application of the effects test established in *Arlington Heights*. The court held that a number of actions, inactions, statements, and decisions disproportionately impacted African Americans in the Dallas area and perpetuated segregation in the area and the community. Lastly, the case of *U.S. v. City of Agawam, MA* (2005) shows how many municipal authorities can be included in FHA cases, not exclusively zoning boards, and that discrimination from resident-opponents can influence fair housing. These cases are good examples for curriculum development because they address activities that land use and zoning boards might encounter.

United States. v. City of Parma, Ohio (1981)

In 1980 a federal Court of Appeals (6<sup>th</sup> Circuit) found the City of Parma's zoning controls and other municipal government activities to have a discriminatory effect on African Americans. Parma is a suburb of Cleveland that had a population of 100,216 in 1970, with only 50 black residents. The U.S. DOJ argued that the city's refusal to enact a fair housing resolution, its general opposition to public and low-income housing, its denial of a building permit for a privately-sponsored low-income housing development, its enactment and implementation of land use ordinances imposing height, parking and voter approval limitations on housing developments, and its refusal to submit an adequate housing assistance plan with its CDBG application, had the effect of discrimination against a protected class (at 566).

One action that led to the lawsuit was the city's rejection of a plan to build a federally subsidized multifamily housing project. Although the city claimed the reason for its denial was that the developer failed to comply with the land use ordinances, the district court held that the denial was based on fear that blacks would live in the housing. "This fear resulted in deviations from standard procedure and substantive norms and rendered impracticable if not impossible, compliance with land-use ordinances" (at 567). These deviations occurred the day before the application was rejected when the voters adopted land use ordinances by referendum. One ordinance limited all new residential buildings to a height of 35 feet (well below the proposed development), the second required voter approval for the project; both were clear attempts at blocking the project.

In its defense, the city claimed that the Fair Housing Act did not apply to municipalities. The Court of Appeals responded, claiming the purposes of the Act were

broadly stated, inclusive of the actions of municipalities, and that the purpose of the Act would be “diluted” if it were only applied to actions of private parties (at 572). Ultimately the ordinance that required all proposals for low-income housing to be submitted to a voter referendum was invalidated. Parma’s reputation for being hostile to blacks and its discriminatory governmental actions, including zoning, were found to perpetuate segregation in the Cleveland area. Remedial actions were ordered by the district and appeals courts in order to promote integration, congruent with the purpose of the FHA.

*Huntington Branch NAACP v. Town of Huntington, NY (1988)*

In the case of *Huntington Branch NAACP v. Town of Huntington, NY (1988)* the Court of Appeals for the Second Circuit overturned a district court’s refusal to invalidate a zoning restriction that prohibited construction of a multifamily dwelling outside a small urban renewal area in the Town of Huntington, New York. The appellants alleged that the town violated the FHA by restricting private construction of multifamily housing to a narrow urban redevelopment area, then occupied mainly by minorities. The district court found that the town had a shortage of affordable rental housing for low and moderate-income households, which added to the town’s burden during its defense.

The conflict began when a private developer sought to build integrated housing in a white neighborhood outside the urban renewal area, in response to the great need for subsidized housing. When the proposal for the project became public, community opposition developed and eventually the Town Board rejected the proposed zoning change. The Town Board adopted a resolution, claiming that the location of the proposed development was not

appropriate due to lack of transportation, traffic hazard and disruption of existing residential patterns in the area.

In response to the district court's refusal to order rezoning, the Court of Appeals for the Sixth Circuit responded by stating that the plaintiff need not prove discriminatory intent, but rather only show that the regulation caused a discriminatory effect. The Sixth Circuit court challenged the district court's decision by claiming that Huntington's zoning ordinance "impedes integration by restricting low-income housing needed by minorities to an area already 52% minority," therefore perpetuating segregation in the town (at 937). In the court's consideration of whether the reasons for the town's actions were legitimate and whether any less discriminatory alternative could serve their needs, it found that the developer's request outweighed the town's weak justifications for its restrictive zoning regulation and its refusal to rezone the proposed site.

*Dews v. Town of Sunnyvale, TX (2000)*

Sunnyvale, Texas is a small town near Dallas, with about 2,000 residents in the year 2000. One important reason for the town's low population was its prohibition of apartments and its one-acre minimum residential lot size. The plaintiffs in this case alleged that the zoning regulations were enacted to exclude minorities and that they inhibited desegregation of Dallas' low-income housing programs. The District Court for the Northern District of Texas, Dallas Division applied the disparate impact analysis to determine whether the zoning restrictions indeed had an adverse effect on African Americans.

Through its application of the disparate impact analysis the court found that the prohibition of apartments and one-acre residential zoning restriction, among other policies



and practices, disproportionately impacted African Americans. The analysis found that the zoning practices weighed more heavily on black households than white; the town had a history of being exclusionary by consistently refusing professional advice to change policies; discriminatory statements were made by residents and officials; and the town departed from standard review procedures when faced with proposals for multifamily homes.

Sunnyvale failed to show, even though it claimed, that its zoning regulations furthered a legitimate governmental interest to address septic problems and regional obligations to protect air, environment, agriculture or transportation. Consistent professional advice contrary to the town's activities was ignored, compounding its failure to justify its actions. The court ordered the town to stop discriminating through zoning, adopt new zoning to remedy the effect of past exclusionary practices and to take action to improve its hostile reputation.

*United States v. City of Agawam, MA (2005)*

In 2002 the Department of Justice filed a complaint against the City of Agawam, MA, including members of the Board of Appeals. The Housing Discrimination Project (now the MFHC) in Holyoke, MA represented the individuals who were allegedly discriminated against. The conflict arose when the owner of a tobacco farm submitted a Site Plan and an Application for Site Approval to the Agawam Planning Board for a proposed residence on the farm. The owner of the farm was required to provide housing for their Jamaican and Puerto Rican seasonal farm workers who were living nearly two hours away in Connecticut.

The owner of the farm modified the original proposal to conform to the requirements of city officials, including the Building Inspector/Zoning Officer, Mayor, and City Solicitor.

On April 19, 2001 the Planning Board voted unanimously to approve the Site Plan, conditional upon receipt of a letter from the Building Inspector indicating whether the uses were allowed under local and state regulations. Within a few months the city's Law Department issued a Memorandum in response to a request from the Mayor and Building/Zoning Officer that the proposed housing was not allowed under the city's zoning ordinance. Between June and July numerous public hearings were held on the issue during which white Agawam residents strongly opposed the proposal. The Board of Appeals eventually reversed the Planning Boards' decision.

DOJ alleged that the city, including the Board of Appeals, opposed the proposed housing because of concerns that black Jamaican and Puerto Rican farm workers would occupy the housing. DOJ alleged the actions intentionally made dwellings unavailable to persons because of race, color and national origin, violating the Fair Housing Act [42 U.S.C. Sections 3604 (a) and 3614 (a)]. In a Settlement Agreement filed during 2005 the city denied all allegations included in the complaints but agreed to the Order to avoid litigation. The city was ordered to not discriminate on the basis of race, color, or national origin in processing, reviewing or granting building permits, variances, special use permits and site plan applications for residential uses. The city was ordered to permit the construction of the farm worker housing and allow future proposals for farm worker housing by right, where reasonable (*U.S. v. City of Agawam, MA, 2005*).

The cases of *Parma, Huntington, Sunnyvale, and Agawam* are a selection of many such cases involving municipalities that illustrate the applicability of the FHA, which makes it unlawful to discriminate through land use planning and zoning practices based on race, color, or national origin. In particular, Sections 3604 (a) provides that it shall be unlawful

“to refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, *or otherwise make unavailable or deny*, a dwelling to any person because of race, color, religion, sex, familial status, or national origin” (my italics). Planning and zoning activities that have the *effect* of denying housing to persons protected by the FHA include departures from normal review procedures, influence from discriminatory sentiments of opponents, restricting housing that could potentially be occupied by minorities to existing minority-concentrated areas, and denying proposed housing developments that could be occupied by minorities on factors unrelated to the purposes of legitimate planning and zoning.

The FHA does not only apply to racial discrimination cases. The following section discusses additional applications of the FHA, namely within the area of disability discrimination. Under the FHA, municipalities have an obligation to not discriminate against individuals and groups of individuals with physical and mental disabilities.

#### Group Homes, Reasonable Accommodations, and Reasonable Modifications

A 2002 NPR special report on housing, *Housing First*, explores challenges facing Americans with special needs searching for good housing and the effects these challenges have on their important reintegration into mainstream society. The report finds that the physically handicapped face financial as well as physical hurdles when seeking decent, affordable housing and the mentally ill are a largely stigmatized group and frequently face community opposition. Michael Allen, former senior staff attorney at the Judge David C. Bazelon Center for Mental Health Law in Washington, DC commented: “There are huge NIMBY battles about establishing a four-person home for people with depression” (Karaim, 2002,

para. 11). Recovering substance abusers encounter similar battles in their search for housing that is essential to their recovery. Adequate time for recovery is important for successful integration into society for this group of people. Millions of Americans with special housing needs face challenges to obtaining good housing; enacting and enforcing regulations that are considerate of special needs is an important purpose of planning, zoning and municipal government.

#### Pertinent Sections of the FHA

The Fair Housing Act prohibits a refusal to make reasonable accommodations for the physically and mentally handicapped (same as disabled) [42 U.S.C. 3604 (f)(3)(b)]. Discrimination through planning and/or zoning also includes “a refusal to permit, at the expense of the handicapped person, reasonable modifications ... if such modifications may be necessary to afford such person full enjoyment of the premises” [42 USC 3604 (f)(3)(a)]. A reasonable accommodation is a “change, exception, or adjustment to a rule, policy, practice, or service” where a reasonable modification is a structural change to a dwelling (HUD/DOJ Joint Statement, 2008, 6). HUD and DOJ state that the FHA does not preempt local zoning laws, but it does apply to municipalities and other local government agencies by prohibiting them from making zoning or land use decisions or implementing policies that exclude or discriminate against the protected categories (HUD/DOJ Joint Statement, 1999).

## HUD and DOJ Position on Zoning and Group Homes

The Department of Housing and Urban Development and the Department of Justice released a Joint Statement in 1999 titled: *Group Homes, Local Land Use, and the Fair Housing Act*. The statement discusses the technical issues most common to municipalities when planning and zoning for group living arrangements as well as those issues related to making reasonable accommodations, in order to help municipalities avoid conflict. Since the FHA was amended in 1988 much litigation and confusion has emerged surrounding group homes and zoning. HUD and DOJ explain that the FHA does not preempt local zoning authority but it does apply to “municipalities and other local government entities and prohibits them from making zoning or land use decisions or implementing land use policies that exclude or otherwise discriminate against protected persons, including individuals with disabilities” (HUD/DOJ Joint Statement, 1999).

Persons with disabilities are considered under the FHA to be individuals with mental or physical impairments, which substantially limit one or more major life activities [42 U.S.C. 3602 (h)(1)]. Certain provisions for disability discrimination do not extend to persons who claim to be disabled because they were, for example, a juvenile delinquent, are a sex offender, who have been convicted of the manufacture or sale of illegal drugs, or are a direct threat to others. The term ‘group home’ refers to housing occupied by groups of unrelated individuals with disabilities; ‘group housing’ is also frequently used to describe any group of unrelated individuals who live together, such as college students. The FHA does not generally affect the ability of local government to regulate the latter unless they discriminate against the residents on the bases of the protected classes under the FHA (HUD/DOJ Joint Statement, 1999).

Occasionally, in order to allow disabled individuals or groups of unrelated disabled individuals an opportunity to occupy a dwelling, reasonable accommodations need to be made in zoning and land use regulations. Exceptions or waivers must be granted in instances where it is necessary to accommodate the disabled. For example, it may be necessary to waive a setback requirement so a ramp can be constructed to accommodate the needs of a person with a mobility difficulty. HUD and DOJ emphasize that whether an accommodation is reasonable or not must be decided on a case-by-case basis. Two questions are posed: First, “does the request impose an undue burden or expense on local government? Second, does the proposed use create a fundamental alteration in the zoning scheme?” (HUD/DOJ Joint Statement, 1999). If the answer to either question is ‘yes’, the accommodation is unreasonable.

A local government is obligated to respond in a timely manner to a request for reasonable accommodation. Local zoning review procedures should outline the necessary steps when requesting a reasonable accommodation and should inform the public of such procedures in order to promote transparent review. Local government officials should not state an unfair bias about the review of an application for a reasonable accommodation because courts may consider statements made by officials and/or residents when applying the effects test (HUD/DOJ Joint Statement, 1999).

Communities will often illegally restrict the proximity of one group home to another, as in Elizabeth, NJ, discussed below. Residents may often express concern when local zoning and land use authorities grant permits for group homes in residential neighborhoods, as was the case in St. John, Indiana. A municipality would violate the law if it reacted to discriminatory sentiments of neighbors when denying a permit, even if the authorities were

not themselves discriminatory. The same principle applies where neighbors are opposed to a proposed dwelling or dwellings due to racial prejudices. “If the evidence shows that the decision-makers were responding to the wishes of their constituents, and that the constituents were motivated in substantial part by discriminatory concerns, that could be enough to prove a violation” (DOJ/HUD Joint Statement, 1999).

Neighborhood opposition to unwanted uses is frequently referred to as NIMBY, ‘not-in-my-backyard’, and LULU, ‘locally-unwanted-land-uses’ (Dear, 1992; Cameron and Crewe, 2006; Schively, 2007). “NIMBY refers to the protectionist attitudes of and oppositional tactics adopted by community groups facing an unwelcome development in their neighborhood” (Dear, 1992). Human or public service facilities, such as group homes for the mentally disabled, often stimulate NIMBY responses, largely because residents fear decreasing property values, community stigmatization, and other negative effects (Schively, 2007, p. 256). Dear (1992) suggested that community-based facilities consistently run into zoning problems, especially when the number of occupants exceeds the allowable number under zoning regulations. In these cases operators or developers of such facilities need to apply for variances or conditional-use permits. When zoning or land use boards are required to decide on the siting of unwanted land uses, especially when neighbors respond unfavorably to such land uses, boards are required not to make decisions based on discriminatory feelings of neighbors, as this may violate fair housing laws (HUD/DOJ Joint Statement, 1999).

## Cases

### Refusal to Grant a Variance, Discriminatory Influence from Neighbors

During 2007 DOJ filed a complaint with the U.S. District Court for the Northern District of Indiana, Hammond Division, against the Town of St. John, Indiana, alleging the town violated the FHA by refusing to grant a special-use, 30-year variance to a resident who wanted to allow one unrelated individual with a disability to live with him in his home (*U.S. v. Town of St. John, Ind. Complaint, 2008*). The town code narrowly defined family as one or more persons occupying a unit provided they were related by blood, marriage, or other legal arrangement. DOJ stated in its complaint that the requested variance was reasonable and necessary to afford prospective residents with MS an equal opportunity to use and enjoy a dwelling in the town. When the resident notified neighbors of his petition they made oral or written statements to the Town Board of Zoning Appeals expressing their discomfort over having disabled persons as neighbors. The Board of Zoning Appeals' recommendation to deny the petition was subsequently adopted by the Town Council. The Complaint states that by denying the petition, the town failed or refused to make a reasonable accommodation in the application of its code in violation of 42 U.S.C. Section 3604 (f)(3)(B). The case is ongoing.

### *Association for Advancement of the Mentally Handicapped, Inc. v. City of Elizabeth, NJ* (1994).

The legal issue in this case is whether a municipal ordinance and the state statute upon which it is based, that set up barriers to community residences for people with disabilities, violate the FHA. The first plaintiff, Association for the Advancement of the Mentally Handicapped,



Inc. (AAMH), is a nonprofit corporation that provides social support services to its developmentally disabled members. The second plaintiff, Creative Property Management of N.J., Inc. (CPM), is a nonprofit corporation that purchases and holds real estate for use and occupancy by developmentally disabled persons. Additional plaintiffs include two developmentally disabled members of AAMH living in Elizabeth with support and services provided by AAMH.

In 1990 SERV Centers of N.J. entered into a contract with the N.J. Department of Human Services to provide a transitional community residence for emotionally disturbed children discharged from a local hospital. The Elizabeth Construction and Zoning Department agreed that such a residence was permitted at this location. In 1991 members of the community found out about the project and subsequently expressed their concerns. When the Mayor learned of the project he influenced the Director of Construction to issue a stop work order. At a special meeting, the Elizabeth Planning Board adopted a resolution recommending that the City Council amend the zoning code to automatically deny a conditional use permit “if the proposed residence is located within 1,500 feet of an existing residence for developmentally disabled; or if existing community residences or community shelters within the township exceed 50 persons or 0.5% of the township population, whichever is greater” (at 617). The city later added a third ordinance that would automatically deny a conditional use permit if the proposed community residence were within 1,500 feet of a school or day care center. The New Jersey Municipal Land Use Law, from which the ordinances drew their authority, generally permitted community residences for the developmentally disabled; however, in the case of community residences housing more than six persons, it authorized municipalities to enact zoning ordinances that required

conditional use permits. The statute validated the conditions that Elizabeth required for conditional use permits.

In 1991 CPM purchased a condo complex in Elizabeth and applied to the city for a certificate of occupancy after AAMH offered the unit to the two private plaintiffs. The defendant (Director of Construction for the City of Elizabeth) denied the certificate of occupancy, stating that the proposed use- housing developmentally disabled persons- “would violate the requirement of not being ‘located within 1,500 feet of a community residence’” (at 618).

After this suit commenced, the City of Elizabeth revised the requirements of granting conditional use permits for community residences for more than six persons, but maintained their three conditions for the automatic denial of a conditional use permit. The plaintiffs asked the court to declare these three provisions, the city ordinance, and the portion of the MLUL upon which the ordinance was based, a violation of the FHA, which the court did. Citing *U.S. v. Schuylkill Township, PA* (1990), the court affirmed that “The Act is intended to prohibit the application of special requirements through land-use regulations, restrictive covenants, and conditional or special permits that have the effect of limiting the ability of such individuals to live in the residence of their choice” (at 620). The court held that an ordinance could be found to discriminate against the handicapped on its face and when it serves no governmental purpose. The court determined that the City of Elizabeth ordinance discriminated on its face by imposing conditions on community residences for the developmentally disabled housing more than six persons that were not imposed on residences housing more than six persons who were not developmentally disabled.

The city argued that it had a right to be notified who they are to ‘host’, arguing that developmentally disabled persons may pose a risk of danger to the community. Second, they argued that because such residences would change the character of the community, communication with the Mayor and City Council should be required before a community residence was established. The United States District Court for the District of New Jersey declared that both arguments failed because there was no evidence indicating that developmentally disabled persons would pose any danger to the community and that automatically denying conditional use permits to community residences housing six or more developmentally disabled persons sought to be established within 1,500 feet of an existing community residence, school or day care center actually protected the city’s citizens.

*Tsombanidis v. City of West Haven, CT (2003)*

The owner of a residence (Oxford House-Jones Hill, OHJH) in West Haven, CT and eight current or future residents of OH-JH and Oxford House, Inc. (OHI) brought action against the First Fire District for the City of West Haven and the City of West Haven under the FHA and Title II of the Americans with Disabilities Act (ADA). This summary focuses on the action against the City, under the FHA.

OHI oversees more than 900 independent homes for recovering alcoholics and drug addicts. OHI has found that residents are more likely to succeed if homes are, among other conditions, located in residential neighborhoods away from drugs and alcohol, accessible to areas that provide basic needs and employment opportunities, and accommodating for a minimum of six people to live together in shared bedrooms (at 570). In 1997 an individual bought a house in a residential area of single-family detached homes in West Haven, CT to

start an Oxford House. Within days after the original residents moved in, neighbors expressed concerns and it was obvious that there was significant community opposition to the new residents. After receiving complaints from opponents, the city informed the owner/operator that she was operating an illegal boarding house in a residential zone and she was ordered to reduce the number of tenants. When she applied to the ZBA for a special-use exception to continue to use the property as an Oxford House, the ZBA denied the application after holding a public hearing.

The first claim against the city was that they intentionally discriminated against the residents and potential residents of the Oxford House. To establish intentional discrimination, plaintiffs must “prove that a motivating factor behind the City’s refusal to classify OH-JH as a single-family household was the residents’ status as recovering drug addicts and alcoholics” (at 579). In its application of the *Arlington Heights* test, the court considered substantial evidence showing hostility toward the residents of the home motivated the city in its enforcement efforts; the city rarely enforced codes against boarding houses in residential neighborhoods; the city failed to acknowledge correspondence sent by OHI explaining how they operated and why their residents had a right to be treated as a single-family residence; an official expressed personal dissatisfaction with the house; and bias was found to influence the denial of Oxford House’s request for a special use exception by the ZBA (at 580).

The second piece of the claim against the city was that it failed to provide a reasonable accommodation to allow the home to operate. The appeals court affirmed that the city failed to grant a reasonable accommodation, declaring that it “cannot deny the variance request based solely on plaintiffs’ handicap where the requested accommodation is

reasonable” (580). The city accepted that granting the variance would not cause a financial burden on the town nor did it present evidence that the home would cause significant increases in traffic congestion or noise.

The courts consistently find that regulations or policies applied to housing for the handicapped must be applied equally to all persons, regardless of whether they have a handicap or not. Gathe (1997) suggests that cities should base local zoning regulations for group homes for the handicapped on state policy, they need to show an attempt at integration, and they should regulate institutions not individuals. Regulations and policies that treat individuals or groups of persons with a handicap less favorably than those without a handicap are consistently challenged under the FHA. Gathe (1997) argues that the reasonable accommodation provision of the Act requires municipalities to be flexible when regulating for group homes. “Government officials are required to tailor certain zoning provisions to the needs of the handicapped and the establishment of group homes, especially where it would not impose an undue burden on the local government” (Gathe, 1997, Sec. III.B.2).

### Additional FHA Issues

#### Spacing Requirements

Municipalities often attempt to regulate the density of group homes within certain neighborhoods or within the municipality at large. Gathe (1997) highlights conflicting decisions in federal courts surrounding spacing requirements. One federal appeals court upheld a requirement by the City of St. Paul, Minnesota to obtain a license for a residential program, which required applicants to meet a 1,320-foot spacing requirement (*Familystyle of St. Paul, Inc. v. City of St. Paul*, 1991). Another court overturned a 1,000-foot spacing

requirement in *Horizon House Developmental Services, Inc. v. Township of Upper Southampton* (1992). The court found that “the spacing requirement ... is grounded in community opposition, stereotyping and prejudice against people with handicaps” (at 690). HUD and DOJ claim that they “take the position, and most courts that have addressed the issue agree, that density restrictions are generally inconsistent with the Fair Housing Act” (HUD/DOJ Joint Statement, 1999).

### Familial Status and Occupancy Restrictions

Occupancy standards refer to “the number of people who may legally live in a unit based either on the absolute number of people per bedroom or the number of people per square foot” (Pader, 2002, p. 303). The FHA provides: “Nothing in this title limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling. Nor does any provision in this title regarding familial status apply with respect to housing for older persons” [42 U.S.C. 3607 (b)(1)]. Nevertheless, what is ‘reasonable’ requires closer examination because these standards have a disproportionate impact on ethnic, racial, social and economic groups that aren’t typically stakeholders in their enactment and enforcement. Pader (2002) argued that facially neutral occupancy standards have neither a neutral effect nor is their effect always intended to be neutral.

Since the 1960s communities have used a variety of regulations to prevent extended families of unrelated persons from living together in a single dwelling unit (Kushner, 1995, p. 110). In *Village of Belle Terre v Boraas* (1974), the Supreme Court sustained a single-family

zoning ordinance that barred families of more than two unrelated persons from living together. However, in *Moore v. City of East Cleveland* (1977), the Supreme Court reversed an Ohio lower-court ruling and overturned the city's zoning ordinance that prohibited members of an extended family from living together in the same residence. The original ordinance prohibited a grandmother from having her two grandsons (each by a different one of her children) in the dwelling. Communities are generally able to regulate housing for unrelated families, however any attempt to interfere with related families is closely examined (Kushner, 1995, p. 112). The Supreme Court held in the case of *City of Edmonds v. Oxford House, Inc.* (1995), an important case clarifying the rights of disabled to live together in single-family districts, that there is a difference between regulating how many people could live in a house and how a family could be composed. In *Edmonds*, the Court found that a zoning restriction that limited occupancy defined family composition and not occupancy, and therefore did not fall within the FHA's exemption for occupancy limits.

#### Emerging Issues Resulting from Local Attempts to Regulate Housing for the Undocumented

The Pew Research Center estimates that sometime between 2020 and 2025, the foreign-born will account for more than 15 percent of residents in the U.S. (Roberts, 2008). While some communities view immigrants as an asset, other communities are less welcoming to immigrants- particularly the undocumented. Local governments will have to continue to plan for the increasing numbers of foreign-born persons and must consider how the FHA will influence their actions and decisions when it comes to housing these people.

Berry (2007) discussed local government ordinances that federal housing officials and civil rights groups are challenging on grounds that they discriminate against minorities, by allegedly targeting illegal immigrants, many of whom are Hispanic. Local laws challenged under the FHA include a law adopted in 2006 by the City of Hazleton, PA to fine landlords who rent to illegal immigrants. The law was challenged and later struck down by a federal judge (*Lozano v. City of Hazleton*, 2007). An ordinance in Manassas, VA defined family so that households were restricted to immediate relatives even when below the occupancy limits. The city repealed the ordinance after HUD and private housing groups alleged the ordinance was only applied to Hispanics and threatened to sue. Berry (2007, paras. 21-22) quoted the assistant secretary for HUD's Office of Fair Housing and Equal Opportunity, Kim Kendrick, as saying that "when you're enforcing those provisions, you must do it uniformly to all people." Kendrick went on to say that even illegal immigrants "have the protections of the Fair Housing Act."

Municipalities, including land use and zoning boards, should consider recent responses by private civil rights groups, HUD, the courts, and the federal government to local housing and other ordinances that discriminate against illegal immigrants. According to officials in some states, an influx of immigrants is contributing to increased complaints (Berry and Benincasa, 2007).



## Affordable Housing

Kushner (1995, p. 608) argued that the segregation of American suburbs is caused largely by exclusionary zoning and growth controls, such as minimum lot and home sizes, height limitations and dimensional requirements that increase the cost of housing. Although fair housing laws do not guarantee home seekers access to housing when they would otherwise be unable to afford it, HUD and many organizations, such as the Massachusetts Department of Housing and Community Development, and the Fair Housing Project (FHP) of the Statewide Housing Services division of the Champlain Valley Office of Economic Opportunity (Vermont), tie affordable housing into discussions about fair housing. In this thesis I do not distinguish between affordable housing and low-income housing; however, affordable housing is generally housing that costs no more than 30% of an individual's or a family's annual income (HUD, Community Planning & Development, 2008). The MA DHCD states that "Land use regulations can be inclusive of minorities, disabled persons, and other groups that are disproportionately low-income and/or disadvantaged in the housing market by increasing affordability" (DHCD AI, 2007, p. 107). Once again, where fair housing is thought of in terms of inclusiveness broadly, affordable housing becomes an important element.

HUD's Fair Housing Planning Guide (1996) contains guidance for conducting analyses of impediments to fair housing by advising the authors of these analyses to determine whether local zoning ordinances, building codes, and other land use and fiscal policies limit the supply of low-income housing. HUD's connection of fair housing to low-income, or affordable housing, establishes an important precedent for other organizations and municipalities that aim to promote fair housing. The FHA does not extend protections to

low-income home seekers, but HUD provides that “The provision of affordable housing is often important to minority families and to persons with disabilities because they are disproportionately represented among those that would benefit from low-cost housing” (Fair Housing Planning Guide, 1996, sec. 5-4). In *Dews v. Sunnyvale* (2000) the district court held that Sunnyvale’s ban on apartments and commitment to one-acre zoning contributed to having the effect of discrimination against African Americans within the region. Presumably, the courts will consider the whole range of facts surrounding a claim of a FHA violation, and a community’s receptiveness to affordable housing may certainly be a consideration.

The Fair Housing Project of Vermont, in partnership with the VT Human Rights Commission, make a video available on their Web site titled: “Tearing Down Regulatory Barriers to Fair Housing” (2005). The video addresses the connection between fair housing and housing affordability by remarking that low and moderate-income people and people with disabilities are often unable to find decent or affordable housing. Exclusionary zoning bylaws have the effect of driving up housing costs, thereby offsetting any remedy that increasing the housing supply may have on affordability. An interviewee in the video claims that most municipal officials in Vermont don’t know they have an obligation under the FHA. Municipal officials should understand their obligation, work with other organizations promoting fair housing, get the information and training about fair housing and take any necessary steps to promote fair housing. In a second video made available on the Vermont Fair Housing Project Web site, “Fair Housing & Growth Centers- What is the Connection?” (2007), the writer and producer traces the growth center patterns of Vermont towns and cities from historically high density to modern sprawl, arguing that sprawl effectively drives up the

cost of housing and closes off communities to some persons protected by the FHA. The Executive Director of the Chittenden Co. Regional Planning Commission claims that the most common way that municipalities can run afoul of fair housing laws is to enact zoning that affects affordability because less expensive housing benefits families with children and the handicapped. The President of Housing Vermont suggests that political leadership is expected to reduce unsafe, unsanitary, and unaffordable housing conditions.

Because a lack of affordable housing has been found to disproportionately burden people protected by the FHA, HUD, fair housing advocates and municipalities make the connection between fair housing and housing affordability. Affordable housing is a characteristic of inclusive communities, and the actions and decisions of planners, local land use boards and municipal decision makers that affect housing can either have the effect of exclusion or inclusion.

While the extent of discrimination at the municipal level is great, this discussion illustrates several areas where municipalities are most frequently found to violate the FHA. This should alert municipalities to the range of important issues they are involved with, to provide an explanation of policies and practices to avoid, and to outline potential subjects and cases advocate-instructors can discuss in a curriculum. Although it is essential to warn municipalities of the costs for violating the FHA, it is perhaps equally important to suggest to them ways that they can take a proactive planning approach to reducing any risk of violating the Act in the future and promoting inclusive communities. The following chapter discusses ways that municipalities might affirmatively further fair housing.

## CHAPTER 5

### AFFIRMATIVELY FURTHERING FAIR HOUSING AT THE MUNICIPAL LEVEL

#### What it Means to Affirmatively Further Fair Housing

Affirmatively furthering fair housing is not only one of HUD's guiding principles but also a requirement for participating in any of HUD's many housing and community development programs. Under the FHA, HUD is also required to affirmatively further fair housing.

Affirmatively furthering fair housing means, most simply, non-discrimination. Practicing non-discrimination, however, requires real efforts such as establishing fair housing enforcement organizations, providing outreach and education to housing providers, and encouraging lenders to operate in underserved areas (HUD FHEO, 2007, para. 2). In terms of land use planning and zoning, affirmatively furthering fair housing could require amending policies or practices that inhibit housing choice or that have a disproportionate effect on the protected classes. Training municipal authorities on their roles and responsibilities is another way of affirmatively furthering fair housing.

The Housing and Community Development Act of 1974, as amended, is the statute for HUD's Community Development Block Grant (CDBG) program. Within Massachusetts there are 28 entitlement cities and 7 entitlement towns; these municipalities receive funding through the CDBG program. Entitlement communities are required to certify to HUD that the awarded grant will be carried out and administered according to the FHA and that they will affirmatively further fair housing (HUD Community Development & Planning, 2008). Specifically, HUD requires recipient communities to:

(1) Examine and attempt to alleviate housing discrimination within their jurisdiction; (2) promote fair housing choice for all persons; (3) provide opportunities for all persons to reside in any given housing development, regardless of race, color, religion, sex, disability, familial status, or national origin; (4) promote housing that is accessible to and usable by persons with disabilities; (5) and comply with the non-discrimination requirements of the FHA. (HUD Community Development & Planning, 2008)

The requirements of CDBG recipient communities are applicable to any political jurisdiction involved with the regulation of housing, such as municipal governments. In other words, every municipality has a responsibility to affirmatively further fair housing by practicing non-discrimination. HUD's leadership on fair housing at the municipal level extends to all municipalities, regardless their involvement with the CDBG program. Beyond the responsibility to promote fair housing, municipalities have an obligation to be cognizant of regional development patterns and their social environment.

Regional economies and sprawling land use patterns reinforce the need for a regional approach to fair housing planning. For example, planning that spreads needed affordable housing across an entire region instead of concentrating it in the traditional urban centers increases the opportunities for those who are typically neglected. Blackwell and Bell (2005, pp. 289-309) argue that suburban growth, inner-city decline, and exclusionary suburban land use controls have cut off the entry of low-income people of color to key quality of life elements. Regional housing planning needs to consider the impact that demographic changes will have on the entire region as well as the impact on the communities that make up the region. MAPC's *MetroFuture* draft report (2007) predicts the greater Boston area will add 465,000 people and 307,000 housing units by the year 2030 under current trends.

## Municipal Measures

### Proactive Fair Housing Planning

Affirmatively furthering fair housing is a proactive planning strategy, not a reactive response to proposed affordable housing developments or potentially controversial housing developments. Often it is necessary to take steps to “assure that the housing is fully available to all residents of the community;” regardless of whether they belong to a protected category under the FHA or other state or local laws (HUD Fair Housing Planning Guide, 1996, sec. 5-4). There are a range of activities and actions that municipalities should take in order to prevent any doubt as to their receptiveness to persons protected under the FHA and to promote inclusive communities, beginning with an analysis of who lives within the municipality and how planning and zoning practices and regulations impact these individuals and/or families. “Whether intentionally or unintentionally, zoning ordinances may contain provisions that treat affordable housing, supportive housing or group homes for people with disabilities differently” (The Housing Alliance of Pennsylvania, 2004, ch. 2). Taking proactive measures, such as understanding the effect of zoning regulations on protected classes and working with neighbors to assuage fears or biases might prevent conflict when new housing developments are proposed and they might offset many of the land use and zoning practices that are found to limit fair housing choice.

Affirmatively furthering fair housing can be integrated seamlessly into broader municipal and regional planning strategies. The Fair Housing Act does not limit the ability of municipalities to “create single family districts, preserve open space, prevent overcrowding, promote adequate access to public utilities, ensure adequate parking, prevent congestion and mitigate the effects of automobile and other traffic,” and other legitimate

purposes of zoning to protect the health, safety, and wellbeing of the public (The Housing Alliance of Pennsylvania, 2004, ch. 2). Municipalities can continue to utilize land use and zoning regulations to regulate buildings and structures so that they fit into the character of the community while also affirmatively furthering fair housing, as long as the regulations are not used to discriminate against protected categories.

Affordable housing is often identified as a barrier to fair housing because lack of affordable housing is an impediment to economic diversity and therefore other types of diversity (Newton, MA AI 2005, p. 3). Providing affordable housing is “often important to minority families and to persons with disabilities” (HUD Fair Housing Planning Guide 1996, sec. 5-4). Encouraging affordable housing and a diverse housing stock is an effort supported by many communities. “Supporting Newton’s cherished diversity is a fundamental goal. To achieve diversity, individuals and families must be able to find and maintain suitable housing at affordable costs” (Newton AI 2005, p. 3). Newton’s AI (2005, pp. 7-8) identified zoning and land use as an impediment to fair housing choice, by effectively increasing the cost of housing, for four reasons: (1) there is a lack of sufficient developable land zoned to permit compact development, mixed-use development, efficiencies or single room occupancy units; (2) dimensional and parking standards inhibit some development, such as in village centers where historic lot sizes are often smaller than the minimum lot sizes required for new development; (3) street and utility requirements can, in some cases, be unnecessary and add to costs in certain developments; and (4) the project approval process, including procedure and fees, can increase cost and delay a project because there is limited by-right development.

In Newton, MA proactive planning practices might offset these impediments by increasing affordable housing, reducing zoning barriers to by-right development, considering

appropriate compact development in village centers, streamlining the accessory apartment zoning process, and getting city approval and financial support of small-scale residential developments (Newton AI, 2005, p. 33). Massachusetts Chapter 40B Anti-snob Zoning, Ch. 40R Smart Growth Zoning, and inclusionary zoning ordinances are additional opportunities for affirmatively furthering fair housing within Massachusetts. Newton's Inclusionary Zoning Ordinance (IZO) (adopted in 2003) promotes housing opportunities for households at or below 120 percent of the area median income. It applies to all two or more-unit developments requiring a special permit. The IZO assists developers by allowing them to increase density by .5 units for every affordable unit created. The IZO requires developers to make cash payments for use in future development of affordable housing units (if less than 6 units) (Newton AI, 2005). Statewide and local statutes and regulations encourage affordable housing development and municipalities and home seekers benefit from these regulations in their pursuit of fair housing.

Reactions from neighbors to certain types of proposed housing developments for persons who are protected under the FHA or other non-discrimination laws can be negative, as discussed in Chapter 4. Reactions to these negative attitudes by municipal authorities resulting in making housing unavailable to persons of a protected category would violate the FHA. Public pronouncements of general policy, such as standard review procedures and the provisions of the FHA, and planning and implementation of such projects, are strategies that municipalities can employ to reduce or prevent potential conflicts arising over proposed housing developments (HUD Fair Housing Planning Guide, 1996, sec. 5-6). The Housing Alliance of Pennsylvania (2004) suggests that developers of potentially controversial housing developments can ask zoning officials to employ alternatives to widespread notification and



mass meetings, which may provide forums for public opposition. Rather, door-to-door outreach with neighbors, small meetings with stakeholders, and a city agency serving as mediator can reduce the risk of outright opposition that could be expressed at a large public meeting. “Responsible public policy requires a mechanism for distinguishing legitimate from illegitimate objections, giving voice to the former and ensuring that the latter have no role in the process” (The Housing Alliance of Pennsylvania, 2004, ch. 2).

Municipalities should begin their approach to planning, zoning and site selection by asking the following (a selection):

- Are there concentrations of low- and moderate-income housing in one or more localities or neighborhoods within the jurisdiction’s geographic area?
- Are current zoning and other policies and procedures promoting this pattern or exerting a neutral effect on the existence of such concentrations?
- What is the impact of the jurisdiction’s zoning ordinance(s), building codes, and other land use or fiscal policies on the provision of lower-income housing?
- If there is vacant or other land that can be developed within the jurisdiction’s geographic area, do zoning regulations permit medium and high-density residential development for such land, or only low-density housing (and accompanying high cost)?
- Do zoning, subdivision, or occupancy ordinances or regulations define the term “family” narrowly so as to prevent unrelated individuals from sharing the same home?
- Do zoning, subdivision, or occupancy regulations include provisions that permit housing facilities for persons with disabilities in a wide array of locations to prevent their concentration?

(HUD Fair Housing Planning Guide 1996, secs. 5-6 – 5-8)

In the case that an analysis of impediments to fair housing finds that any or all of these conditions exist within the community, it is especially important for the municipality to address them. Not only are these questions pertinent to proactive planning to affirmatively further fair housing, but they may also be considered either individually or collectively by

courts hearing fair housing cases, as in the case of *Dews v. Sunnyvale* (2000). A municipality's approach to affirmatively further fair housing involves a continual comprehensive analysis of any and all impediments that affect housing opportunity. Zoning and land use policy is but one public sector issue affecting fair housing; municipalities should identify and work with partners across other sectors and throughout their region.

### Influence of Effects Test

Despite the Supreme Court's ruling in *Village of Arlington Heights v. Metropolitan Housing Development Co.* (1977) that Constitutional claims of housing discrimination must be supported by evidence of intent to discriminate, it established an important test that weighs the *effects* that policies have on persons protected by the FHA. Commonly referred to as the effects test, this test is applied in cases where there is no direct evidence of intent to discriminate (Voelker, 2006, p. 4). This test is important because discrimination can be easily concealed and is very difficult to prove (MCAD, FAQ's, 2007, para. 17).

The effects test shifts the burden of the argument to the defendant. In the case where a municipality must defend itself against a FHA claim it must prove its actions furthered a legitimate governmental interest and no non-discriminatory alternative to the challenged action or policy exists. If a municipality denies a request for a reasonable accommodation it must show that the request imposes an undue burden or expense on the municipality or the request creates a fundamental alteration in the zoning scheme.

Effect could be proven by showing either adverse impact on a certain protected class or harm to the community in general. Courts have considered the discriminatory impact of the challenged decision or policy, its historical background, discriminatory statements made

by officials and opponents, departures from the normal procedures, and the administrative or legislative history of the policy or decision (Voelker, 2006, p. 4).

In the case of *Dews v. Sunnyvale*, the town of Sunnyvale failed to show its ban on apartments and one-acre zoning minimum (in addition to other policies) were legitimate uses of its zoning authority and the policies perpetuated segregation in the region. In Agawam, MA, DOJ challenged the ZBA's reversal of the Planning Board's preliminary approval of a site plan for farm worker housing for black Jamaicans and Puerto Ricans after hearing negative opposition from neighbors. The cases discussed at length in Chapter 4 suggest that conflicts tend to arise when individuals or groups, municipal authorities, or both, oppose certain proposed housing developments within the community and are motivated by negative attitudes toward the residents or prospective residents of the housing. Municipal authorities need to be aware of the effects that their decisions could have on prospective residents of a proposed housing development.

### Permanent Legal Obligations

Knowing the FHA and other non-discrimination laws and understanding how they apply to municipal land use planning and zoning practices is the first step to affirmatively furthering fair housing. Failure to comply with the FHA can have serious legal and other consequences, as discussed in Chapters 2-4. Certain instances can arise that require municipal authorities, such as planning and zoning boards, to understand their legal requirements under the FHA and other non-discrimination laws.

Applications or proposals for certain types of housing developments within a municipality can cause a potential FHA violation if a discriminatory action is taken to deny

or make the housing unavailable when the prospective residents are of a protected class. Certain zoning or land use policies, actions and decisions that may raise a “red flag” can alert developers (have standing under FHA) of potentially controversial housing to a possible violation of the FHA (Curry, 2007, p. 14). Curry presents a selection of “red flags” mentioned in The Housing Alliance of Pennsylvania’s *Addressing Community Opposition to Affordable Housing Development: A Fair Housing Toolkit* (2004):

- Discriminatory statements are made by decision makers or discriminatory sentiments appear to be in play.
- Potential residents of the opposed development are members of protected classes in the statute.
- Decision makers discuss who will live in the development more than whether the development meets zoning requirements.
- Demographic statistics show patterns of segregation will be continued if the development is kept out of a certain neighborhood or area of town. (2007, pp. 14-15)

#### Affirmatively Furthering Fair Housing and the Disabled

Affirmatively furthering fair housing requires understanding the obligation under the FHA to make reasonable accommodations for the disabled in zoning and land use policies and practices. In cases where a request for a reasonable accommodation is made so that a disabled person or group of persons is able to enjoy a dwelling, municipal authorities need to know that they are required under the FHA to grant the accommodation as long as it does not cause an undue burden or expense on local government nor cause a fundamental alteration in the zoning scheme. Furthermore municipalities within Massachusetts need to understand the provisions of the Dover Amendment (Ch. 40A, Sec. 3) in addition to the FHA. Homes for the disabled are frequently the subject of community opposition. The same proactive

planning measures discussed above should be taken to assuage any negative sentiments that opponents of such homes could harbor.

### Making Fair Housing Strategies Accessible to Municipalities

Arguably, making information on fair housing accessible to municipalities is equally as important as the content made accessible. Without a way of approaching the proper municipal decision makers and instructing them on their roles and responsibilities of affirmatively furthering fair housing, the curriculum planning and design would be futile. This section examines the activities of the Massachusetts Department of Housing and Community Development; namely those activities discussed in the Department's Analysis of Impediments to Fair Housing. Second, this section examines the collective efforts of several organizations within the state of Vermont. The purpose of this examination is to identify what other fair housing advocates could learn from the experiences, goals, and issues promoted by these organizations so that they may construct an approach that is appropriate to them and yet aligned with the efforts of others.

#### Massachusetts Department of Housing and Community Development

In Massachusetts the Department of Housing and Community Development (DHCD), with the assistance of a Fair Housing Advisory Panel (FHAP) (convened in 2004; augmented and reconvened in 2007), released an analysis of impediments to fair housing access in which a number of impediments to fair housing are identified and potential action steps are proposed. The report claims that there is not enough education about fair housing and that fair housing

leadership is essential. “Technical expertise exists in many facets of fair housing but there is no standardized educational tool available” (99). The DHCD recognizes the importance of education about fair housing laws and the incorporation of fair housing principles into their programs and activities. The FHAP recommended the DHCD and partners educate internal staff and others throughout the housing delivery system on fair housing. Such an approach would involve reviewing existing training efforts to develop a uniform standard, providing materials on the roles and responsibilities of promoting fair housing and informing municipalities of the penalties for violating fair housing laws.

The DHCD proposes to educate communities about programs such as Chapter 40S in order to address concerns that communities have with escalating educational costs resulting from increased construction of multifamily dwellings (100). The DHCD also proposes to promote Chapter 40R districts, which require a diversity of housing by right (100). Chapter 40R Smart Growth Zoning Districts encourage municipalities to establish districts where affordable housing is built near transit stops, town centers, commercial areas or underused industrial parks. Chapter 40S provides education funds to communities implementing Chapter 40R districts in order to offset the potential increase in school enrollment from an increase in housing (Massachusetts Smart Growth Alliance, paras. 7-9). In addition to promoting Chapter 40R and Chapter 40S, the DHCD proposes to promote inclusionary zoning, smart growth, transit access, housing affordability, regional housing equity, and fair housing principles in all housing programs and activities. The DHCD proposes to continue to offer incentives to communities that incorporate fair housing principles in development and housing policies and penalties for those that do not (107). Under the DHCD Commonwealth Capital Program, priorities may be given to communities that conduct

analyses of impediments to fair housing, adopt bylaws that create fair housing ordinances and commissions, conduct education and outreach, and promote handicap accessibility and universal design.

The FHAP found that there is a general lack of knowledge regarding housing rights of people with disabilities, segregated patterns of group homes dominate and accessibility requirements remain unsatisfied. The FHAP recommended that DHCD include education that relates specifically to the needs of people with disabilities. DHCD aims to incorporate specific educational tools on the rights of persons with disabilities and support housing for disabled persons in areas that are accessible and serve their needs (102).

### Fair Housing in Vermont

There are several coordinated fair housing resources in the State of Vermont, such as the Department of Housing and Community Affairs, the Fair Housing Project (FHP), a program of the Statewide Housing Services division of the Champlain Valley Office of Economic Opportunity, and the Vermont Association of Planning and Development Agencies. The FHP has released reports detailing fair housing and land use, posted multimedia on the Web, and is conducting fair housing and land use training for municipal officials. The FHP posts an Affirmatively Furthering Fair Housing progress report on its Web site in order to help municipalities measure their understanding of their responsibilities under the Fair Housing Act (FHP, AFFH Progress Report).

Affirmatively furthering fair housing is a requirement of all municipalities, whether or not they receive CDBG funds from HUD. The FHA regulates the actions of municipalities concerning fair housing, making certain practices unlawful, such as enforcing

policies that target a protected class for less than equal treatment. Municipalities have a responsibility to promote fair housing beyond what is merely required of them under the FHA. Practices that promote fair housing include proactive planning measures, including conducting an analysis of impediments to fair housing within the municipality and region, talking with residents about potentially controversial projects before they arise, and examining the regulations to determine whether they may have a discriminatory *effect* on persons protected under the FHA. Fair housing advocates can make fair housing information accessible through a variety of outreach efforts, which could be tailored specifically to the municipal audience.

By learning the instruction experiences of fair housing advocates and municipal authorities that could presumably learn about fair housing, I intend to join the needs of both groups to arrive at appropriate curriculum considerations. Chapter 6 discusses the survey methods that I employed, which informed the curriculum considerations and concluding remarks included in Chapter 8. The case law and fair housing advocate review clarified the connection between municipal land use planning, zoning and fair housing. The purpose of the survey is to capture a more detailed picture of the relationship with special emphasis given to instruction and learning needs.



## CHAPTER 6

### METHODS

My research began with a purpose, as discussed in Chapter 1, which was to understand *how fair housing centers might design and implement effective educational programs in order to empower key municipal authorities to promote fair housing opportunity and avoid violating fair housing laws*. The purpose is supported by an assumption that *fair housing centers and municipal government authorities could cooperatively fight against illegal discrimination in housing if the former could design and teach an effective training curriculum and implement a broader, comprehensive educational program and dialogue with municipal governments*.

#### Discussion of Potential Survey Model that Could Inform Training

Surveys are valuable tools that can be used to gather insight from a range of informants on a given subject matter (Babbie, 2001). A survey intended for instructors and another intended for learners may strengthen the relationship between these two groups and inform instructors of the most appropriate rationale, intended learning outcomes, and evaluation of the material they teach. This thesis examined two groups of subjects: citizen planners and fair housing advocates. Information gathered from the fair housing advocates captures their training goals and objectives as well as their experiences working with municipal officials. The survey of the citizen planners could capture their learning needs in areas such as ethics, as well as in the technicalities of planning and zoning under the FHA. Both surveys were designed to gather the preconceptions about fair housing that citizen planners might bring to training.

The two groups of survey participants were identified and selected for the pivotal role they play in fair housing. There is a general lack of literature that explores the relationship between fair housing advocates as trainers and citizen planners as learners. In the review of the literature, legal cases, fair housing advocacy and political agency information I found that municipal planning and zoning boards are involved in legal cases frequently and fair housing education is conducted by a multitude of fair housing advocates.

One hundred surveys were placed randomly in the informational folders of the attendees of the Citizen Planners' Training Collaborative (CPTC) workshop held in Worcester, MA on March 15<sup>th</sup>. Attendees consisted primarily of volunteer board members from various towns and cities throughout Massachusetts, and also professional planners, students and others. There was a very low response rate to the surveys distributed at the CPTC workshop and so I decided not to include the results in this thesis. I learned also that most of the respondents were students and these were not the targeted research subjects.

The survey intended for fair housing advocates yielded more substantial information and reached a greater number of research subjects than the citizen planner survey. The results of this survey were collected through a Web-based survey application called Survey Monkey ([www.surveymonkey.com](http://www.surveymonkey.com)). The information collected from the survey can be split into two categories, pertaining to outreach and instruction.

*Research questions on the experience of fair housing advocates' experiences with municipalities, generally (outreach) include:*

1. Do advocates instruct municipal authorities on their roles and responsibilities under the FHA?

2. Is fair housing instruction for municipal authorities a relative priority compared to other instructional activities?
3. Which municipal authorities do advocates believe should be instructed?
4. How do advocates attract this group to trainings?

*Research questions on instruction of municipal authorities include:*

1. What teaching methods are most effective for this particular group of learners?
2. How should advocates design educational program material such as presentations, dialogues, and other educational models?
3. How can advocates determine what volunteer planning and zoning board members don't know about fair housing?
4. What do advocates feel are the most important concepts and information that municipalities should understand/know?

The results of the fair housing advocate survey are compared and contrasted with the findings of the literature review and discussed in detail in Chapter 7. I designed the survey to inform the development of a fair housing curriculum and to learn about the experiences of fair housing advocates in instructing municipal officials so that future efforts and outreach might be improved. Both the citizen planner survey and the fair housing survey are found in the Appendix.

## Limitations

I had originally intended to create and distribute surveys to citizen planners in their capacity as learners and to fair housing advocates in their capacity as instructors and propose a curriculum that married the needs of each group. However, the citizen planner survey was left out of this thesis because there was not enough substantial input to contribute to the development of a curriculum.

Posner and Rudnitsky (2006) emphasize the importance of an evaluation plan that measures behavioral indicators suggesting learning outcomes as part of comprehensive course planning. Considerations for an evaluation plan are discussed in Chapter 1 but a potential evaluation is not included in this thesis. The research topic and long-term course planning and execution will be enhanced following an evaluation of the learning and the instruction. In addition to the evaluation, maintaining current information about legal developments would contribute to a facilitator's ability to provide the most important information. The cases discussed at length in Chapter 4 were selected because of their applicability to municipal government, land use planning and zoning. While these cases were determined to be important fair housing cases they may not represent the totality of facts and issues surrounding fair housing and land use.

## CHAPTER 7

### FINDINGS

#### Literature Review

There is a clear connection between the Fair Housing Act and land use planning, zoning and municipal government in general. Courts have held in FHA cases that where the policies, actions or decisions of municipalities have the effect of disproportionately affecting protected categories of persons they could violate the Act. Because seemingly neutral policies can have the effect of discriminating, it is incumbent upon municipalities to take proactive measures to avoid violating the FHA. Fair housing advocates also make the connection between municipal land use and fair housing laws. Advocates indicate that many municipal officials, and planning and zoning boards in particular, tend not to fully understand the connection between the law and their role.

Municipalities have certain responsibilities to affirmatively further fair housing whether they receive CDBG funds or not. These responsibilities range from practicing non-discrimination through land use planning and zoning, in general, to making reasonable accommodations in rules, policies and procedures to allow persons with disabilities the opportunity to use and enjoy a dwelling, more specifically. Claims against municipalities occur often throughout the country, including within Massachusetts. Although discrimination is hard to prove, enforcement is strict and penalties are high when municipalities are found to violate the Act.

While the FHA mandates municipalities avoid discrimination, there are a number of non-mandated actions that municipalities can take to affirmatively further fair housing.

These actions apply both to recipients of federal funds, such as CDBG funds, or those that receive no such funds. Proactive fair housing planning reduces discriminatory barriers and affords more people the opportunity to live wherever they choose. Inclusionary zoning, such as allowing a variety of housing options, encouraging affordable housing and even siting housing where jobs, schools and services are accessible, benefits home seekers and creates fair housing opportunity.

### Survey

Fair housing advocates include HUD, state housing agencies, fair housing centers, attorneys and municipalities. Efforts to instruct municipal and other government officials on their roles and responsibilities under the FHA are ongoing. Studies indicate that there are training needs for non-expert municipal officials who might lack the knowledge to understand the long-term implications of today's decisions. Instruction should be appropriate to the particular audience. It is important to understand the learning needs of municipal government officials pertaining to their roles and responsibilities under the FHA.

Most of the 21 participants in the fair housing advocate survey were staff of fair housing organizations, including directors, assistant directors and attorneys. Other participants included a housing discrimination investigator for a city council and an attorney and fair housing administrator for a municipal FHAP. These advocates suggested they would target planning boards (19 of 21), zoning boards (18 of 21), staff planners (16 of 21), city councils (14 of 21), municipal attorneys (11 of 21) and mayors (8 of 21) for fair housing training. They indicated that the reasons for not intending to train municipal land use and zoning authorities was for a lack of money (7 of 14), lack of personnel resources (4 of 14),

and that it is not a priority (3 of 14). None of the participants indicated that there was little or no value in such training.

Several advocates indicated there had been complaints brought against municipalities within their region. Within one region complaints were brought against a city (mainly city council), a mayor, and a village council. Within a second region there have been two disability and one national origin complaints filed against a county board of supervisors, zoning administrator, city council, and code enforcement staff. Complaints in a third region were filed against a planning and zoning board by a group home for recovering substance abusers to provide a reasonable accommodation. In a fourth region complaints were filed against a city for racially discriminatory occupancy inspections. The city changed its policies after DOJ intervened. Complaints were filed within one area for discriminatory code enforcement in a case where the victims alleged that neighbors influenced the discriminatory enforcement. Within the same region, an organization is deciding whether to file a complaint against a city for its refusal to support an affordable housing development.

Fifteen advocates indicated that they have worked with municipal authorities or boards about fair housing. Most felt that many of the individuals they worked with did not always understand the connection to their position. Only two advocate-trainers indicated that their audience of municipal officials fully understood the connection to their position. Strategies employed by advocates or their organizations to make the connection clear include: warning that failure to affirmatively further fair housing might jeopardize their CDBG funds, they relate fair housing to exclusionary zoning, use case law as a riddle for municipal officials to solve, they publish and distribute material such as brochures and use the analysis of impediments as a starting point for dialogue.

Nine of 21 advocates felt that if municipal authorities had information about their roles and responsibilities under the FHA it would somewhat reduce illegal housing discrimination, while only one advocate felt that it would not. Five of 21 indicated it might reduce it a little, 5 of 21 quite a bit, and one felt it would reduce it very much. One advocate wrote that “There needs to be a larger and more comprehensive campaign to educate the constituents of these boards and municipalities about why they should break down the regulatory barriers to fair housing. The exclusionary/NIMBY climate in many communities precludes any meaningful changes in zoning/regulation.” A second advocate wrote that a “problematic issue for municipalities is that they get caught between the requirements of the law (if they know what they are) and the fears and opposition of their constituents.” Finally, one advocate suggested training continuously because there is an attrition of municipal officials.

Advocates indicated that municipal officials should know things from the basics of the FHA and why it exists to the facts about reasonable accommodations and modifications to their obligation to affirmatively further fair housing. Several advocates wrote that municipal officials needed more information on restrictions placed on group homes, others felt officials should understand that the case law about how the FHA influences their decisions is significant and fair housing laws apply to occupancy codes. One advocate wrote: “Planners and city council need to understand the difference between discriminatory rhetoric by government officials and the 1<sup>st</sup> Amendment rights of the public.” Put another way by a different advocate: “They should understand the fine line between protected speech and action to make housing unavailable and be wary of making a decision on a housing



project/zoning matter based on public meetings that show discriminatory intent.” Another advocate called dealing with NIMBY attitudes a “political hot potato.”

Many advocates suggested that it is difficult to attract municipal officials to trainings on their roles and responsibilities under the FHA. One advocate wrote: “We have the state ordering municipalities to show up at fair housing training in order to get grants/housing money from the state and it is still difficult to get them to attend.” Strategies for attracting municipal authorities to trainings include joining other trainings and/or information sessions on different topics, collaborating with attorneys and other fair housing advocates, making the presentations entertaining and relevant to the specific audience, using the AI to segue into discussions and “appealing to their risk management/avoidance needs.”

The information and reflections provided by the fair housing advocates on the range of issues discussed reaffirm the findings of preceding chapters discussing the relationship between fair housing and municipal government, land use planning and zoning. Overwhelmingly, the advocates surveyed indicated that municipal officials do not fully grasp their roles and responsibilities under the FHA and that instruction on this subject matter might reduce violations, at least somewhat.

The next step is to take the findings from the fair housing advocate survey and the preceding chapters on the relationship between the FHA and municipal land use planning and zoning, and consider how they might be used to inform the development of a curriculum to be used by fair housing advocates to train municipal officials. This thesis does not propose an actual curriculum but the following chapter discusses some important considerations for advocates that wish to develop a new curriculum or improve an existing one.

## CHAPTER 8

### DISCUSSION AND CURRICULUM CONSIDERATIONS

The case law, its interpretations, the issues presented by fair housing advocates through publications and on their Web sites, and the advocates surveyed, indicate there is a learning gap to fill with fair housing and municipal government training. Advocates consistently identify planning and zoning boards as authorities that make decisions that can run afoul of the FHA; other municipal authorities might include city council members, mayors, staff planners, building inspectors and code officials. Curricula can be tailored to address the unique learning needs of each of these authorities.

Based on Dean's (1994) and Posner and Rudnitsky's (2006) instructional considerations (see Chapter 1), the first step for advocates who wish to train municipal authorities is to develop instructional skills. Second, it is important to understand the subject matter that they wish to teach and develop a rationale for the training. Third, advocate instructors must aim to understand the extent to which their audience understands the subject in order to develop intended learning objectives. Lastly, instructors must be prepared to evaluate whether learning took place, which might include an assessment of the instructor/instruction.

Offering municipal authorities a comprehensive picture of their roles and responsibilities is enhanced through partnerships. Fair housing advocates indicated in the survey that they typically find it helpful to partner with other fair housing advocates, including state agencies, housing specialists and attorneys. Partnerships enhance instruction because different advocates bring different experiences with municipal officials and might cover a greater multitude of issues.

### Outline of Sections to Cover in the Presentation

Fair housing advocates wishing to instruct municipal authorities on their roles and responsibilities under the FHA might elect to address the background of non-discrimination laws in the U.S., especially the FHA and its significance. Significant legal developments in non-discrimination law and case law might be outlined and discussed to reinforce the extent of civil rights protections with respect to municipal government. Many fair housing advocates, such as the FHP in Vermont, make a clear connection between fair housing and affordable housing. While the FHA does not protect the poor, HUD and others argue that exclusionary zoning and high housing costs disproportionately affect persons protected under the FHA (HUD Fair Housing Planning Guide, 1996). Municipal authorities might find it easier to understand disparate impact in terms of the effects of exclusionary zoning. Collectively, these facts or issues are referred to as the intended learning outcomes and might differ depending on the preferences of the instructor and the knowledge of the learners.

While some fair housing advocate-instructors exclusively warn their audience of the penalties of violating the FHA, others propose strategies to municipalities for affirmatively furthering fair housing. Focusing entirely on how municipalities can avoid lawsuits in particular cases risks not influencing long-term change in policies, practices and attitudes. Chapter 5 discussed common violations of the FHA and action steps to overcome impediments that thread through the publications of, and input from, fair housing advocates. These action steps might be presented as proactive planning measures for municipalities to take in addition to understanding the law and how to avoid FHA violations.

Curricula can always be modified and improved to suit the unique learning styles of different learners and to incorporate new information. Evaluating learning is an effective

method for assessing whether the intended learning outcomes of the audience are being met (Posner and Rudnitsky, 2006, ch. 8). Instructors might develop a method for evaluating their audience's learning to be conducted following a presentation or workshop. One fair housing advocate suggested in the survey that using the case law as a riddle for learners to solve is an effective form of engagement and evaluation. Other strategies for evaluating learning might include a quiz or test that measures the ability of the learners to distinguish certain activities that could trigger a violation compared with neutral activities that are nearly always legitimate. Training participants could be split into groups to conduct a miniature analysis of impediments within their communities, as one advocate indicated that this is a good way of initiating a deeper dialogue. Furthermore, an analysis of impediments is an important starting point for identifying, building support for, and implementing proactive measures to overcome impediments. A participant-led analysis can be evaluated as an indication of learning and critical thinking.

### Where to Go From Here

To strengthen the conclusions drawn in this thesis, further research should evaluate the learning outcomes of instruction to determine whether the information/concepts taught were appropriate for the particular audience. Further research should include a survey, similar to the one included in the Appendix, for municipal authorities to evaluate whether the curriculum might need to be redesigned depending on the audience. Other organizations that advocate for fair housing should be identified to learn what issues they encounter and what their strategies are for overcoming these issues. Lastly, identifying and partnering with

municipal authorities or professional planners who are experts on this subject matter might enhance instruction since these experts would have an insider's perspective.

Instructing municipal authorities on their roles and responsibilities is an effort that fair housing advocates could pursue to further fair housing. The actual instructional method to be employed should be determined by the instructor and/or the organization depending upon what is comfortable and feasible. Fair housing instruction might be challenging to many because the case law is often difficult to interpret and there is a general lack of concise material clarifying the roles and responsibilities of different municipal authorities under the FHA. Nevertheless, an introductory dialogue about fair housing with this audience establishes in-roads for more meaningful, long-term outreach and instruction. The ultimate goal of fair housing instruction for municipal authorities is the elimination of municipal-level fair housing violations and the realization of equal housing access for all.

Fair housing advocates have an abundance of information at their fingertips pertaining to municipal government's role in promoting fair housing and their responsibilities under the FHA. The challenge for advocate-instructors is determining what material is most relevant to the unique learning needs and preferences of their particular audience. Fair housing cases are a fundamental element of a fair housing curriculum because they can be interpreted and taught as illustrative warnings of FHA violations and they can instruct municipal authorities on the specific practices and activities that might intersect with the FHA. Warning municipal authorities of the penalties of violating the FHA without providing information and developing knowledge and understanding of the significance of the FHA and ways for promoting fair housing risks not affecting long-term change. Therefore, a fair housing and planning/zoning workshop or other form of instruction should present action

steps to be taken that mitigate fair housing violations. These actions steps can be derived directly from the case law or from the range of fair housing advocate publications, including those discussed in this thesis.

I believe that fair housing instruction can result in increased awareness of barriers to equal housing opportunity at the municipal level and a straightforward discussion of the significance of the FHA and municipal government's role in promoting fair housing can reduce many of these barriers. Ultimately, the role of municipal government in providing housing opportunity is great, and all home seekers benefit from non-discriminatory practices.

## APPENDIX A

### SURVEYS FOR FAIR HOUSING ADVOCATES

Dear Participant,

I am inviting you to participate in a research project that explores the relationship between fair housing and municipal zoning and land use activity and how this relationship could inform the design of a training program. Along with this letter is a short questionnaire that asks a variety of questions about your working relationship with municipalities and some general questions about your training preferences. I am asking you to look over the questionnaire and, if you choose to do so, complete it. It should take you about 5 minutes to complete. Your participation is entirely voluntary.

The results of this project will help me develop my master's thesis. I hope that the results of the questionnaire will be useful for the development of future training workshops and I hope to share my results by making a copy of my thesis available at the UMass Amherst W.E.B. DuBois Library.

I do not know of any risks to you if you decide to participate in this survey and I guarantee that your responses will not be identified with you personally. I promise not to share any information that identifies you with anyone outside my research group, which consists of me and Dr. Ellen Pader, Department of Landscape Architecture and Regional Planning, UMass, Amherst.

I hope you will take the time to complete this questionnaire and return it. If you have any questions or concerns about completing the questionnaire or about being in this study, you may contact me at: Department of Landscape Architecture & Regional Planning, 109 Hills North, University of Massachusetts, Amherst, 01003. The Institutional Review Board at The University of Massachusetts Amherst has approved this project.

Sincerely,

Ethan Parsons  
Masters in Regional Planning Candidate  
Dept. of Landscape Architecture & Regional Planning  
University of Massachusetts Amherst

1. Please check the statement(s) that correctly identifies your position. You may select more than one answer.

|                          |                                    |                          |                       |
|--------------------------|------------------------------------|--------------------------|-----------------------|
| <input type="checkbox"/> | Staff of fair housing organization | <input type="checkbox"/> | Board member          |
| <input type="checkbox"/> | Director of fair housing org.      | <input type="checkbox"/> | Other: Please specify |
| <input type="checkbox"/> | Attorney                           | <input type="checkbox"/> |                       |

---

2. If you could teach municipal authorities about their roles and responsibilities under the Fair Housing Act as they relate to land use and zoning, which authorities would you target?

|                          |                |                          |                    |
|--------------------------|----------------|--------------------------|--------------------|
| <input type="checkbox"/> | Zoning board   | <input type="checkbox"/> | Staff planner      |
| <input type="checkbox"/> | Planning board | <input type="checkbox"/> | Municipal attorney |
| <input type="checkbox"/> | City council   | <input type="checkbox"/> | Other:             |

---

3. If you/your organization do not plan to train municipal land use and zoning authorities, why?

|                          |                                |                          |                                |
|--------------------------|--------------------------------|--------------------------|--------------------------------|
| <input type="checkbox"/> | Don't have the money           | <input type="checkbox"/> | Little or no value in doing so |
| <input type="checkbox"/> | Don't have personnel resources | <input type="checkbox"/> | Other:                         |
| <input type="checkbox"/> | Not a priority                 | <input type="checkbox"/> |                                |

---

4. If you, or another agency within your region, have brought a complaint against a municipality:

- a) Which municipal entities were involved (eg. zoning board)?
- b) How has it been resolved? If not resolved, why not?

If no complaint has been brought against a municipality, write "none".

5. If you have worked with municipal authorities or boards about fair housing:

- a) Do they understand the connection to their position?
- b) What strategies have you used to make the connection clear?

Please provide an explanation in the space provided below.



6. Supposing municipal decision makers were equipped with the necessary information about their roles and responsibilities under the Fair Housing Act, rate the likelihood that this information would reduce illegal housing discrimination at the municipal level.

not at all      a little      somewhat      quite a bit      very much

7. What are the most important technical/legal issues that municipal decision makers should know about fair housing and land use/zoning?

8. If you have taught/worked with municipal authorities, what were your strategies for attracting this audience to a workshop or other training? What strategies do you think are successful for attracting this audience?

9. THANK YOU VERY MUCH FOR YOUR PARTICIPATION!

Please provide any further thoughts you may have in the space provided below.

## APPENDIX B

### MODEL SURVEY FOR MUNICIPAL AUTHORITIES

Dear Participant,

I am inviting you participate in a research project that explores the relationship between fair housing and zoning and land use policy and how this relationship could inform the design of a training program. Along with this letter is a short questionnaire that asks a variety of general questions about your knowledge surrounding fair housing and about your learning preferences. I am asking you to look over the questionnaire and, if you choose to do so, complete it and return it to me by placing it in an envelope provided at the check in/out desk in the lobby before you leave today's conference. It should take you about 5 minutes to complete. Your participation is voluntary and there is no penalty if you choose not to participate.

I do not know of any risks to you if you decide to participate in this questionnaire and I guarantee that your responses will not be identified with you personally. I promise not to share any information that identifies you with anyone outside my research group, which consists of me and Dr. Ellen Pader, Department of Landscape Architecture and Regional Planning, UMass, Amherst. If you have any questions or concerns about completing the questionnaire or about being in this study, you may contact me at: Department of Landscape Architecture and Regional Planning, 109 Hills North, University of Massachusetts, Amherst, 01003. The Institutional Review Board at the University of Massachusetts, Amherst has approved this project. I will share my results by making a copy of my thesis available at the UMass Amherst W.E.B. DuBois Library.

Sincerely,

Ethan Parsons

Masters in Regional Planning Candidate  
Dept. of Landscape Architecture & Regional Planning  
University of Massachusetts Amherst

1. Are you a member of a:

|                          |                |                          |              |
|--------------------------|----------------|--------------------------|--------------|
| <input type="checkbox"/> | Planning Board | <input type="checkbox"/> | City Council |
| <input type="checkbox"/> | Zoning Board   | <input type="checkbox"/> | Select Board |
| <input type="checkbox"/> | Employee/Staff | <input type="checkbox"/> | Other: _____ |

2. How many years have you served on this board or performed this job?

Yrs.  
\_\_\_\_\_

3. Please provide any thoughts you may have of what 'fair housing' refers to.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

4. Which of the following issues relate to fair housing? Please check all that apply.

|                          |                           |                          |                                |
|--------------------------|---------------------------|--------------------------|--------------------------------|
| <input type="checkbox"/> | Affordable housing        | <input type="checkbox"/> | Granting variances and waivers |
| <input type="checkbox"/> | Rezoning                  | <input type="checkbox"/> | Subsidized housing             |
| <input type="checkbox"/> | Permitting                | <input type="checkbox"/> | Occupancy standards            |
| <input type="checkbox"/> | Creating zoning districts | <input type="checkbox"/> | Redevelopment                  |
| <input type="checkbox"/> | Other _____               |                          |                                |

5. How familiar are you with fair housing and its applicability to zoning and land use?

|                          |            |                          |             |
|--------------------------|------------|--------------------------|-------------|
| <input type="checkbox"/> | Not at all | <input type="checkbox"/> | Quite a bit |
| <input type="checkbox"/> | A little   | <input type="checkbox"/> | Very much   |
| <input type="checkbox"/> | Somewhat   |                          |             |

6. If you are at least "a little" familiar with fair housing and its applicability to zoning and land use, how have you gained this knowledge? Check all that apply.

|                          |                               |                          |                    |
|--------------------------|-------------------------------|--------------------------|--------------------|
| <input type="checkbox"/> | On the job experience         | <input type="checkbox"/> | Training/Workshops |
| <input type="checkbox"/> | Published sources (eg. books) | <input type="checkbox"/> | Internet           |
| <input type="checkbox"/> | Other: _____                  |                          |                    |

7. How much do you use the skills learned in workshops in your position as a zoning or planning board member or other municipal position?

  
  


Not at all  
 A little  
 Somewhat

  


Quite a bit  
 Very much

8. What is your motivation for selecting which workshops to attend?

Please answer this question by using the following scale:

Scale: 1= not at all    2=a little    3=somewhat    4=quite a bit    5=very much

|   |   |   |   |   |   |   |
|---|---|---|---|---|---|---|
| a | Learn new necessary skills/ technical knowledge | 1 | 2 | 3 | 4 | 5 |
| b | Brush up on existing knowledge                  | 1 | 2 | 3 | 4 | 5 |
| c | New subject of interest                         | 1 | 2 | 3 | 4 | 5 |
| d | Develop the ability to solve problems           | 1 | 2 | 3 | 4 | 5 |
| e | Personal growth                                 | 1 | 2 | 3 | 4 | 5 |
| f | Topic very relevant to community                | 1 | 2 | 3 | 4 | 5 |
| g | Required  | 1 | 2 | 3 | 4 | 5 |
| h | Learn information on which to base decisions    | 1 | 2 | 3 | 4 | 5 |
| i | Convenience/Cost                                | 1 | 2 | 3 | 4 | 5 |
| j | Other:  | 1 | 2 | 3 | 4 | 5 |

(Source: Posner and Rudnitsky, 2006)

9. Where would you look for information about fair housing?

---



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10. Please feel free to provide any additional comments below:

---



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