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STRUCTURAL DISCRIMINATION: How Policies, Rules, and Industry Practices Obstruct Fair Housing

PULLING THE CAP OFF UNCAPPING EVENTS IN MICHIGAN: Avoiding Costly Mistakes When Transferring Real Estate

STRUCTURAL DISCRIMINATION: How Policies, Rules, and Industry Practices Obstruct Fair Housing

By Robin Wagner

A sober-living residence for women was blocked by its town's zoning board after the neighbors to the property launched a social media and letter-writing campaign to keep these "addicts" from living next door.

Assisted-living homes and large apartment-rental companies around Michigan have routinely informed applicants who say that they are deaf and only communicate through American Sign Language (ASL) that they will not and cannot supply ASL interpreters when needed for essential transactions.

A Black family with a perfect credit score and excellent rental history was denied an apartment lease because the father had a 20-year-old conviction, and the rental screening company has a blanket policy of assigning a "0" score for any applicant with any criminal history at all.

A Black family sought a home-equity loan, and the bank's appraiser came back with a value that was $500,000 less than the appraised value after the family "whitewashed" their home — removing all traces of their race, such as pictures of their family and African art.

These examples from recent clients illustrate four trends in housing discrimination and also highlight the complex and systemic nature of this area of the law.[1]

The Fair Housing Act and its amendments (FHAA), 42 USC 3601 *et seq.*, is arguably the most powerful and far reaching of the federal civil rights statutes passed in the 1960s,[2] yet it is the least understood and utilized of the civil rights laws — housing discrimination lawsuits account for only 2% of all civil rights lawsuits filed in federal courts.[3] Michigan's civil rights acts, the Elliott-Larsen Civil Rights Act (ELCRA)[4] and the Persons with Disabilities Civil Rights Act (PDCRA),[5] also contain housing rights provisions that largely track the federal statute.[6] The FHAA prohibits discrimination based on race, color, religion, sex, national origin, familial status, or disability.[7] The law, along with its largely analogous Michigan statutes, is a remedial statute "applicable to a broad range of discriminatory practices and enforceable by a complete arsenal of federal authority."[8]

Of the many structural obstacles to housing equality, two of the most common areas relate to disability discrimination and race bias. Disability discrimination comprises over half of all housing discrimination cases, investigations, and charges handled nationally.[9] The FHAA is generally more favorable to the rights of the individual than workplace or public accommodations laws because the FHAA protects individuals' rights to fully enjoy their homes.[10]

These days, a common form of systemic discrimination involves municipal planning and zoning. Group homes for individuals with disabilities such as substance use disorder (which is a recognized disability under federal and state law) have infamously been the targets of "not in my backyard" (NIMBY) campaigns.[11] Through rulings specific to their variance applications and through enactment of restrictive ordinances, cities routinely violate the FHAA by adopting the NIMBY sentiments of neighbors and excluding group homes from their desired residential areas. NIMBY crosses the line from free speech to housing and equal protection violations when a planning commission accedes to the NIMBY sentiments on the posters and in the public comments and ratifies this opposition by adopting these unfair statements and imposing restrictions or special conditions on the group home.[12]

Group homes have brought successful lawsuits against cities' NIMBY actions, but they face an uphill battle in doing so. A municipality has a legitimate governmental interest in its zoning and planning; therefore, a group home seeking a variance or exception must be precise with its application to ensure that its request for what is a *reasonable* accommodation under the FHAA is *necessary* to afford the residents an *equal* opportunity to use and enjoy their dwelling.[13] The group home may even be expected to follow a special process for requests of its kind, even when other applicants do not need to use such a process. Even if that process may seem like unfair treatment, a court may nonetheless view it as reasonable and perhaps even favorable treatment, rather than a refusal to accommodate.[14]

Another persistent, systemic barrier to housing for individuals with disabilities is the failure across the rental and property management industry to adequately train their employees. Despite regular training, these employees rarely demonstrate a competent understanding of "reasonable accommodation" under the FHAA. From my own experience taking these individuals' depositions, they uniformly fail to appreciate that a reasonable accommodation request could be for a designated parking space next to their apartment entrance, even if the building otherwise does not allow for reserved spaces, or for the assistance of an ASL interpreter — at the landlord's expense — to facilitate essential communications such as initial tours of the building, lease signing, and requests for repairs.

Housing providers also fail to appreciate that even their companies' set policies and

practices are not written in stone when it comes to accommodations for persons with disabilities. Importantly, the FHAA applies to anyone involved in the real estate transaction — third-party screeners and the landlords alike. A property may have a fixed formula for the minimum financial qualifications for a tenant, and their agents may even have been instructed that this formula is applied to all applicants. However, if an applicant does not meet that property's formula for qualification because their disability impairs their earning capacity but could demonstrate their ability to pay and mitigate the landlord's concerns about the risk of nonpayment in some other way — say, by asking for the assets of a family member to be calculated — then the property company must evaluate this request for an accommodation and make an individualized determination for that applicant with the disability.[15]

The lesson here lost on most participants in the rental industry is that any rule or policy may in some cases present an obstacle to fair housing for some individuals with certain kinds of disabilities. It is up to the landlords and their agents to listen carefully and evaluate carefully whether a request for an exception to that rule is indeed a *necessary* and *reasonable* accommodation from that rule.

The FHAA prohibits not just intentional discrimination but also conduct that has an unjustified discriminatory effect on people because of a protected characteristic.[16] When it comes to the persistence of race discrimination in housing, tenant screening is often the source of structural barriers and inequity. The rental industry largely relies on third-party screening services to evaluate tenants, and these screenings often include criminal background checks, along with a review of credit scores and other risk factors. However, disqualifying a tenant because of criminal history can be that prohibited neutral policy with an unlawful discriminatory effect.

Since it is well documented that people of color are arrested and incarcerated at rates disproportionately high compared to their share of the population, "criminal records-based barriers to housing are likely to have a disproportionate impact on minority home seekers."[17] This nationwide trend is true for Michigan, where Black people comprise only 13% of all residents but 51% of the prison population and 36% of the jail population.[18] The Department of Housing and Urban Development's guidance lays out a fact-specific, three-step process to evaluate whether a criminal background screening is unlawful.[19] The HUD guidance on criminal background checks prohibits the use of an arrest record alone as justification for excluding someone from housing,[20] and also explains that even a blanket policy of exclusion based on prior convictions will violate the FHAA because it cannot "show that its policy accurately distinguishes between criminal conduct that indicates a demonstrable risk to resident safety and/or property and criminal conduct that does not."[21]

Finally, this article has focused primarily on rental housing, but race inequality persists in homeownership. Recently there has been renewed attention to racial inequality arising from the widespread devaluation of Black-owned homes through discrimination in appraisals.[22] Appraisers, who are used in the home lending and real estate sales process to assess the value of houses, are overwhelmingly white men in a clublike profession who visit a house in person and apply stereotypes regarding the racial composition of a neighborhood or an individual minority owner in an otherwise white-majority neighborhood in arriving at a house's value.[23] Appraisers justify their unfair valuations by selecting comparator properties from other historically undervalued neighborhoods or by selecting properties that are not comparable in size or quality to the subject home.[24] Famously, efforts to thwart this bias — by erasing the signs that a Black family resides in the home through removing family photographs and African art and then having a white friend greet the appraiser and pretend to be the owner — have demonstrated that simply being Black and owning a home can drastically lower its price.[25]

Housing discrimination takes many shapes and forms, but as the above discussion suggests, a practitioner would be well advised to consider the various structural and systemic barriers to achieving equality and equity in housing — a necessity for all of our lives.

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Footnotes:

1. For an overview of the Fair Housing Act, see "Beyond Redlining: The Current State of Housing Discrimination," Robin Wagner, *Michigan Bar Journal*, January 2022 (available at *michbar.org/journal/details/Beyond-redlining-The-current-state-of-housing-discrimination?articleid=4319*).
2. These laws include the Civil Rights Acts of 1960 (primarily voting rights), 1964 (public accommodations, education, and employment), 1965 (voting rights), and 1968 (housing) and their subsequent amendments. See, e.g., "Constitutional Amendments and Major Civil Rights Acts of Congress Referenced in *Black Americans in Congress*," History, Art & Archives, US House of Representatives (available at *perma.cc/BB9N-BBRV*). The Fair Housing Act was amended in 1974 to include discrimination on the basis of sex and in 1988 to incorporate protections against disability discrimination and discrimination on the basis of familial status. See "Fair Housing and Equal Opportunity," HUD (available at *hud.gov/fairhousing*), for more information. All websites cited in this article were accessed December 17, 2023.
3. For the 12-month period ending December 31, 2022, 34,733 federal lawsuits were filed alleging civil rights violations, and only 813 of them involved housing discrimination. By contrast, employment discrimination, including disability rights in the employment context, comprised 10,183 federal lawsuits, which constituted 29% of all civil rights cases filed in that period. "Table C-2, U.S. District Courts, Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, During the 12-Month Periods Ending December 31, 2021 and 2022," US Courts, December 31, 2022 (available at *uscourts.gov/statistics/table/c-2/statistical-tables-federal-judiciary/2022/12/31*).
4. MCL 37.2101 *et seq.*
5. MCL 37.1101 *et seq.*
6. It is also important to note that the ELCRA protects against housing discrimination based upon religion, race, color, national origin, age, sex, familial status, or marital status, making it more inclusive than the FHAA (MCL 37.2502), and the PDCRA applies to persons with disabilities with language similar to the FHAA. Compare MCL 37.1103 with 42 USC 3602(h), and MCL 37.1502 and MCL 37.1506a with 42 USC 3604(f).
7. 42 USC 3604, amended in 1988 to apply to persons with a physical or mental impairment, with a history of such an impairment, or perceived to have a disability. The familial status protections have a carve-out for senior living environments, provided that they comply with certain regulatory requirements. 24 CFR 100.300 *et seq.*
8. *Jones v Alfred H Mayer Co*, 392 US 409, 417; 88 S Ct 2186; 20 L Ed 2d 1189 (1968). See also *Havens Realty Corp v Coleman*, 455 US 363, 380; 102 S Ct 1114; 71 L Ed 2d 214 (1982), and *Eide v Kelsey-Hayes Co*, 431 Mich 26, 36; 427 NW2d 488 (1988) (recognizing "the manifest breadth and comprehensive nature of" the Michigan civil rights acts).
9. "2023 Fair Housing Trends Report: Advancing a Blueprint for Equity," National Fair Housing Alliance (available at *nationalfairhousing.org/wp-content/uploads/2023/08/2023-Trends-Report-Final.pdf*).
10. *Overlook Mut Homes, Inc v Spencer*, 666 F Supp 2d 850, 858-59 (SD Ohio, 2009):

    "Simply stated, there is a difference between not requiring the owner of a movie theater to allow a customer to bring her emotional support dog, which is not a service animal, into the theater to watch a two-hour movie, an ADA-type issue, on one hand, and permitting the provider of housing to refuse to allow a renter to keep such an animal in her apartment in order to provide emotional support to her and to assist her to cope with her depression, an FHA-type issue, on the other."

    See also *Velzen v Grand Valley State Univ*, 902 F Supp 2d 1038, 1047 (WD Mich, 2012) (citing an HUD memorandum of Feb. 17, 2011, stating that the DOJ's rules limiting the definition of service animal to exclude emotional support animals did not apply to the FHAA).
11. See *Cleburne v Cleburne Living Ctr*, 473 US 432, 448 (1985). See also *Smith & Lee Assoc, Inc v City of Taylor, Mich*, 102 F3d 781, 794-95 (CA 6, 1996) ("We find persuasive the analysis of courts that define equal opportunity under the FHAA as giving handicapped individuals the right to choose to live in single-family neighborhoods, for that right serves to end the exclusion of handicapped individuals from the American mainstream").
12. See, e.g., *Amber Reineck House v City of Howell, Mich*, No. 20-CV-10203, 2022 WL 17650471 (ED Mich, December 13, 2022) (denying summary judgment in part but granting on a claim related to the alleged disparate treatment of a variance application process specifically designed for group homes); *Gilead Cmty Servs, Inc v Town of Cromwell*, 432 F Supp 3d 46 (D Conn, 2019) (denying summary judgment to a town whose officials made discriminatory statements and engaged in disparate-treatment discrimination and retaliation against a housing and community-based service organization for people with disabilities; in October 2021, the jury returned a $5.2 million verdict for plaintiffs).
13. 42 USC 3604(f)(3)(B) (banning "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling"). For instance, a city need not grant an exception to generally applicable health and safety ordinances such as minimum square footage requirements for two-person bedrooms. However, it may not require a sober-living home to install a high-tech fire suppression system if it does not impose that condition on comparable residences. The municipality would have to justify why the requirement is necessary in light of the disabilities of the residents, such as if the residents have mobility and dexterity limitations. See *Marbrunak, Inc v City of Stow, Ohio*, 974 F2d 43, 47 (CA 6, 1992) (a city's required safety measures for group homes must be tailored to the unique disabilities of the individuals in that residence).
14. See, e.g., *Amber Reineck House*, 2022 WL 17650471, at *59-64 (concluding that a special application process for the sober-living home created "a clear and accessible path to zoning approvals" and thus was not discriminatory).
15. See, e.g., *Giebeler v M B Assoc*, 343 F3d 1143 (CA 9, 2003).
16. June 10, 2022, Memorandum from Demetria L. McCain, Principal Deputy Assistant Secretary for Fair Housing and Equal Opportunity (available at *hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF*).
17. *Id.* at 2.
18. "Michigan Profile," Prison Policy Initiative (available at *prisonpolicy.org/profiles/MI.html*); "Incarceration Trends in Michigan," Vera Institute of Justice (available at *vera.org/downloads/pdfdownloads/state-incarceration-trends-michigan.pdf*).
19. June 10, 2022, Memorandum at 2-7.
20. *Id.* at 5 (citing, *inter alia, Schware v Bd of Bar Examiners*, 353 US 232, 241 (1957); *United States v Berry*, 553 F3d 273, 282 (CA 3, 2009) ("[A] bare arrest record — without more — does not justify an assumption that a defendant has committed other crimes and it therefore can not support increasing his/her sentence in the absence of adequate proof of criminal activity."); *United States v Zapete-Garcia*, 447 F3d 57, 60 (CA 1, 2006) ("[A] mere arrest, especially a lone arrest, is not evidence that the person arrested actually committed any criminal conduct.")).
21. HUD at 6.
22. See, e.g., "Appraised: The Persistent Evaluation of White Neighborhoods as More Valuable Than Communities of Color," Junia Howell and Elizabeth Korver-Glenn, 2022 (available at *eruka.org/appraised*); "Black Homeowners Face Discrimination in Appraisals," *New York Times*, August 25, 2020 (available at *nytimes.com/2020/08/25/realestate/blacks-minorities-appraisals-discrimination.html*); "Home Appraised with a Black Owner: $472,000. With a White Owner: $750,000.," *New York Times*, August 18, 2022 (available at *nytimes.com/2022/08/18/realestate/housing-discrimination-maryland.html*); "Freddie Mac Finds 'Pervasive' Bias in Home Appraisal Industry," Bloomberg, September 30, 2021 (available at *news.bloomberglaw.com/banking-law/freddie-mac-finds-pervasive-bias-in-home-appraisal-industry*); "Racial Gap in Appraisals Devalues Homes Owned by People of Color," Marketplace, June 8, 2021 (available at *marketplace.org/2021/06/08/racial-gap-in-appraisals-devalues-homes-owned-by-people-of-color/*).
23. "Identifying Bias and Barriers, Promoting Equity: An Analysis of the USPAP Standards and Appraiser Qualifications Criteria," National Fair Housing Alliance, January 2022 (available at *nationalfairhousing.org/wp-content/uploads/2022/01/2022-01-18-NFHA-et-al_Analysis-of-Appraisal-Standards-and-Appraiser-Criteria_FINAL.pdf*).
24. Howell and Korver-Glenn, "Appraised."
25. See, e.g., citations at n 22, *supra*.