

Fair housing compliance: local government considerations



Overview

Why should you read this? Idaho cities and counties struggle to provide essential services in the face of shrinking budgets. The last thing any community or county needs is litigation stemming from a fair housing or false claims* complaint. This overview should get you thinking about increased compliance with federal laws, thereby reducing costly liability (see *Legal implications and liability* below). Non-compliance can also make your jurisdiction (and local housing and service providers) ineligible to receive federal housing and community development funds. **Note.** *This document is not a substitute for expert legal guidance.*

What is Fair Housing? Fair Housing is defined as *the right of all people to be free from discrimination in the rental, sale or financing of housing.* The act covers everyone, since we all belong to one or more ‘protected class.’ Protected class refers to members of populations characterized by *race, national origin, sex, color, religion, familial status* and/or *disability*. One impediment in Idaho exists because state law does not include familial status (i.e., families with children) as a protected class. While this limits state enforcement independence and access to federal funds, familial status is still covered under federal law.

What is an impediment? According to HUD, impediments to fair housing choice are:

- Any actions, omissions, or decisions *taken because of* race, color, religion, sex, disability, familial status, or national origin that restrict housing choices or the availability of housing choices.
- Any actions, omissions, or decisions *that have the effect of* restricting housing choices or the availability of housing choices on the basis of race, color, religion, sex, disability, familial status, or national origin. (see *disparate impact* below under ‘Legal implications and liability’)

What is an Analysis of Impediments? The 2011 Analysis of Impediments (2011 AI) examines policies and practices among Idaho’s cities, counties and housing industry to *determine potential barriers to fair and equal access to housing for all Idahoans.* This process was coordinated by the Idaho Housing and Finance Association (IHFA) and the Department of Commerce (Commerce), with active involvement of Idaho’s entitlement cities and other housing and community stakeholders. The goals of this process are to provide practical strategies that increase compliance with fair housing law, reduce discrimination and liability, and make efficient use of scarce resources.

To view and comment on the full report, visit www.ihfa.org and type **2011 Analysis** in the Search field. This document contains excerpts from the full 2011 AI; it is strongly recommended that Idaho city and county officials refer to the full document or equivalent local AI to understand impediments and best practices. IHFA and Commerce can provide technical assistance and referral to additional resources on request. Visit www.fairhousingforum.org under ‘Info. for providers and communities’ for other options.

Affirmatively furthering fair housing. Beyond basic education and outreach, any recipient of federal funds related to housing and urban development must document actions that ‘affirmatively further fair housing’ in your jurisdiction. You must:

1. Conduct an analysis to identify impediments to fair housing choice within the jurisdiction (if required), and take specific actions that promote fair housing choice.
2. Take appropriate actions to overcome the effects of any impediments identified through the analysis,
3. Maintain records reflecting the analysis and actions taken in this regard.

Why it matters. Noncompliance is painful and costly for everyone. Everyone in America has the right to live where we choose and can afford. When this choice is denied due to discrimination, it can limit opportunities to obtain employment, quality education and essential services. Discrimination also limits community and economic development by limiting diversity. Finally, discrimination costs taxpayers,

housing professionals and service providers money when complaints are filed. This money is better spent providing essential services and infrastructure or on more affordable housing choices for everyone.

Who should consult the 2011 AI? The 2011 AI examines all aspects of housing: rental, sale, marketing and lending; planning, zoning, and land-use policy; and other decisions affecting the location and type of housing constructed in Idaho. Clearly, everyone involved in Idaho's housing industry should be familiar with fair housing rights and responsibilities. Beyond this, we strongly encourage the following groups to obtain a full copy of the 2011 AI and understand its impact on their decisions and liability:

- *Elected officials.* County commissioners, city councils, mayors and legislators.
- *Policy makers.* Those involved in formulating or implementing state or local government policy.
- *Legal Counsel.* City, county and state attorneys, as well as those representing housing and service providers. Fair housing law is very specialized and case law is always evolving; it is critical that attorneys for these groups understand the need for up-to-date and extensive knowledge to identify and address potential liability.
- *City, County, Special Districts, and non-profit staff.* Those involved in receiving, distributing, or otherwise administering federal funds originating from HUD and used to support housing or community development activities (including emergency shelter and transitional housing).
- *Housing professionals.* This includes lenders, REALTORS[®], property managers, housing authorities, building officials, public housing authorities and landlords.

Legal implications and liability. Standard procedures and protocols are no protection from a Fair Housing complaint if those practices are alleged to have a 'disparate impact' on one or more protected classes as defined by the Fair Housing Act. In other words, an otherwise neutral action or policy—applied equally to all persons—may appear to have an unintended but *disparate* or unequal impact on members of a protected class and lead to a complaint. Fair Housing law is complex and dynamic; expert civil rights defense counsel is essential to determining liability and reviewing complaints before any action is taken. Once a complaint is filed—whatever its basis—legal and administrative fees start to add up.

In *Alamar Ranch LLC v. Boise County*, a 2010 court ruling involving a residential treatment facility resulted in a \$4 million judgment (not counting legal costs) against Boise County, Idaho. County officials believed they were following standard procedures when reviewing the project application, responding to public testimony from constituents and ultimately granting permits. The plaintiff's legal team persuaded the court that the net effect of the process constituted discrimination based on disability. Many feel the outcome might have been different with a more complete understanding of fair housing law at the outset. In November, 2011, [Judge Lynn Winmill](#) ordered Boise County to levy a tax on its property owners to repay the estimated \$5.4M resulting from the court case.

*In *U.S. ex. rel. Anti-discrimination Center v. Westchester County*, a U.S. District Court confirmed that local government eligibility for Federal Community Development Block Grant Funds requires certification that the city or county is in compliance with the Federal Fair Housing Act. This landmark case resulted in a \$53 million dollar judgment against Westchester County under the [*False Claims Act](#); the court found county policies and practices had the effect of segregating protected classes through a pattern of housing investment that concentrated minorities in certain portions of the county. The Plaintiff successfully argued that the county *falsely claimed* to be 'affirmatively furthering fair housing' in order to administer federal funds for housing and community development.

Our ultimate aim is encourage Idaho counties and cities to take proactive steps to review and remedy potential barriers and reduce unintended violations and exposure before injuries or complaints occur.

Public awareness

Among other things, the recent AI recommends that cities and counties raise awareness of fair housing rights and responsibilities among staff, elected officials, housing professionals and the general public. This can be as simple as posting a link to available fair housing materials on official web sites, displaying posters and brochures with a referral to additional fair housing information, and/or creating opportunities for local stakeholders to participate in education and outreach activities. These are good first steps, and must be followed up with additional actions, some of which are referenced here and in the 2011 AI.

IHFA and Commerce make several resources available to cities and counties at no cost. These include the 2011 Fair Housing Campaign poster, video and radio public service announcements (PSAs), and a dedicated web site at www.fairhousingforum.org. The campaign is a partnership with the 2-1-1 Idaho Care Line, which provides information and referral for any caller with a fair housing question. Idaho's seven entitlement communities (Coeur d'Alene, Lewiston, Nampa, Meridian, Boise, Pocatello and Idaho Falls) are also a good source of information on local public awareness strategies.

Idaho's housing market – getting customers in the door

Another recommendation of the 2011 AI would expand marketing opportunities for Idaho homebuilders and reduce Idaho's Medicaid liability by encouraging more single-family homes accessible to Baby Boomers and their parents. The AI suggests adopting incentives for single-family construction that follows minimal access guidelines found in the International Building Code, or IBC. In practice, this adds a few hundred dollars to most homes and makes them attractive to a much wider customer base. It also creates an accessible residence that (by some estimates) can save the State of Idaho up to \$32,000 per resident/recipient each year in Medicaid costs over institutional care.

With an aging population, more local accessible housing also means that aging or disabled family members can live at home longer. Most rural communities lack quality care facilities, so when mobility decreases, individuals leave rural Idaho for regional population centers. Over time, these resources can make a difference in local economies. Communities with accessible housing attract and retain retirees and their families—along with their incomes and skills—and create local jobs for home health professionals.

Examples of ordinances addressing access are found in the Arvada, Colorado, Municipal Code, (Chapter 18, Article XIV, 'Visitability') and the Pima County, Arizona, Inclusive Home Design Ordinance (both are based on the American National Standards Institute's publication A117.1, 'Accessible and Usable Buildings and Facilities', published by the International Code Council). Pima County's authority to adopt these types of building standards was upheld in *Washburn v. Pima County*, 81 P.3d 1030 (Az. Ct. Ap. 2003).

The Pima County ordinance simply requires that new homes in the unincorporated county around Tucson be built with at least one entrance with no step, and doors at least 32 inches wide. It also requires:

- Lever door handles;
- Reinforced walls in ground-floor bathrooms so it's easy for an occupant to install grab bars;
- Switches no higher than 48 inches; and
- Hallways 36 inches wide throughout the main floor.

The Pima County ordinance was the first to require a zero-step entry in new single-family homes.

County specific impediment and possible remedies

Page 6 of the 2011 AI Executive Summary identifies the following county specific impediment:

Idaho counties' land use regulations and zoning policies may create barriers to fair housing.

Section VI of 2011 AI contains a review of land use regulations for every county in Idaho in the context of creating or reducing barriers to fair housing choice. The review found that every county in the state has the opportunity to make changes to their land use regulations to expand housing options for existing and new residents. Most of the barriers to fair housing choice were found in group home regulations.

Specifically, some counties do not allow group housing in residential zones; others have very narrow definitions of the types of group homes allowed (e.g., nursing and rest homes). In addition, no counties have provisions in their code that encourage affordable or accessible housing development. Some counties lack land use regulations. In addition, the Intermountain Fair Housing Council (IFHC) estimates that there could be hundreds of Homeowner Association Organization (HOA) covenants that restrict group homes outright, or whose policies have the effect of discriminating.

Why is this an impediment? Regulations that *have the effect* of excluding certain protected classes can be found to be in violation of the Federal Fair Housing Act (see *Alamar Ranch LLC v. Boise County*). Exclusion can take the form of disallowing group homes in certain areas and/or not providing an adequate supply of accessible and affordable housing. Persons with disabilities, because of limitations on their

ability to work, have a disproportionate need for affordable housing. In the same way, members of other protected classes whose incomes are consistently lower (elderly, single-parent households, certain minority populations) may experience a disparate impact from a lack of housing affordable to a range of income levels (see *U.S. ex. rel. Anti-discrimination Center v. Westchester County*). Lack of land-use regulations can also lead to inadvertent violations of fair housing law in land-use and zoning decisions.

Land-use, zoning as economic development and compliance strategies

Excerpted from Section VII, p. 11 of the 2011 Analysis of Impediments

The ability of private real estate markets to meet affordable housing needs is strongly affected by zoning, subdivision, and land development regulations adopted by local governments. Local regulations that are intentionally or unintentionally exclusionary can offset the impact of affordable housing subsidies or increase the amount of subsidies necessary for the market to meet affordable housing needs.

County land use regulations that attempt to promote housing choice should include as many of the following tools as is consistent with the county's future development plans. While it is not necessary that each county code include all of these types of provisions, including more of them will further reduce barriers to housing choice.

The recommendations below support a range of housing choice and price, essential to compliance with fair housing law. Housing that is affordable at different income levels also represents a *perpetual wage subsidy* for local employers. The resulting housing assets become part of a community's permanent infrastructure and represent a recruitment and retention tool for employees and employers alike.

Purpose statement. The code should reflect the county's purpose to provide housing choice for its residents and to comply with applicable federal and state law regarding housing choice.

Small lots. At least one zone district (or overlay district or permit system) that allows small lots for single-family detached housing in some locations. While the appropriate minimum lot size will vary with the character of the county, a zone allowing minimum lot sizes in the 3,000-6,000 square foot range would be appropriate for more urbanized areas of many counties. In addition, lot width requirements should be reasonable and consistent with minimum lot sizes; while some codes require minimum lot widths of 70 feet or more, small homes can be constructed on lots as narrow as 40 feet (or even less). Minimum lot size requirements are the type of regulation most responsible for increasing housing costs.

Multifamily parcels. At least one zone district (or overlay district or permit system) that allows the construction of multifamily housing, and mapping enough land into this district to allow a reasonable chance that some multifamily housing will be developed. In many rural counties, these mapped areas may be close to incorporated or urbanized areas. Maximum heights should be reasonable and consistent with the maximum density permitted; avoid mapping areas for multifamily densities and then imposing height restrictions that prohibit efficient development at those densities. Failure to provide opportunities for multifamily development has been identified as one of the four leading regulatory causes of increased housing costs.

Manufactured homes. Manufactured housing meeting HUD safety standards should be allowed somewhere (per the federal Manufactured Housing Act of 1974). While restricting these homes to manufactured home parks is common, the better practice is to allow them in at least one residential zone where the size and configuration matches the scale and character of the area.

Minimum house sizes. The zoning and subdivision regulations should not establish minimum house or dwelling unit sizes (beyond those in the building code). Minimum house size requirements have also been identified as a significant cause of increased housing prices in those communities where they are in place.

Group housing. The code should clarify that housing for groups protected by the Fair Housing Act Amendments of 1988 are treated as residential uses, and should generally allow those group housing uses in at least one residential district. While some communities require a special permit for these uses, others find that they can be allowed by right provided that they comply with standards limiting scale, character, and parking. Failure to provide for these uses in the code could subject the county to a developer's request for "reasonable accommodation" under the Act, and failure to provide "reasonable accommodation" could be a violation of federal law. In light of the aging of the American population, the code should also provide areas where congregate care, nursing home, and assisted living facilities may be constructed.

Accessory Dwelling Units. The code should allow accessory dwelling units in at least one zone district—either as an additional unit within an existing home structure or in an accessory building on the same lot. While some communities require a special permit for these uses, others find that they can be allowed by right provided that they comply with standards limiting scale, character, and parking.

Mixed Use. In order to promote affordability, housing should be allowed near businesses that employ workers, particularly moderate- and lower-income employees. To do that the code should permit residential units in at least one commercial zone district or should map some lands for multifamily development in close proximity to commercial districts.

Lower parking standards. Although the traditional standard of two parking spaces per dwelling unit may be reasonable for many areas of a county, a lower standard can and generally should be used for affordable housing, multifamily housing, group housing and special needs housing.

Flexibility on nonconforming structures. Although zoning codes generally require that nonconforming structures damaged or destroyed through fire or natural causes can only be rebuilt in compliance with the zoning code, an increasing number of codes are exempting affordable housing from this requirement. Often the most affordable housing in a community is located on lots that are too small or narrow for the district where they are located, or in multifamily buildings that have too many units for the district where they are located. If forced to replat with larger lots or to reduce density following a disaster, those affordable units may be lost, and allowing rebuilding with the same number of units as before may be the most efficient way to preserve these units in the housing stock.

Incentives. In order to encourage the development of affordable housing, the code should recognize the difficult economics involved and should offer incentives. Common incentives include smaller lots, increased density in multifamily areas, reduced parking requirements, or waivers or reductions of application fees or development impact fees. Some communities provide additional incentives for housing that is restricted for occupancy at lower percentages of the Area Median Income (AMI).

For example, developments restricted for households earning less than 50 percent of AMI could receive more generous incentives than those for households earning less than 80 percent of AMI. While zoning and subdivision incentives alone are often not enough to make development for lower levels of AMI economically feasible, they can be part of a broader package of incentives (i.e., including financial incentives or land contributions) that make those projects feasible. Any incentives offered should be updated as new housing studies are completed and new information about specific affordable housing needs is obtained.

Growth management exemptions. Most communities that operate a growth management system exempt affordable housing or allow it to compete for a separate pool of development rights in order to encourage this type of housing.

Summary

The above information and examples represent a starting point for local and regional discussions; it is critical that every Idaho city and county conduct an internal review of policies and procedures that could expose government officials and taxpayers to liability. Ignorance of the law or good intentions are not a defense if you are found in violation, and complaints—even those without a clear basis—require a diversion of scarce resources to review and defend. Since fair housing law is very specialized, it may be worthwhile for cities and counties to pool resources with other jurisdictions to seek expert civil rights counsel that can help all involved move toward compliance and resolve complaints more effectively.

Please direct questions or comments to: ICDBG@community.idaho.gov or hirc@ihfa.org.

Resources

HUD's Fair Housing Planning Guide <http://www.hud.gov/offices/fheo/images/fhpg.pdf>

Idaho Fair Housing Forum www.fairhousingforum.org (general information on fair housing issues; see 'Resources and Links' after reading and agreeing to the Waiver of Liability.)

2-1-1 Idaho Care Line www.211.idaho.gov (Information and referral for fair housing questions)