

RIGHTS & RESPONSIBILITIES UNDER THE FAIR HOUSING ACT: AN OVERVIEW



**FAIR HOUSING PROJECT
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FAIR HOUSING LAWS

Federal Fair Housing Act

- 42 U.S.C. § 3601, *et seq.*

State Fair Housing Act

- N.C. Gen. Stat. § 41A-1

“Substantially Equivalent” Local Fair Housing Ordinances

- Charlotte/Mecklenburg County, Greensboro, Winston-Salem, Durham, Orange Co.

Other Civil Rights Laws

- Civil Rights Act of 1866
- Title VI of Civil Rights Act of 1964
- Americans with Disabilities Act
- Section 504 of the Rehabilitation Act of 1973



WHAT IS THE FAIR HOUSING ACT?

The Fair Housing Act (FHA) is a U.S. law that prohibits discrimination in the rental, sale, and provision of housing.

Congress passed the FHA in 1968 as part of Civil Rights-era legislation.



TYPES OF PROPERTY COVERED

The FHA broadly applies to “dwellings,” which includes almost every residential rental unit

- Single and multi-family housing
 - houses, apartments & condos
- Public/Private housing
- Shelters/Group Homes
- Migrant housing
- Assisted living housing
- Long-term transient lodging



WHO HAS TO COMPLY?

Almost all people involved in selling, renting, and managing housing must comply with Fair Housing laws

- Owner, landlord, management company, manager, maintenance workers, and other employees
- Real estate agencies, agents, sellers, banks, lending institutions, insurance companies, and appraisers
- Homeowners Associations and Condo Boards



PROTECTED CLASSES

The FHA prohibits discriminatory conduct against persons based on:

1. race
2. color
3. national origin
4. religion
5. sex (gender)(LGBTQ)
6. familial status (families with children)
7. handicap (disability)
8. affordable housing (NC only)

NOWHERE ON A RENTAL APPLICATION DOES IT SAY



YOU MUST BE A WHITE MAN

WITH NO KIDS



AND NO DISABILITIES.



WHAT CONDUCT IS PROHIBITED?

- Refusing to sell, rent, or negotiate for housing
- Discriminating in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities
- Misrepresenting availability
- Statements indicating preference or limitation
- Coerce, intimidate, threaten, or interfere with a person's right to fair housing
- Harassment
- “Otherwise make unavailable or deny” housing



DISCRIMINATION BASED ON DISABILITY

DEFINITION OF A DISABILITY UNDER FHA

**A physical or mental impairment that substantially
limits one or more major life activities;**

Having a history of such an impairment; or

**Being perceived as having such an impairment
(whether person is impaired or not)**

**Includes people associating/residing w/ person
with disability**

EXAMPLES OF PROTECTED DISABILITIES

blindness or other visual impairments

deafness or other auditory impairments

mobility impairments

- e.g. paraplegia, cerebral palsy

mental illness

- e.g. schizophrenia, depression

cognitive disabilities

- e.g. intellectual disability, learning disability

AIDS or HIV+

alcoholism

former drug abuse

IS COVID-19 INFECTION A PROTECTED DISABILITY?

Individualized Assessment

Temporary vs long term impairment

Severity of impairment: substantial limit on major life activity?

Perceived/regarded as “disabled”

History/record of disability

Note: person’s “high risk” condition may itself be a disability

US DOJ AND DHHS GUIDANCE ON LONG COVID

A person with Long COVID has a disability under the ADA and Sec. 504 of the Rehabilitation Act if the person's condition or any of its symptoms is a *physical or mental impairment that substantially limits one or more major life activities* (disability definition based on “record of” and “regarded as” also applicable).

An *individualized assessment* is necessary to determine whether a person's Long COVID condition or any of its symptoms substantially limits a major life activity.

Entitled to the same protections from discrimination as any other person with a disability under the ADA and Section 504.

Same analysis likely applies regarding disability protections for Long COVID under Fair Housing Act.

USDOJ/DHHS Guidance does not address whether (regular) COVID-19 is a disability.

<https://www.hhs.gov/civil-rights/for-providers/civil-rights-covid19/index.html> (July 26, 2021)

DISABILITY PROTECTIONS

Discrimination based on disability prohibited

- Includes disability of buyer/tenant, people residing in unit, and people associated with buyer/renter

Inquiries into nature/existence of disability also prohibited

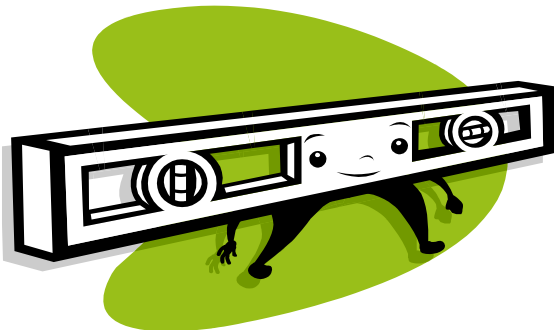
- Exception for questions asked of all applicants to determine eligibility for specific disability program (e.g. HOPWA)
 - Still cannot exclude for additional disabilities

DISABILITY PROTECTIONS

(CONT.)

Housing providers also req'd to take affirmative steps to allow persons with disabilities an equal opportunity to live in the property:

- Reasonable Accommodations
- Reasonable Modifications



This is the law's way of leveling the playing field

REASONABLE ACCOMMODATIONS

Definition

- A change in rules, policies or procedures
- Necessary because of the person's disability
- Provides full/equal use and enjoyment of housing

Can request at any time

- Before tenancy/when applying
- During tenancy
- When facing eviction, if RA could remove basis for eviction

Can be requested by: tenant, family member, MD, social worker, therapist, or others



WHEN CAN AN RA REQUEST BE DENIED?

The request is not reasonable because:

- the request would require a “fundamental alteration” in the nature of the services, program or activity, *or*
- the request creates an undue financial and administrative burden

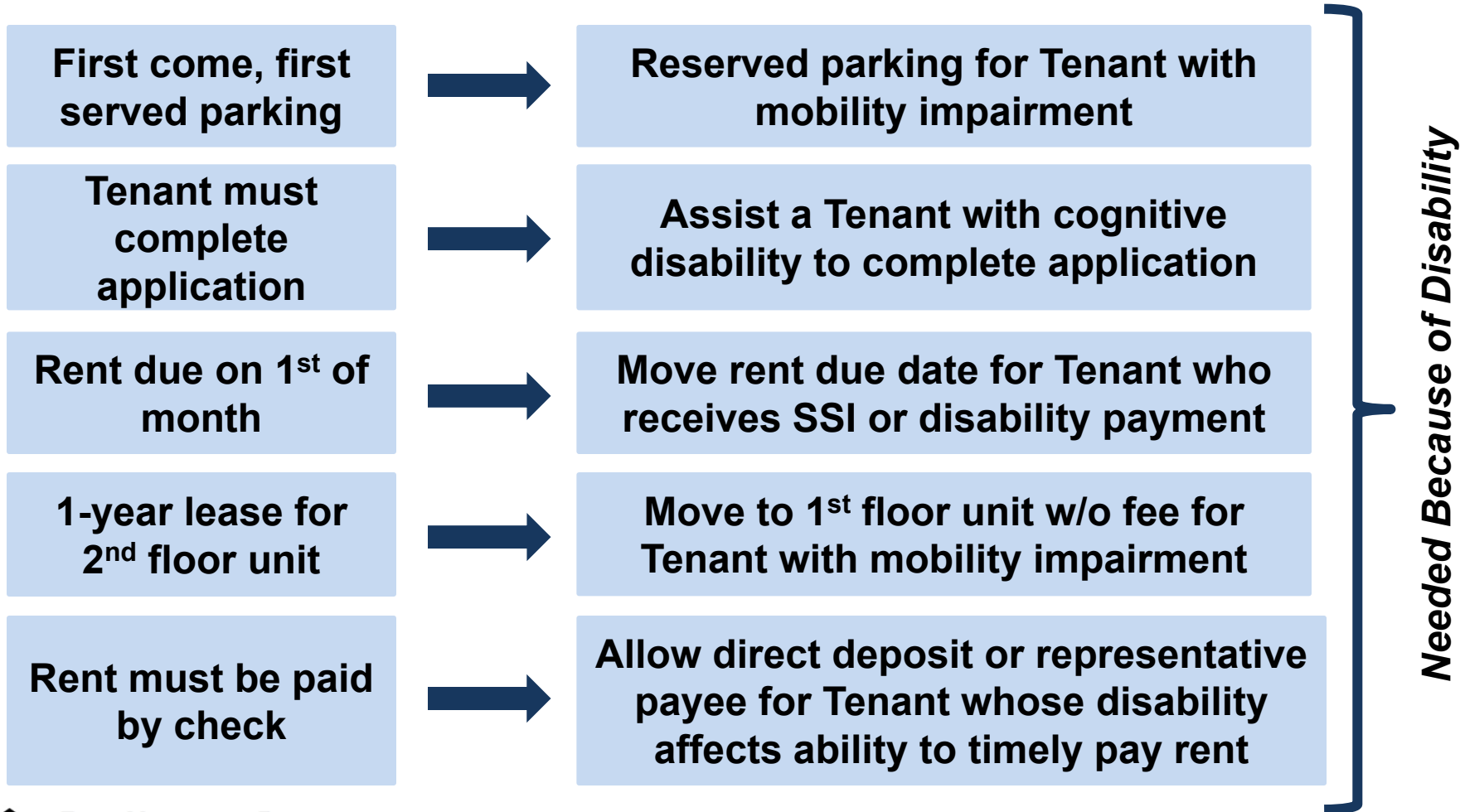
QUESTION 1

Landlords may violate the Fair Housing Act if they deny a tenant's request for a reasonable accommodation, even if the landlord harbors no intent to discriminate against the person with a disability.

- **True**
- **False**

RA EXAMPLES

Rule/Policy → **Changed Rule/Policy as RA**



RA EXAMPLES

Rule/Policy → **Changed Rule/Policy as RA**

Fee for early lease termination



Allow tenant to terminate lease early without fee due to disability (e.g. emergency hospitalization or unit conditions exacerbate disability)

Occupants may only be added at lease renewal



Allow a Tenant with a disability to have live-in aide

Terminate tenancy due to poor housekeeping



Allow a Tenant more time to comply with the lease requirements and remove excess clutter

No pets allowed



Allow service or assistance animal for Tenant with disability



Needed Because of Disability

QUESTION 2

Tenants whose disability causes them to disturb other tenants by shouting and making loud noises in their unit can always be evicted by their landlord for their breach of their lease.

- **True**
- **False**

REQUESTS FOR ASSISTANCE ANIMALS

Pet rules are for use with pets

Service/assistance animals are not “pets”

Service animal

- Dog (or miniature horse)
- Trained for specific task

Assistance animal

- Animal commonly kept in household
- “Unique animals” are treated differently
- Training not required

FHA allows both service animals & assistance animals in housing





**HOW TO HANDLE A
REQUEST FOR A
REASONABLE
ACCOMMODATION**

WHAT IS REQUIRED TO MAKE AN RA REQUEST?

Does not have to include any specific “magic words”

- Person does not need to say “reasonable accommodation” or “reasonable modification”

Can be oral or written

Do not have to use specific forms of landlord or property manager

However...

BEST PRACTICES FOR EVALUATING RA REQUESTS

Acknowledge receipt of request

**If it was oral request, put it in writing (w/ date) and
give person copy**

If you need add'l info to evaluate, ask in writing

Respond promptly

- Sometimes immediately
- Generally 7-10 days
- Delay = denial

WHAT CAN PROVIDER REQUEST WHEN EVALUATING RA REQUEST?

Proof of disability

- But *only* if disability is not obvious or otherwise known
- Not entitled to medical history or even diagnosis

Information of how RA will help w/ this disability (the “nexus”)

- But *only* if not readily apparent or known

DISABILITY PROTECTIONS UNDER FHA

Unlawful Statements & Advertising

- Indicating limitation based on disability
- Applies to all property
 - including single-family houses and other property exempt from other parts of the FHA

Examples:

- “Have you ever been in a drug rehab. program?”
- “Can you live independently?”

EXCEPTIONS

Direct Threat. FHA does not require a tenancy that would be a “direct threat” to the health or safety of others or result in substantial damage to the property of others unless an RA could eliminate the threat

- Determination must be based on an individualized assessment
- Unlawful to exclude people b/c of fear, speculation or stereotypes

Drug use. Current use of illegal drugs is excluded from the definition of disability.

STATUTE OF LIMITATIONS

Federal Act:

- 1 year from date of last act to file a HUD complaint
- 2 years from date of last act to file a lawsuit
- Filing a complaint with HUD stops the running of the time to file a lawsuit under the federal Fair Housing Act

TENANT SELECTION & CRIMINAL HISTORY SCREENING

QUESTION 3

A landlord has an absolute right to exclude applicants with a criminal history to ensure that they are providing other tenants and staff with a safe, crime-free environment.

- **True**
- **False**

HUD GUIDANCE: EXCLUSIONS BASED ON ARREST

Arrest records not proof of past misconduct

- Only shows someone probably suspected another of an offense
- Possible exception: pending charges/Deferred w/ guilt
- Arrest records often incomplete
- Not reliable basis to assess potential risk to safety or property

A provider “cannot satisfy its burden of showing that such policy or practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest”

THEREFORE... Do not make decisions based solely on an arrest

HUD GUIDANCE: EXCLUSION BASED ON CONVICTION

Blanket prohibition based on conviction not permissible

Tailored policy (excluding people w/ certain types of convictions) may be permissible if it considers:

- Nature of offense
- Severity of offense
- Amount of time that has passed since conduct

HUD GUIDANCE: EXCLUSION BASED ON CONVICTION

If PM/LL screens, must screen everyone

- Screening only African Americans or people who “look suspicious” is a FH violation

If screens, must screen everyone equally

- If Latino tenant w/ conviction for X offense is excluded, white applicant w/ same history should also be excluded

Using criminal history as pretext = violation

NC HOUSING FINANCE AGENCY GUIDANCE & POLICY

“Fair Housing and Tenant Selection Policy for Properties Monitored by the North Carolina Housing Finance Agency” (3/19/2018)

- Covers LIHTC properties
- All properties must provide their policy to NCHFA
- NCHFA provides model criminal background policy
 - Matrix
 - Other guidance

NCHFA MODEL POLICY

Automatic Exclusion v.
Individualized Assessment
v. No Exclusion

Based on type of conviction
Period begins at date of
conviction

Violent misdemeanor &
violent felony convictions
have automatic exclusion
periods of 2 and 5 years;
violent convictions may be
considered indefinitely w/
an individualized
assessment.

An arrest (w/o conviction) &
expunged conviction will
not be considered.
Pending charge may be
the basis of denial upon
completion of an
individualized
assessment.

Type of Conviction	Automatic Exclusion Period	Individualized Assessment Period	No Exclusion
Nonviolent Misdemeanor (Classes 1-3)	NOT APPLICABLE	0 - 5 years	> 5 years
Nonviolent Felony (Classes H-I)	NOT APPLICABLE	0 - 7 years	> 7 years
Violent Misdemeanor (Class A1 & sex offenses)	0 - 2 years	> 2 years	NOT APPLICABLE
Violent Felony (Classes A-G & sex offenses)	0 - 5 years	> 5 years	NOT APPLICABLE
Felony Involving Sale or Manufacture of a Controlled Substance	0 - 5 years	5 - 10 years	> 10 years

AFFIRMATIVELY FURTHERING FAIR HOUSING: HUD OBLIGATIONS

Administer programs “in a manner affirmatively to further the policies” of the Fair Housing Act

- 42 U.S.C. § 3608(e)(5)

Do “more than simply refrain from discriminating;” must also “assist in ending discrimination & segregation”

- *NAACP v. Sec. of HUD*, 817 F.2d 149 (1st Cir. 1987)
- AFFH includes “a mandate to take actions that undo historic patterns of segregation and other types of discrimination and that afford access to long-denied opportunities.” *President’s 1/26/21 Memorandum.*

AFFIRMATIVELY FURTHERING FAIR HOUSING: GRANTEE OBLIGATIONS

CDBG grants “shall be made only if the grantee certifies” that

- “the grant will be conducted and administered in conformity with” the FHA
- “the grantee will affirmatively further fair housing.”
 - 42 U.S.C. § 5304(b)(2)

Also applies to HOME, ESG, HOPWA, NSP funds

Applies to PHAs

Applies to local gov’t as subgrantees/subrecipients

AFFH: WHAT IS NOW REQUIRED?

On June 10, 2021, HUD published an **interim final rule** (AFFH IFR) “Restoring Affirmatively Furthering Fair Housing Definitions and Certifications,” as part of HUD’s AFFH requirement. **The AFFH IFR rescinds the 2020 Trump admin rule.**

The AFFH IFR restores certain definitions and certifications from the 2015 AFFH Rule.

HUD grantees thus will once again be **regularly certifying compliance** to a standard that requires them to take **meaningful action** to combat residential segregation and eliminate unequal access to housing-related opportunities.

AFFH: WHAT IS NOW REQUIRED?

The IFR does not require any particular fair housing planning process, so long as grantees can **meaningfully certify that they are meeting the Fair Housing Act's AFFH obligation.**

The AFFH IFR went into effect on **July 31, 2021.**

HUD will provide technical assistance and support for grantees that want help with fair housing planning to support their certifications. TBD.

https://www.hud.gov/program_offices/fair_housing_equal_opp/affh

QUESTIONS?

Fair Housing Project

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