

FHA: Forty Years...and a Mule

The Fair Housing Act, as amended, is one of the nation's most important, and I would argue most powerful civil rights laws. With it, declared President Johnson as he signed it, fair housing became the law of the land. But as we all know about our country's troubled history, the law of the land can be vague and variable, indeed. And though most people today are willing to give lip service to the notion of fair housing, it was folly then and would be folly now to think that the history of housing discrimination could have been corrected or remedied in a single act. It is, I believe, also folly to think that history can be reversed through a series of individual complaints. I am not, however, one of those who looks at the equivocal history of the Fair Housing Act and dismisses it as a failure. On the contrary, if we are honest about the situation we faced 40 years ago, we will recognize the progress we have made even as we reflect on how far we still have to go. Such a perspective allows us to learn from but not dwell on past mistakes and shortcomings. In a word, I would argue that the Fair Housing Act has not been used to anything near its full potential and, further, that we can do much better in the future by expanding our understanding of and expectations for the law.

When we to think back 40 years we are reminded that in 1968 the United States was characterized by increasingly segregated communities. Our cities were being abandoned by whites, who were fleeing to white suburban enclaves, leaving core cities of people of color to experience concentrated poverty. We remember Dr. King saying he experienced greater racial antipathy in northern suburbs than he remembered in the violent clashes of the early civil rights era. I, for one, remember there were still places in which homes for sale included racial covenants and the refusal to sell or rent to people of color was an accepted practice. It was time when segregation was bolstered by formal redlining, blockbusting and steering.

The practices that perpetuated racial segregation were outlawed by the Fair Housing Act and over the 40 years since, many of these overt acts have been greatly diminished if not eliminated. If for no other reason, we must consider the control of these blatant practices a

victory. Yet even as we do, we look around and realize that our communities today look very much like they looked 40 years ago. In Boston, for example, we find stark evidence of the mixed results. Harvard University researcher Guy Stuart found that though an increasing number of people of color were purchasing homes outside the city of Boston. He also found, however, that nearly half of those black and Latino home buyers were buying homes in 7 of 126 cities and towns – a swath running north south through Boston known affectionately as Blue Hill Avenue extended. During a press conference releasing his report a realtor stood up and objected to Stuart's suggestion that discrimination might be playing a role in the result. According to the realtor Stuart's findings reflected simple market choices in which people of color purchased homes where they could afford or chose to live among themselves. That realtor, I would argue, suffered from a form of market-induced blindness that has recently become epidemic as many around us herald the onset of a color blind, post civil rights era. This is, of course, a topic for another day, but I would argue that color blindness is a deficiency of sorts; it signals an inability (or unwillingness) to see color, not that color doesn't exist.

But the Fair Housing Center of Greater Boston responded to the realtor's challenge in two ways. First, with the help of Nancy McArdle, another Harvard Researcher, we conducted a study to test the affordability argument so often used to explain the housing patterns we see. I refer you to the Fair Housing Center website to find a copy of our study, *More than Money*, which included extensive data, but will simply summarize here by saying affordability did not explain the patterns of segregations across the region's cities and towns. Indeed, with over 80 percent of the cities and towns in the region containing less than half the number of families of color one would expect if the price of homes purchased explained where people were buying homes, it was clear something else was going on. We also went on to conduct a sales testing audit across the region to gauge the extent to which discriminatory practices contributed to the patterns of segregation. The results, contained in *You don't know what you're missing* [also available at www.bostonfairhousing.org/publications] were disturbing but not surprising. We found a pattern of discriminatory practices that had the overall effect of advantaging a white buyer over a buyer of color in half the instances in ways that severely hampered the latter's' chance of success.

Now I would argue that the Fair Housing Act can be a critical tool in addressing these practices and our experience has been that realtor associations respond positively to the results of our audits by trying to address the practices of their members. Of course it doesn't hurt to have a few large awards to concentrate the mind on corrective action.

Let me draw upon another Boston example to underscore my point and suggest how we might – indeed must – expand our use of the fair housing act in the future. Specifically, I would like to point your attention to yet another study, published by the U.S. Commission on Civil Rights and the Massachusetts Commission against Discrimination. The report, “Route 128: Boston’s Road to Segregation,” described itself as “concerned with white enclaves rather than black ghettos” and it went on to document exactly how those enclaves were maintained. By way of introduction the report states:

At the end of the 1960’s, it was not uncommon for leaders in the Greater Boston academic community to assert that greater racial integration in Boston’s suburbs would occur. More recent census data have shown this not to be the case. At the end of the 1960’s, it was also suggested by some experts that discrimination in sales and rental of housing was of diminishing importance in shaping residential patterns.

The authors went on to report that “in suburban areas public officials of narrow outlook and parochial interests control access to housing in such a way as to exclude most black and Spanish speaking families from their communities” and “In an effort to maintain the status quo and preserve the ‘character’ of their communities, local residents of suburban areas have sought to restrict the housing supply and exclude outsiders from the economic, environmental, educational, and social benefits related to land use.”

Now most of you will recognize this as language from today’s debate over affordable housing, in Massachusetts around our Chapter 40B anti-snob zoning law. Others will recognize the themes of today’s smart growth and regional equity movements. But let me add that the report included a warning that the failure to act in truly affirmative fashion to address these trends

would extend Boston's road to segregation from Route 128 to Route 495. Right. This report and its hauntingly familiar language, were written in 1975, seven years after passage of the Fair Housing Act but more than three decades ago.

My basic point here is simple. To be sure, money has been allocated for outreach and education, but for the past 40 years we have largely used the Fair Housing Act as an enforcement tool. And although we continue to find routine discrimination against individuals, it has proven that it can provide some relief. Indeed, drawing another example from Boston, it can also be used to gain critical equitable relief for entire classes of people. When I was an investigator at HUD in the mid 90s I had a case that was brought by nine women of color against the Boston Housing Authority. In 1989 the BHA had been required to dismantle the system of racial segregation it had maintained for many decades until a law suit brought by the Lawyers' Committee for Civil Rights under the Fair Housing Act forced the agency to institute a unified rather than site based waiting list, but that it had to implement a plan to protect persons of color who were moved into previously all white developments maintained in all white neighborhoods. During the term of the consent decree the plan worked well but with its expiration the BHA became lax in its protection, leading to the creation of what I argued was a racially hostile environment from which the authority refused to protect these complainants. After considerable wrangling all the way to HUD leadership in Washington, with no small dose of national politics, the case was finally transferred to DOJ for prosecution. After several years the case was settled. Not only did the complainants receive sizable monetary settlements, but the BHA was required to institute a revised protection plan and transfer policy.

Again, this is an example of a good use of the Fair Housing Act, but it also points out a major deficiency. The BHA case dragged on and on and had to wait for the right political moment before it could move.

I would close today by making several provocative suggestions for us to consider. All of us who work with HUD know that FHEO is subject to considerable political and bureaucratic arbitrariness. It should not be so. Fair housing and all civil rights are too important to be thwarted

by political expedience or exigencies of the moment. More than that, there is too close a relationship between HUD and those who often violate the Fair Housing Act. Even more, HUD policies themselves often contribute to negative fair housing outcomes, beginning but not ending with the early FHA mortgage underwriting policies. For that reason, I believe responsibility for implementation of the Fair Housing Act should be removed from HUD. I know this is sacrilege to many, who, like me, fought to prevent having FHEO moved to DOJ. I am not sure whether it should go to DOJ, but I am convinced it needs far greater autonomy than it has had over the past 40 years.

Please note that I called for implementation of the Fair Housing Act rather than enforcement, because my second major point is that the newly independent agency should give far greater stress to several features of the act delegated to the Secretary under Section 808 of the current law. Here the Secretary is authorized to “make studies with respect to the nature and extent of discriminatory housing practices in representative communities, urban, suburban, and rural, throughout the United States...publish and disseminate reports, recommendations, and information derived from such studies, specifying the nature and extent of progress made nationally in eliminating discriminatory housing practices and furthering the purpose of this title, obstacles remaining to achieving equal housing opportunity, and recommendations for further legislative or executive action; and to cooperate with and render technical assistance to Federal, State, local, and other public or private agencies, organizations, and institutions which are formulating or carrying on programs to prevent or eliminate discriminatory housing practices... and to administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter.”

Now there is no doubt that HUD would point to various activities as fulfilling these functions. Indeed, they would point to the FHAP and FHIP programs for some and to the simple descriptive reports of activities it issues occasionally; or even to the larger audits it commissions to gauge the extent of discrimination in various parts of the country. And, of course, it would point to the infamous Analyses of Impediments to Fair Housing as exemplifying its efforts to ensure

that recipients of federal funds are, in that grammatically challenged term, affirmatively furthering fair housing. But I would urge us to look more closely at these powers and to think about the ways they can and should be used to create an entirely new environment for carrying out the work of fair housing; an environment that couples rigorous social science with innovative legal strategies; one that conducts comprehensive policy analysis to craft creative policy alternatives.

It is high time we demand and expect more than the simple, plodding activities that characterize our national fair housing programs and policies. I would suggest to you that it is more than the observation of an anniversary that demands this. I believe that 40 years out from passage we face a similar crisis/opportunity to that which faced us in 1968. We face a U.S. Supreme Court that shows signs of adopting colorblindness as a standard. This is not only evident with Justice Roberts' cynical claim that the way to end discrimination is to stop discriminating, but even more alarming from what we thought was a possible voice of reason in Justice Kennedy, who with no apparent irony suggested during oral arguments in the Parents Involved case that a plausible alternative to voluntary school assignment plans would be to build new schools on the border between black communities and white communities. Let us leave for a moment whether such communities would last and think about what it means for a justice of the supreme court to basically give sanction and blessing to segregated communities by suggesting public policy based on their persistence. While the court is the challenge, the opportunity is that one way or another next January will inaugurate a new administration and I would urge us all to think about truly new and innovative fair housing directions for that administration. It's time to trade in our mule for a more modern conveyance...

I hope I have succeeded in being provocative to some extent and look forward to discussing these ideas further.