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COMMENT

THE BROADENED DIMENSIONS AND MORE POWERFUL BITE OF THE STATE FAIR HOUSING ACT

INTRODUCTION

The Department of Housing and Urban Development (HUD) enables state and municipal agencies to provide Title VIII protection to persons discriminated against in the residential real estate industry. The Federal Fair Housing Act (FFHA) requires HUD, when possible, to refer Title VIII cases to substantially equivalent agencies. The Secretary of HUD authorizes the North Carolina Human Relations Council, a substantially equivalent agency, to hear fair housing claims which arise in this state.

In an attempt to maintain HUD certification, the North Carolina legislature amended the State Fair Housing Act (ASFHA)

2. 42 U.S.C.A. § 3610(f)(3)(A) (West Supp. 1989). In order to qualify as a substantially equivalent agency, the Assistant Secretary for Fair Housing and Equal Opportunity of HUD must certify that the state or local agency meets the following criteria: (1) The law administered by the state or local agency must provide, on its face, substantially equivalent substantive rights, procedures, remedies, and availability of judicial review as the FFHA. (2) Current practices and past performance of the agency must “demonstrate that, in operation, the law in fact provides rights and remedies which are substantially equivalent” to the FFHA. 24 C.F.R. § 115.2 (1989).
4. The FFHA requires that state or agencies with fair housing acts, such as the State Fair Housing Act, modify their respective act to maintain certification within 40 months of enactment of the Federal Fair Housing Amendments Act. 42 U.S.C.A. § 3610(f)(4) (West Supp. 1989).
5. State Fair Housing Act, 1989 N.C. Sess. Laws 507 (codified as amended at N.C. GEN. STAT. § 41A (1989)). For purposes of consistency and clarity, the amended State Fair Housing Act will be called ASFHA, while the previous State Fair Housing Act will be called SFHA. Likewise, the Federal Fair Housing Amendments Act will be called FFHAA, while the previous Federal Fair Housing Act will be called FFHA.
resulting in a more effective weapon against discriminatory prac-
tices in the housing industry. Part I of this Comment analyzes the
substantive changes in the Act. These substantive changes signifi-
cantly extend the scope of the protection against discriminatory
practices. These changes mirror those in the recently amended
Federal Fair Housing Act (Title VIII of the Civil Rights Act of
1968). Substantively, the Acts are now virtually identical. There
are, however, some differences of which the practitioner should be
aware. Part II discusses the procedural implications of the new
State Act. How the State and Federal Acts and agencies function
together in enforcement procedures is the primary focus of Part II.

I. SUBSTANTIVE EFFECTS OF THE 1989 AMENDMENTS

The State Fair Housing Act (SFHA) already prohibited dis-
crimination against any person because of race, color, religion, sex,
or national origin in the buying, selling, and renting of residential
real estate and in related loan transactions. The ASFHA extends
this prohibition to discrimination against persons with handicaps and
discrimination based on familial status. The ASFHA also
clarifies the scope of prohibited practices. The new term "residen-
tial real estate related transactions" encompasses certain types of
transactions formerly too remote from residential real estate trans-
actions to be subject to scrutiny for discrimination under Title
VIII.

6. N.C. GEN. STAT. § 41A (1989). Two weapons against the fair housing of-
fender fall outside the scope of this comment. The first weapon makes it an "un-
lawful discriminatory housing practice to coerce, intimidate, threaten, or interfere
with any person in the exercise or enjoyment of, on account of having exercised or
enjoyed, or on account of having aided or encouraged any other person in the
exercise or enjoyment of any right granted or protected" by the SFHA. N.C. GEN.
STAT. § 41A-4(e) (1989). The second provides federal criminal and civil sanctions
7. See infra notes 10-115 and accompanying text.
9. See infra notes 10-215 and accompanying text.
10. N.C. GEN. STAT. § 41A-4(b) (1983), repeated by N.C. GEN. STAT. § 41A-
12. Id.
13. Id.
A. Discrimination Against Handicapped People

The ASFHA extends Title VIII protection to handicapped persons. There are also provisions to ensure that the special needs of handicapped persons are met. The ASFHA defines a "handicapped condition" as "a physical or mental impairment which substantially limits one or more of a person's major life activities, a record of having such an impairment, or being regarded as having such an impairment." The scope of this definition broadens the ordinary meaning of the word "handicap." Interpretational problems confront application of this new definition. For example, how does one deal with a drug-addicted victim of Acquired Immune Deficiency Syndrome (AIDS)? Although federal regulations protect victims of AIDS, both the ASFHA and the Federal Fair Housing Amendments Act (FFHAA) exclude current users and addicts of controlled substances from protection. Many AIDS victims have histories of controlled substance abuse. While federal regulations include protection for alcoholics and other types of drug addicts, the ASFHA is silent on the point. Whether North Carolina would extend fair housing protection to the intravenous drug user infected with the AIDS virus lies in the discretion of the courts. Even if a court would conclude that the ASFHA protects such an AIDS victim, the ASFHA contains a catchall exception excluding from protection any individual "whose tenancy would constitute a direct threat to the health and safety of other

18. Id.
19. Webster's Ninth New Collegiate Dictionary defines "handicapped" as "having a physical or mental disability that substantially limits activity esp. in relation to employment or education." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 550 (9th ed. 1987).
21. 42 U.S.C.A. § 3602(h) (West Supp. 1989); N.C. GEN. STAT. § 41A-3(3a) (1989). A recently enacted statute provides that "it shall be unlawful to discriminate against any person having AIDS virus or HIV infection on account of that infection in determining suitability for continued employment, housing, or public services." N.C. GEN. STAT. § 130A-148(i) (1989). The only remedy available for a housing discrimination claim is to institute a civil action pursuant to N.C. GEN. STAT. § 41A-7 of the ASFHA. Id. § 130A-148(i) adds no protection beyond what is already available under the ASFHA.
persons or whose tenancy would result in substantial physical damage to the property of others. How effectively the ASFHA protects these AIDS victims will depend upon court and agency interpretation of this catchall exception.

The ASFHA not only protects handicapped people from traditional Title VIII discrimination, but also contains special provisions for the unique problems of the handicapped. There are three such provisions: First, handicapped people may make reasonable modifications of existing premises at their own expense; Second, landlords and others must make reasonable accommodations in rules, policies, and services for the handicapped; and Third, builders must satisfy special design and construction requirements for multifamily dwellings.

1. Reasonable Modifications

The ASFHA prohibits discrimination against handicapped buyers or tenants who must make reasonable modifications in a dwelling to fully enjoy the property. This provision may significantly impact landlords and property managers. Federal regulations allow handicapped tenants to install grab bars in bathrooms at tenants' expense. However, federal regulations allow the landlord to condition any modification on the tenant's promise to remove the grab bars and return the bathroom to the condition that existed prior to the modification when the tenancy ends. The requirement of returning the property to its original condition applies only where a condition interferes with the landlord's or future tenant's enjoyment of the property. For example, tenants need not remove wall reinforcements added to support grab bars. Such modifications would not substantially interfere with landlord's or future tenants' enjoyment of the premises. If a tenant

25. Id. at § 41A-4(2a).
26. Id. at § 41A-4(2b).
27. Id. at § 41A-4(2c).
28. Id. at § 41A-4(2a).
29. See infra notes 30-35 and accompanying text.
30. 24 C.F.R. § 100.203(c) example 1 (1989).
31. Id.
32. Id.
33. Id.
34. Id.
found it necessary to widen a bathroom door to use his wheelchair, the widened doorway could likewise be left unaltered because a widened doorway does not substantially interfere with the use and enjoyment of property.  

2. Reasonable Accommodations

The ASFHA provides that landlords may not refuse to grant reasonable accommodations in rules, policies, practices, or services when a handicapped person needs such accommodations for his use and enjoyment of the premises. For example, a blind applicant to an apartment complex with a "no pets" policy would be allowed to have his seeing eye dog. An applicant who is unable to walk long distances could request a reserved parking space. These accommodations are necessary to afford the applicant an equal opportunity to use and enjoy the apartment. To refuse such requests results in a violation of federal regulations.

3. Design and Construction Requirements

The design and construction requirements of the ASFHA will have a noticeable effect on the appearance of residences. The ASFHA requires builders of apartments, condominiums and other multifamily dwellings to design and construct new units so that they are accessible to the handicapped and can readily be adapted for use by persons in wheelchairs. After March 13, 1991, builders must design "first occupancy" "covered multifamily dwellings" which provide access for handicapped persons. Units are not sub-

35. 24 C.F.R. § 100.203(c) example 2 (1989).
37. 24 C.F.R. § 100.204(b) example 1 (1989). (This example and other examples drawn from federal regulations, is used to illustrate the SFHA because there are no state regulations containing similar examples. In light of the General Assembly's intent that North Carolina retain its substantially equivalent certification, these examples should be strongly persuasive in North Carolina courts. Other federal examples follow this one for the same reason).
38. 24 C.F.R. § 100.204(b) example 2 (1989).
39. 24 C.F.R. § 100.204(b) (1989).
41. Id.
42. 'Covered Multifamily Dwellings' means a building with four or more units, including all units and common areas, if there is an elevator. It also means a building with ground floor units and common areas in elevatorless buildings. N.C. GEN. STAT. § 41A-3(1a) (1989).
ject to the building requirements if occupied on or before March 13, 1991. The design and construction requirements include making public and common use areas readily accessible, placing light switches and other controls in accessible locations, and making all rooms of a dwelling accessible to persons in wheelchairs. Builders will satisfy the FFHA by complying with the pertinent specifications of the American National Standard Institute (ANSI) for buildings and facilities providing accessibility and usability for physically handicapped people. The ASFHA states that it does not "nullify any provisions of the North Carolina Building Code for construction of residential housing for the handicapped" which are more stringent.

B. Discrimination Against Families With Children

Section 41A-3(1B) of the ASFHA protects persons discriminated against because of familial status. The ASFHA defines this protected class as "one or more persons who have not attained the age of eighteen years being domiciled with: A. A parent or other person having legal custody of the person or persons; or B. The designee of the parent or other person having custody, provided the designee has the written permission of the parent or other person." The protected class also includes any person in the process of securing legal custody of a person under eighteen or any person who is pregnant. HUD and commentators of the federal regulations did not debate the scope of the protected class. While determining the scope of the protected class should not produce hardship for North Carolina in drafting its regulations, the provi-

44. Id. at § 41A-4(a)(2c)(b.4.).
45. Id. at § 41A-4(a)(2c)b.3. N.C. Gen. Stat. § 41A-4(a)(2c)(b.3.).
50. Id.
51. Id.
sion itself presents difficulties. These difficulties surface when attempting to understand concerning housing exemptions for the elderly.\textsuperscript{54}

1. **NCGS Section 41A(e)(6): The Sixty-two and Over Exemption**

The first exemption applies to housing "intended for and solely occupied by persons 62 years of age and older."\textsuperscript{55} This wording, found in both the State and Federal Acts, requires that any person residing in a unit meet the age requirement for the management to maintain the special exempt status of the housing.\textsuperscript{56} The ASFHA provides details in the statute that reflects some variance from the HUD’s administrative regulations and the federal statute.\textsuperscript{57}

For instance, a slight variation exists between the state and federal interpretation of the date after which only applicants meeting the age requirement may be accepted.\textsuperscript{58} Under the ASFHA, the age requirement applies to occupants entering after October 1, 1989 (the effective date of ASFHA), but does not apply to occupants already living in a unit on this date.\textsuperscript{59} HUD, on the other hand, has determined that the FFHA protects only those persons “residing in such housing as of the date of enactment of this Act (i.e., September 13, 1988).”\textsuperscript{60} This restricts occupancy even before the effective date of the AFFHA.\textsuperscript{61}

The age requirement exception protects persons already living in a unit from unfair eviction.\textsuperscript{62} Innocent tenants who leased units in all-adult complexes up until the effective date of the Federal Act should not be evicted for failure to meet the age requirement.\textsuperscript{63} HUD’s literal interpretation defeats the protective purpose of the

\textsuperscript{54} N.C. GEN. STAT. § 41A-6(e) (1989).
\textsuperscript{55} N.C. GEN. STAT. § 41A-6(e)(2) (1989).
\textsuperscript{57} 42 U.S.C.A. § 3605 (West Supp. 1989); 24 C.F.R. § 100.300-.304 (1989); N.C. GEN. STAT. § 41A-6(e)(2) (1989).
\textsuperscript{58} 24 C.F.R. § 100.303(a)(1) & .304(d)(1) (1989); N.C. GEN. STAT. § 41A-6(e)(2)-(3) (1989).
\textsuperscript{59} N.C. GEN. STAT. § 41A-6(e)(2) (1989).
\textsuperscript{60} 24 C.F.R. § 100.303(a)(1) (1989) (emphasis added).
\textsuperscript{61} Commentary, supra note 52, at 3253.
\textsuperscript{62} Id.
\textsuperscript{63} Id.
age requirement exception. The age requirement exception does not protect tenants who first resided in a unit between the date of enactment and the effective date of the FFHAA. Landlords or property managers would have to evict these tenants to comply with the exemption. Some period of decision-making time should be allowed.

North Carolina’s Act extends protection to tenants residing in a unit at the effective date of the ASFHA. Any complaints received by HUD would be routed to the North Carolina Human Resources Council (NCHRC) which would apply the ASFHA. The difference between the FFHAA and the ASFAA on this point is not great enough to endanger North Carolina’s status as a jurisdiction having a “substantially equivalent” statute and regulations. The ASFHA version goes further to prevent unfair eviction.

HUD regulations and the ASFHA allow resident employees performing “substantial services directly related to management or maintenance of the housing,” along with family members, to live in a unit even though they do not meet the age requirement. If, however, the employee works primarily at another complex belonging to the employer, the employee does not qualify to live in the complex.

Anyone under the age limit who inherits a unit in a sixty-two exemption complex would have to rent or sell the unit to someone meeting the age requirement. There are no statutory or regulatory exceptions for occupants, such as live-in nurses, whose presence in a unit is necessary for an elderly person’s enjoyment of the unit. An elderly person requiring a live-in nurse to function should, however, qualify as handicapped. The elderly person, then, could

64. Id.
65. Id.
66. Id.
68. 42 U.S.C.A. § 3610(f) (West Supp. 1989); 24 C.F.R. § 100.303 (1989); Commentary supra note 52, at 3256.
70. N.C. Gen. Stat. § 41A-6(a)(2) (1989); See also Commentary, supra note 52, at 3256.
73. A person not meeting the age requirement could own a unit, but he could not use it himself.
74. 42 U.S.C.A. § 3605 (West Supp. 1989); 24 C.F.R. § 100.204(a) (1989);
request a reasonable modification in the age requirement to accommodate his special need of a live-in nurse. A second familial status exemption, the fifty-five and over exemption, allows more flexibility for such persons and does not require all occupants to meet the rigid age requirement.

2. NCGS Section 41A(e)(7): The Fifty-five and Over Exemption

This second familial status exemption applies to housing which is operated for occupancy by at least one person fifty-five years of age or older. The Act further requires the housing complex meet certain criteria that indicate the complex is operated primarily for the benefit of the older occupants. HUD's interpretation of the FFHAA allows the State to set higher age limits. The ASFHA, however, mirrors the federal provisions and also clarifies several points covered by HUD regulations but not found in the FFHA.

Housing facilities eligible for this exemption must provide "significant facilities and services specifically designed to meet the physical and social needs of older persons." If this is not practicable, the housing must at least provide "important housing opportunities for older persons." Neither HUD nor the NCHRC has any procedural system which can guarantee that a facility will meet these requirements before development. The HUD regulations do, however, provide a nonexhaustive list of the types of special facilities and services which might be necessary to meet the needs of older persons. There is also a list of factors relevant for deciding whether services and facilities are not practicable.

The ASFHA allows a certain percentage of noncomplying

7. Id.
7. Id.
7. Id.
7. Commentary, supra note 52, at 3254-55.
8. See infra notes 84-102 and accompanying text.
8. Id.
units to exist in a housing facility. The ASFHAA requires that at least 80% of the occupied units be occupied by at least one person fifty-five years old or older. Twenty percent of the units may be occupied by persons not complying with the age requirements. The purpose behind allowing this variance is to allow some flexibility for occupants under fifty-five, such as persons who might end up owning a unit after a person meeting the age requirement dies. Thanks to the allowable noncompliance rate, spouses or cohabitants have the option of continuing in their home when the person qualifying dies. Persons acquiring title to a condominium subject to the stricter sixty-two or over exception would not be able to occupy the property and could only sell the property to someone meeting the age requirement or willing to rent the property to qualified applicants. The lower age requirement and added flexibility of this exemption promote the marketability of property and increases the chances of success for housing projects for the elderly.

In order to give new projects a chance to start up without the burden of meeting the eighty percent requirement, the General Assembly has incorporated part of a HUD regulation into the text of the ASFHAA, relating to "newly constructed housing facilities." A newly constructed housing facility need not meet the eighty percent requirement until twenty-five percent of the units are occupied. The only difference between this HUD regulation and the corresponding North Carolina statute is that the effective dates are different.

As with the sixty-two and over exemption, units occupied by employees may be excepted from the age requirement. There arises some ambiguity in interpreting whether a complex meets the eighty percent requirement when there are employee-occupied units. For example, if a one hundred unit apartment complex had

88. Id. at § 41A-6(e)(2).
89. Id.
90. Commentary, supra note 52, at 3254-55.
91. Id.
92. See supra, note 74. Commentary, supra note 52, at 3254.
94. Id.
eighty complying units and twenty noncomplying units, what would the effect be of replacing one of the eighty complying units with an under-aged employee? Under a literal interpretation of the wording of the ASFHA and the HUD regulation, the complex retains its status as exempt. "Housing satisfies the requirements of subdivisions (2) and (3) of this subsection even though there are units occupied by employees. . . under the minimum age. . ." 97 Employee-occupied units should be counted as complying units rather than just not counted. This would not disturb the original eighty percent compliance rate. Yet under HUD’s regulation, the most likely result is the loss of the exemption. 98 HUD would subtract units occupied by employees from the total units, so twenty percent of ninety-nine units would have to comply with the age requirement under this hypothetical. 99 The prudent landlord should never allow his complex to approach twenty percent noncompliance.

Any complex approaching the twenty percent threshold should be warned that although intentionally renting a few units to noneligible persons is not per se a violation of the exemption status, it could be evidence of a lack of intention to reserve the property for older persons. 100 Also, the higher the noncompliance rate, the greater the risk that unforeseen deaths or property transfers may threaten the exempt status of the facility. 101

In addition to meeting the eighty percent age requirement and providing special services for the older person, qualified housing must publish and adhere to policies and procedures to show they intend to attract applicants meeting the age requirement. 102 When faced with problems concerning whether a housing complex meets the standards to qualify for the fifty-five and over exemption, an attorney should be careful to draft policies and procedures which clearly indicate that the property is to provide housing to persons fifty-five and over. The eighty percent requirement sounds omi-

97. Id.
98. Commentary, supra note 52, at 3256.
99. Id.
100. Id.
101. Id.
102. N.C. GEN. STAT. § 41A-6 (e)(3); 42 U.S.C.A. § 3607 (b)(2)(c)(iii) (West Supp. 1989); 24 C.F.R. § 100.304 (c)(2)(i)(vi) (1989); Commentary, supra note 52 at 3255. (HUD removed a proposed example because it sounded as if the 20% allowable nonconformance rate was a safe harbor for compliance with the 55 and over exemption).
nous; the owner or manager of a housing facility cannot control who occupies each unit. Particularly in the large facilities, there might be time when because of deaths of qualified tenants or a poor market, the units may be close to or over the twenty percent threshold. However, if management policies and facilities reflect an intent to provide housing for older persons, no investigation is likely.

C. The Expanded Scope of Transactions Subject to Title VIII Scrutiny

Not only have the Federal and State Acts added new protected classes to Title VIII, but both have expanded coverage to include transactions formerly on the periphery of coverage.103 The ASFHA covers all persons or business entities involved in “residential real estate related transactions.”104 Both the FFHAA and the ASFHA cover the conduct of purchasers on the secondary mortgage market,105 and the conduct of appraisers of residential real estate.106 The FFHAA contains an appraisal exemption which states that appraisers may take into account factors other than race, color, religion, national origin, sex, handicap, or familial status when appraising real property.107

This appraisal exemption appears undefinable, unless one considers that federal and state courts do not always require discriminatory intent to find a Title VIII violation. Often plaintiffs must only prove “disparate impact” (or “disparate effect”) against a protected class to prove a prima facie case of housing discrimination.108 This standard of proof of discrimination first arose in Title VII employment discrimination cases109 and soon was incorporated

103. 24 C.F.R. § 100.50-.90 (1989); N.C. GEN. STAT. § 41A-4(b1) (1989)
into Title VIII fair housing litigation.\textsuperscript{110} By allowing a demonstration of disparate impact to stand as a prima facie case for plaintiffs, the more insidious and subtle forms of discrimination are discouraged.\textsuperscript{111}

One such subtle form of discrimination occurs where appraisers have consistently lowered value estimates based on racial composition of neighborhoods. Appraisers no longer expressly consider race as a factor in appraisals, yet "less overt forms of racial appraisal practices can result in equally pernicious consequences."\textsuperscript{112} Evidence of discrimination in appraisal today is likely to be an unspoken, hidden factor. Proving discriminatory intent would, therefore, be difficult if not impossible. But allowing too broad a standard of adverse impact would interfere with the appraiser's job of producing accurate market valuations of property.\textsuperscript{113} The federal appraisal exemption probably protects appraisers who have relied on legitimate economic factors and established appraisal methods. The federal appraisal exemption and the related HUD regulations leave unresolved, however, the degree to which appraisers may legally consider subjective neighborhood factors or features.\textsuperscript{114} Where a complaint has shown a discriminatory pattern in an appraiser's valuations, the appraisal exemption apparently shifts the burden to the appraiser to prove his low property valuations were based on "factors other than race, color, religion, national origin, sex, handicap or familial status."\textsuperscript{115} Absent the exemption appraisers would have to prove that their consideration of factors which have discriminatory impact is a matter of business necessity.\textsuperscript{116} The best protection for an appraiser from fair housing complaints is a well-documented appraisal report.

North Carolina has not adopted the federal appraisal exempt-
tion. The State has statutorily recognized disparate impact as sufficient to constitute a violation under the ASFHA, which also provides for the business necessity exception as well.\textsuperscript{117} Although there have been no appellate decisions concerning disparate impact since this amendment was enacted, the ASFHA, on its face, places a greater burden of proof on the appraiser than the federal appraisal exemption.\textsuperscript{118} The history behind the enactment of this amendment will be covered in depth in Part II."

II. \textbf{PROCEDURE AND ENFORCEMENT UNDER THE AMENDED FAIR HOUSING ACT}

\textbf{A. Interrelationship of HUD and the North Carolina Human Relations Council}

In order to understand the procedures and enforcement of the ASFHA, it is necessary to examine the relationship of the North Carolina Human Relations Council (NCHRC) to HUD. The North Carolina General Assembly authorizes the NCHRC to accept fair housing complaints only during the time HUD certifies that the NCHRC is a substantially equivalent agency.\textsuperscript{119} Understanding how the state and federal agencies interrelate and function together, both formally and informally, clarifies how the ASFHA and NCHRC function. This section will first examine the actions of HUD, NCHRC, and the General Assembly in reaction to the \textit{Weaver Realty} case, then will examine HUD's administrative controls over "substantially equivalent" state and local agencies.

\textit{1. Administrative and Legislative Reactions to the Weaver Realty Case}

The question of whether North Carolina recognizes adverse

\textsuperscript{117} N.C. \textsc{Gen. Stat.} § 41A-5(a) (1987). North Carolina courts have never defined business necessity, but the Fourth Circuit has. "Where employment practice, which may exclude black employees is job related, the practice is not discriminatory and the touchstone is business necessity." \textit{White v. Carolina Paperboard Corp}, 564 F.2d 1073, 1080 (4th Cir. 1977). Under the business necessity defense, the question is whether there exists an overriding legitimate business purpose such that the practice is necessary to safe and efficient operation of the business." \textit{Tippet v. Liggett & Myers Tobacco Co.}, 402 F. Supp. 934, 947 (M.D.N.C. 1975).

\textsuperscript{118} N.C. \textsc{Gen. Stat.} § 41A-4(b1)(2) (1989).

\textsuperscript{119} N.C. \textsc{Gen. Stat.} § 41A-7(a) (1989).
impact in the absence of intent to discriminate as a violation of the ASFHA was the subject of one of two fair housing cases to reach the North Carolina Court of Appeals. The Court of Appeals held that adverse impact was mere circumstantial evidence of discrimination and that intent to discriminate was a necessary element to a fair housing claim. Since the court remanded the case and the evidence of intentional discrimination was strong, the defendants settled the case before trial. The next year, the General Assembly passed an amendment which states that adverse impact is sufficient to violate the SFHA.

Soon after the Court of Appeals handed down its Weaver Realty decision, the General Counsel's office in Washington telephone NCHRC to request information about the case. Having reviewed the case, the General Counsel decided Weaver Realty alone did not threaten NCHRC's status as "substantially equivalent." Because the North Carolina Supreme Court did not decide the case, these same issues could still be raised in some subsequent case.

In 1987, one year after Weaver Realty, the NCHRC was the primary organization to propose the 1987 amendments to the SFHA. The General Assembly clarified the Act by rewriting parts of N.C.G.S. Section 41A-5 to recognize adverse impact as sufficient to be a violation of the SFHA. The revised statute does make an exception where a person proves "his action or inaction was motivated and justified by business necessity." This 1987 amendment wrote the adverse impact theory of federal case law into the SFHA.

HUD's informal handling of the Weaver Realty decision, by telephone conversation and by review of trial and appellate records demonstrates HUD's deference for decision-making in "substan-

121. Id. at 715, 340 S.E.2d at 769.
122. Interview with Daniel D. Addison, General Counsel to the North Carolina Human Relations Council (Oct. 22, 1989) (A transcript of this interview is on file at Campbell University School of Law) [hereinafter, Interview].
124. Interview, supra note 122.
125. Id.
126. Id.
127. Id.
130. Interview, supra note 122.
tially equivalent” fair housing systems. Even without becoming directly involved the possibility of HUD involvement gave NCHRC and the General Assembly an incentive to amend the law before a challenge to “substantially equivalency” could be raised.

2. **HUD Regulation of NCHRC Investigations and Cases**

There are two levels of HUD review of the performance of NCHRC. On the first level, the individual case level, HUD monitors all complaints from the time of filing. No matter whether first filed with NCFRC or with HUD, both agencies establish files on all cases which arise in North Carolina. When a case is complete, NCFRC forwards copies of investigation results and determinations, memos of conciliation results, or copies of settlement agreements, depending on the outcome of the case, to a HUD monitor working in the HUD regional office in Atlanta. Where the holding in a particular case raises questions about the substantial equivalency of a jurisdiction's law, as happened in the *Weaver Realty* case, HUD may investigate. HUD may take over cases or investigations from NCHRC if NCHRC fails to commence with proceedings thirty days after receiving the referral or complaint, if NCHRC after commencement fails to carry out the proceedings reasonably promptly, or if NCHRC loses its certification as “substantially equivalent.”

On the second level, HUD regularly inspects general operations of NCHRC. At least once a year, the HUD regional monitor inspects all the files “as they are” at NCHRC’s office and makes suggestions on how NCHRC can improve law management.

At least once every five years, or upon petition of an interested person or organization, HUD must extensively review NCHRC’s

131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
137. *Id.* at § 3610(f)(2)(B).
138. *Id.* at § 3610(f)(2)(C).
139. Interview, *supra* note 122.
140. *Id.*
administration of the SFHA. The HUD Assistant Secretary for Fair Housing Secretary for Fair Housing and Equal Opportunity examines the law on its face and the quality of the state agency's administration of that law in determining whether to recertify the agency.

Although HUD provides some supervision and control of NCHRC handling of cases, HUD generally will not interfere with NCHRC's handling of a case. Since North Carolina fair housing complaints will be referred to NCHRC anyway and there are no special advantages in filing first with HUD, an attorney should recommend that a person with a complaint go to NCHRC. Even if the attorney intends to take the case to court himself, he should still take advantage of the free discovery NCHRC supplies through its initial investigation. The NCHRC investigation saves the attorney time and the client money.

B. Enforcing the State Fair Housing Act: New Weapons

One fair housing scholar has described housing discrimination as totally "unabated, entrenched and impervious to public policy and civil rights enforcement." According to a 1979 HUD-funded survey, each year some two million acts of housing discrimination are committed, yet few complaints are filed. Of the less than 5,000 complaints HUD receives per year, NCHRC handles around forty of these complaints. One factor often criticized has been the relative impotence of the enforcement provisions of the FFHA. As the statutory basis for HUD's certification of the NCHRC as a "substantially equivalent" agency, the original SFHA mirrored the FFHA in most important respects and contained the

142. Id. at § 3610(f)(5).
145. Interview, supra note 122.
147. Id. at 1052.
149. Interview, supra note 122.
same weaknesses. 151

As originally enacted, an aggrieved party would file a complaint with the NCHRC. 152 Then, the NCHRC would investigate and determine whether there were reasonable grounds for the complaint. 153 If the NCHRC found reasonable grounds, the SFHA in conjunction with the FFHA, provided three methods of dealing with violations. 154 First, complainant and respondent could voluntarily submit to conciliation by NCHRC. 155 Second, complainant could voluntarily file suit in state superior court with the assistance of NCHRC 156 or in federal or state court with his own private attorney. 157 Third, in cases where HUD or NCHRC established a “pattern or practice” of discrimination, the United States Attorney General could sue respondent on behalf of the United States. 158 Each method of enforcement had its disadvantages. The ASFHA improves investigation and enforcement procedures and adds a new procedure for enforcement called the administrative hearing. 159

1. Investigation and Reconciliation Attempts

Investigation and reconciliation actions have been, until now, the most frequent proceedings used by NCHRC in handling fair housing claims. 160 The purpose of the investigation is to determine whether there are reasonable grounds for claimant to believe he has or is about to be injured by a violation of the ASFHA. 161 Of the roughly forty investigations NCHRC makes in a year, only half result in a reasonable grounds determination. 162

The ASFHA does not change the substance of the investigation but does modify the procedure to insure compliance with Con-
gress's and HUD's standards of reasonable promptness. Complaints may be filed with NCHRC within one year after the alleged discriminatory practice occurred. Upon filing of a complaint, NCHRC has ten days to serve a letter on complainant acknowledging receipt of the complaint and informing the complainant of his forum choices under the State and Federal Acts. During this same period, NCHRC must serve respondent a copy of the complaint and a letter of notification, informing respondent of his right to answer the complaint within ten days and explaining the procedures involved in a complaint. NCHRC must commence the investigation within thirty days of respondent's filing of the complaint or send the complaint to another State or local agency with the same or greater jurisdiction.

The investigation by NCHRC is nonadversarial; it is not a hearing. The investigator talks to witnesses and to parties to the complaint and gathers what evidence he can. Later, the information is shared with all parties and everyone has an opportunity to comment on the testimony gathered or the questions asked. Attorneys may use whatever information is gathered as free discovery. The investigation is required to be completed within ninety days of the filing unless NCHRC gives notice in writing to the parties of the reasons for delay. If the investigation takes longer than 130 days from the day of filing to complete, complainant is automatically entitled to a right-to-sue letter upon written request. The new procedures guarantee both the complainant and the respondent a right to a speedy investigation. Speedier investigations should encourage persons to make complaints and cause less hardship on innocent respondents.

If the complaint is not resolved before the investigation is complete, the

165. Id.
167. Id. at § 41A-7(c). (The existence of another state or local agency with the same or greater jurisdiction divests NCHRC of jurisdiction).
168. Interview, supra note 122. However, the investigation has the potential for becoming adversarial because of the NCHRC's power to subpoena and issue interrogatories during investigation. N.C. Gen. Stat § 41A-8 (1989).
169. Interview, supra note 122.
170. Id.
171. Id.
173. Id. at § 41A-7(i)(2).
complete, upon completion of the investigation, NCHRC shall issue a reasonable grounds determination.\textsuperscript{174} If NCHRC finds no reasonable grounds, the complaint is dismissed, and complainant receives a right-to-sue letter which allows the complainant to bring a civil action in superior court.\textsuperscript{175} NCHRC’s finding of no cause is practically the death knell to any further action by the complainant.\textsuperscript{176} No complainant has ever brought suit in North Carolina after a dismissal.\textsuperscript{177} However, if NCHRC finds reasonable grounds, the next step is to informally attempt to conciliate.\textsuperscript{178}

Daniel D. Addison, General Counsel to NCHRC, considers one of the primary functions of the NCHRC is to provide an informal conciliatory forum before a situation requires litigation.\textsuperscript{179} Before the 1989 amendments, when conciliation failed, the complainant had to voluntarily decide whether to file suit.\textsuperscript{180} Although the SFHA did provide for NCHRC representation the complainant the cost of hiring independent counsel, the hassle and emotional expenses of going to trial kept some complainants out of court.\textsuperscript{181} Now, unless voluntary conciliation works or any of the parties or NCHRC elects to take the case to superior court, the ASFHA provides for an automatic administrative hearing.\textsuperscript{182} The specter of potentially expensive and unavoidable legal proceedings gives the respondent a greater incentive to settle than ever before.\textsuperscript{183} Kentucky reported greater success in its fair housing conciliation efforts after implementing a similar administrative hearing process as adopted in North Carolina.\textsuperscript{184}

Conciliation agreements are subject to approval by NCHRC and must be made public, unless all parties agree otherwise and NCHRC determines that disclosure is unnecessary to further the

\begin{itemize}
\item \textsuperscript{174} Id. at § 41A-7(e).
\item \textsuperscript{175} N.C. GEN. STAT. § 41A-7(f) (1989).
\item \textsuperscript{176} Interview, supra note 122.
\item \textsuperscript{177} Id.
\item \textsuperscript{178} Id. Although conciliation efforts often start after the reasonable grounds determination, the NCHRA investigator may decide to try informal negotiating and mediation at any time. N.C. GEN. STAT. § 41A-7(d) (1989).
\item \textsuperscript{179} Interview, supra note 122.
\item \textsuperscript{180} N.C. GEN. STAT. § 41-A7(h) (1983), as amended by N.C. GEN. STAT. § 41A-7(h),(l) (1989).
\item \textsuperscript{181} Interview, supra note 122.
\item \textsuperscript{182} N.C. GEN. STAT. § 41A-7(l) (1989).
\item \textsuperscript{183} Kushner, supra note 146, at 1097.
\item \textsuperscript{184} Schwemer, \textit{Kentucky is a Leader in Fair Housing Enforcement}, 52 Ky. BENCH & BAR 26(4) (1988).
\end{itemize}
purposes of the SFHA. The chance to avoid public disclosure of a fair housing violation could be yet another powerful bargaining chip for settlement, but this depends on how NCHRC interprets its duty to disclose violations. The HUD regulations provide that even when all parties agree not to disclose the agreement, the records of the agreement would still be a matter of public record.

NCHRC should retain more flexibility than HUD to determine whether an agreement must be made public. Every case which can be settled before reaching court or an administrative hearing saves the taxpayer money and litigant’s time. The success of a real estate brokerage firm or a bank depends on its reputation. An agreement not to disclose a violation could bring about more cooperation and prevent an inequitably harsh punishment in some circumstances where the offense is relatively minor.

2. The Administrative Hearing Process

The administrative hearing process begins twenty days after NCHRC issues its notice of failure to conciliate unless some party or NCHRC elects otherwise. Once the election period lapses, the administrative hearing is inevitable. The hearing will be conducted as set forth in Article 3A of the North Carolina Administrative Procedures Act, except that NCHRC’s attorney will present respondent’s case, not independent counsel. An administrative law judge (ALJ) conducts the hearing in the capacity of a presiding officer. The ALJ proposes a decision based on his conclusions of law and findings of fact. The full Council or a panel of three Council members makes the final decision. Before the Council makes its decision, it must carefully review the ALJ’s findings of fact and conclusions of law, and give each party the opportunity to

185. N.C. GEN. STAT. § 41A-7(g) (1989).
188. Id. An attorney should decide whether to take his client’s case to federal court before the end of this 20 day period. Otherwise, the attorney must take the appeal of the administrative decision through the state courts.
190. Id. at § 41A-7(l)(1).
191. Id. at § 41A-7(l)(2).
192. Id.
193. Id. at § 41A-7(l)(3).
present exceptions and propose findings of fact. Each party must also be given an opportunity to present oral and written arguments to the Council.

The Council has the power to award "relief as may be appropriate," including compensatory damages, injunctive and other equitable relief. In addition, the Council may assess a civil penalty limited by the number of prior violations in a time period. Judicial review of the administrative decision can be sought from the Court of Appeals.

Beyond facilitating conciliation efforts as mentioned above, the administrative hearing process should be a cheaper, more consistent forum for complainants and respondents. The administrative hearing is less formal and public than a civil trial. One scholar researched all prior fair housing trials and enforcement proceedings in federal and state court and agencies up until 1983. He found that blacks had the best chance of success in state courts and administrative hearings in those states with "substantially equivalent" agencies. For respondents, the risk of facing a jury can be a costly risk. Although an administrative hearing can result in high damage awards and civil penalties, the amount of damages or penalties is usually lower than in a civil trial. The results, however, may be more predictable.

194. Id. at § 41A-7(l)(2).
195. Id.
197. N.C. GEN. STAT. § 41A-7(l)(3)a-c (1989). Council's order for civil penalties may be up to $10,000 where "respondent has not been adjudged to have committed any prior unlawful discriminatory housing practice." Id. at § 41A-7(l)(3)a. The civil penalties may be up to $25,000 where respondent has been adjudged to have committed a violation within 5 years of the filing date of the second complaint. Id: at § 41A-7(l)(3)b. The penalty may be up to $75,000 where respondent has been adjudged to have committed 2 or more violations within a 7 year period ending on the filing date of the complaint. Id. at § 41A-7(l)(3)c.
199. See supra notes 96-99 and accompanying text.
201. Id at 267.
202. J. Kushner, Fair Housing: Discrimination in Real Estate, Community Development and Revitalization, app. 9-1 (1983 and Supp. 1988) (This index lists damages awards and their jurisdiction and shows that administrative hearings result in lower awards).
203. Rice, supra note 200, at 259.
3. Civil Trial

Before passage of ASFHA, complainant’s only recourse to a failure to conciliate was to bring a civil action either in federal or state court. The complainant, however, had to volunteer to go to court. The ASFHA makes few changes to the scheme of bringing suit in state superior court. Complainant has one year to file suit rather than 180 days as under the old State Act. Where the prevailing party is a state agency or commission, the court is no longer barred from awarding court costs. The state court option remains the same except for these two provisions. The federal court option, on the other hand, has been vastly improved in light of the federal amendments. Since the option to file suit in federal court is always possible for the respondent, these changes demand attention at this point.

In contrast to the North Carolina statute of limitations of one year from the issuance of a right-to-sue letter or from the time of the alleged violation, the FFHAA allows an injured person two years, excluding time in administrative procedures, to bring suit. Further, the court is now to authorized to appoint an attorney for the aggrieved person or authorize commencement of the action without fees, costs or security. The FFHAA authorizes attorney's fees and court costs to prevailing parties except the United States.

Where “issues of public importance” or “patterns and practices of resistance” to the FFHAA arise, the Attorney General is authorized to intervene in an already commenced civil suit or commence his own suit which complainant may join. In cases which are prosecuted by the Justice Department, the amendments allow damage awards to complainants the same as if the suit was an ordinary civil suit. For the respondent, the presence of the Attor-
ney General can mean even greater civil penalties than available in a state or federal civil suit or administrative hearing. The fact that the complainant first filed with NCHRC or commenced a civil action in state court does not keep the Justice Department from taking over an investigation or litigation. The Justice Department has carried out several investigations in North Carolina.

In light of the improved private suit and Justice Department suit options, the federal forum is now equal to the state forum. An attorney who takes a fair housing case has more flexibility now than ever before for forum shopping. The attorney can take advantage of NCHRC's offer of free discovery to establish whether there is reasonable cause, then either take the case to federal court or allow NCHRC to attempt to conciliate. If effort fails, an attorney can still advise the client to choose either state or federal courts or an administrative hearing. If an injured party chooses not to seek independent counsel, he still has the competent support of NCHRC to enforce his claim.

CONCLUSION

The ASFHA expands the scope of protected classes to include handicapped people and families with children. Its definition of a handicapped person is broader than the ordinary meaning of the word, and the protection for these persons is tailored to their special needs. This provision of the ASFHA will change the way apartment buildings are constructed and make most future housing accessible to handicapped people. The protection of families with children makes illegal the once popular all-adult apartment or condominium complex. Although there are exemptions for housing for older persons, the requirements to keep the exempt status can be tricky.

HUD and NCHRC interact and function well together. When faced with a client having a fair housing claim, the attorney must stay aware of how the state and federal enforcement systems function together. The ASFHA provides a better system for quick res-

214. Id. at § 3612(d)(C).
215. Interview, supra note 122.
216. Id.
olution of complaints either through conciliation, an administrative process, or litigation. These methods of resolution, combined with more threatening forms of relief, have transformed the old SFHA into a potent weapon in civil rights protection.

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