October 18, 2019

Regulations Division  
Office of the General Counsel  
Department of Housing and Urban Development  
451 7th Street, SW, Room 10276  
Washington, DC 20410-0500

Re: [Docket No. FR-6111-P-02] HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard¹

To Whom It May Concern:

On behalf of the National Association of Housing and Redevelopment Officials (NAHRO), I would like to offer the following comments to the United States Department of Housing and Urban Development (HUD or the Department) in response to the notice titled “HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard” published in the Federal Register on Monday, August 19, 2019.

Formed in 1933, NAHRO represents over 20,000 housing and community development individuals and agencies. Collectively, our members manage over 970,000 public housing units, 1.7 million Housing Choice Vouchers (HCVs), and receive over $1.5 billion in Community Development Block Grant (CDBG) and HOME Investment Partnerships (HOME) Program funding to use in their communities. NAHRO has the unique ability to represent public housing agencies, local redevelopment agencies, and other HUD grantees of all sizes and geography.

This letter states NAHRO’s view that it is consistent with Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc. (Inclusive Communities) to provide a defense for housing authorities that can show that a policy being challenged under the Fair Housing Act (FHA) is a reasonable approach and in the housing authority’s sound discretion.²

¹ All citations are informal.  

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It is Consistent with *Inclusive Communities* to Provide a Defense for Housing Authorities

A housing authority should have the ability to assert an affirmative defense to liability established under the FHA. In *Inclusive Communities*, the Court writes “housing authorities [must] . . . be allowed to maintain a policy if they can prove it is necessary to achieve a valid interest.”

As the Supreme Court has recognized, in an employment context, disparate-impact liability is limited by the “business necessity standard.” “[B]usiness necessity’ constitutes a defense to disparate-impact claims” and provides that Title VII of the Civil Rights Act of 1964 “does not prohibit hiring criteria with a ‘manifest relationship’ to job performance” despite that criteria having a disparate impact on a protected class. This standard, while appropriate in employment contexts, is not sufficient to “cover the full scope of practices covered by the Fair Housing Act, which applies to individuals, business, nonprofit organizations, and public entities.” Indeed, “the Title VII framework may not transfer exactly to the fair-housing context.” Instead, “[j]ust as an employer may maintain a workplace requirement that causes a disparate impact if that requirement is a ‘reasonable measure[ment] of job performance’ . . . so too must housing authorities and private developers be allowed to maintain a policy if they can prove it is necessary to achieve a valid interest.”

Absent this defense, a housing authority may be held liable for a disparate impact to a protected class in pursuing valid interests such as building affordable housing, replacing public housing units, and revitalizing communities. In taking steps to achieve these goals, “[i]t would be paradoxical to construe the FHA to impose onerous costs on actors who encourage revitalizing dilapidated housing in our Nation’s cities merely because some other priority may seem preferable.” Additionally, “[t]he FHA does not decree a particular vision of urban development; and it does not put housing authorities and private developers in a double bind of liability, subject to suit whether they choose to rejuvenate a city core or to promote new low-income housing in suburban communities.” To avoid using liability established through disparate impact analysis under the FHA as a tool to “second-guess . . . approaches a housing authority should follow” in implementing their policies, the rule should incorporate a defense for housing authorities.

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3 *Inclusive Communities Project*, slip op. at 19.
4 *Inclusive Communities Project*, slip op. at 8.
5 *Inclusive Communities Project*, slip op. at 8-9.
6 *Inclusive Communities Project*, slip op. at 19.
7 *Inclusive Communities Project*, slip op. at 19.
8 *Inclusive Communities Project*, slip op. at 19.
9 *Inclusive Communities Project*, slip op. at 19.
10 *Inclusive Communities Project*, slip op. at 18.
A housing authority’s defense should be considered sound in those instances where the housing authority is using a “reasonable approach” and operating within the “housing authority’s sound discretion.” Limiting the defense to those approaches that are reasonable is logically similar to the Age Discrimination in Employment Act of 1967’s (ADEA’s) reasonable-factor-other-than-age (RFOA) provision, which, as the Supreme Court notes, allows an employer “to take an otherwise prohibited action where ‘the differentiation is based on a reasonable factor other than age.’” Similarly, a housing authority must be allowed to follow a reasonable approach in pursuing a valid government interest just as an employer may take an otherwise prohibited action if the factor other than age is reasonable. Additionally, the housing authority’s policy must be within a “housing authority’s sound discretion” to ensure that the housing authority’s policy does not exceed its permissible authority.

For the above reasons, it is consistent with Inclusive Communities to provide a defense for housing authorities that can show that a policy being challenged under the Fair Housing Act (FHA) is a reasonable approach and in the housing authority’s sound discretion. In planning with local stakeholders to build and preserve affordable housing, a housing authority’s work is critical to create and expand the supply of affordable units.

The National Association of Housing and Redevelopment Officials thanks the Department for the opportunity to comment on this rule.

Sincerely,

Tushar Gurjal
Policy Analyst

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13 Inclusive Communities Project, slip op. at 16.