



Statement of the National Multi Housing Council / National Apartment Association

Before the U.S. House of Representatives

Financial Services Subcommittee

Housing and Community Opportunity Subcommittee

Wednesday, January 20, 2010

10:00 a.m.

2128 Rayburn House Office Building

Washington, D.C.

H.R. 476, the Housing Fairness Act of 2009

Chairman Waters, Ranking Member Capito, and distinguished members of the Subcommittee, my name is Jeanne McGlynn Delgado. I am Vice President of Business Operations & Risk Management Policy for the National Multi Housing Council.

This morning I am here on behalf of two trade associations that represent the private apartment industry—the National Multi Housing Council (NMHC) and the National Apartment Association (NAA). NMHC and NAA represent the nation's leading firms participating in the apartment industry. Their combined memberships include apartment owners, developers, managers, builders and lenders.

The National Multi Housing Council and the National Apartment Association represent the nation's leading firms participating in the multifamily rental housing industry. Our combined memberships are engaged in all aspects of the apartment industry, including ownership, development, management, and finance. The National Multi Housing Council represents the principal officers of the apartment industry's largest and most prominent firms. The National Apartment Association is a federation of 170 state and local affiliates comprised of more than 50,000 multifamily housing companies representing more than 5.9 million apartment homes. NMHC and NAA jointly operate a federal legislative program and provide a unified voice for the private apartment industry.

We commend you Chairman Waters for your leadership in holding this hearing to discuss the various stakeholder perspectives on H.R. 476, the Housing Fairness Act, as introduced by Rep. Al Green (D-TX). The apartment industry takes its responsibility to advance fair housing in all of its communities and as such commends Congressman Green for his leadership in Congress in his continued pursuit of equal opportunity for all.

One in three Americans or 117 million households rent their homes. Housing discrimination in the rental market reduces the number of people who otherwise would lease an apartment. As the industry advocates who are passionate about the benefits of renting, we would like to see the number grow, not decline. However, I am sure it will come as no surprise; the apartment industry does not embrace additional testing as an effective, efficient or fair means to combat housing discrimination. While the goal of HR 476, to reduce housing discrimination is supported by the apartment industry, we are concerned that the means to get there can be improved. Our concerns focus on the primary provisions of this legislation, the creation of a national testing program coupled with a doubling of the funding authorization for the Fair Housing Initiatives Program (FHIP), which currently finances testing activities of state and local fair housing organizations. Without corresponding program improvements, we do not believe this initiative will decrease discriminatory behavior. We believe there is merit in the matching grant program to study the causes of housing discrimination and certainly support all efforts to educate industry along with consumers. We appreciate the opportunity to weigh in on this proposal and hope that you will consider our recommendations.

It is important to note, that despite our concerns over enhanced funding, Congress already approved through the 2010 Appropriations process a budget of \$72,000,000 for FHIP/FHAP. This almost triples current funding levels and represents a significant increase from the level of funding proposed in HR 476. While this new funding level shifts the focus of the bill's proposed doubling of FHIP funds, our underlying concerns remain, for which we make the following recommendations for improvement.

- I. Before instituting another testing program, HUD should conduct a comprehensive review of the existing testing programs to measure effectiveness, efficiencies and fairness, especially relative to dismissed cases.
- II. HUD Should consider alternative approaches to current testing protocol.
- III. Expand industry education and outreach efforts and opportunities.

The apartment community and the industry's commitment to fair housing

NMHC and NAA members remain committed to the goal of making housing available to all persons without regard to race, color, religion, sex, national origin, handicap or familial status as well as the additional locally protected classes

In furtherance of this commitment, the industry invests a significant amount of time and resources to educate their staff about their obligations under the Fair Housing Act and the Americans with Disabilities Act. NMHC and NAA offer educational opportunities at the national level through our respective organizations at conferences, educational forums and ongoing communications. Courses are also offered at the state and local levels level through local apartment association training sessions and conferences. It is also not uncommon for companies to institute their own educational training programs to ensure consistent and accurate information is taught.

The "Fair Housing and Beyond" seminar, developed by the NAA can be taken as a classroom-delivered course or in an online format to attract the broadest audiences. Coursework covers the range of issues a leasing associate, a property manager or construction staff need to know to ensure compliance with the law. It is therefore our belief that compliance with the law is especially high among the professionally managed apartment communities. Our members are proud of their record on fair housing. Those who have found themselves unfairly on the receiving end of a fair housing complaint, offer valuable perspective on these issues.

I. The effectiveness, efficiency and fairness of testing programs

There is no shortage of studies, reports and analysis quantifying the level of discrimination in housing, lending and insurance. These studies have value and it is the data from such work that help drive policy decisions and legislative proposals such as this one. Such studies are instructive to the industry as it reinforces the areas of the law to which they must pay additional attention and adjust educational programs. However, we are unaware of any research that has measured the effectiveness of federally funded testing programs. There seems to be an underling assumption that fair housing testing equals effective enforcement and that simply increasing the number of complaints brought against property owners will eradicate housing discrimination. We do not agree with that premise. In fact, we continue to support the position that testing should be limited to those cases in which a resident, or prospective resident believes their rights under the FHA have been violated. We do not support random testing by fair housing organizations claiming to have suffered an injury by diverting its time and resources to conduct investigations and testing. While this matter most likely will continue to play out in the courts, for the purposes of this legislation we do believe there is valuable data and information about rental business practices found in those testing results that can help inform more effective, not to mention efficient, methods for identifying discriminatory practices and methods to enforce the law against such practices.

Testing has become a common investigative tool used by administrative agencies and non-profit fair housing groups. Testing is designed to compare the treatment of protected class home seekers with that of someone who is not part of a protected class. It is assumed in such testing protocol, that all other variables are exactly the same, i.e., similar qualifying requirements, same leasing agent, testers who visit the property on the same day and approximate time, etc. The information collected by the testers is documented and depending on the perceived findings, may form the basis of a discrimination complaint. While it appears fairly straightforward, tests and test results can vary widely.

In a report by a Virginia County Human Rights Commission, a testing program conducted in 2006 limited its efforts to initial site visitations with an inquiry for a one bedroom apartment for a specific

time period. The testers did not complete an application, or participate in the qualifying process. The tests were designed to measure treatment relative to the availability of the unit at the desired time based on national origin or race. In the 50 tests conducted, none showed a difference in treatment in any of the tests. While these results appear to reflect positively on the industry, it is clear that such a test could have easily gone the other direction as it did in the following scenario.

An apartment owner in Baltimore experienced different results from similar testing strategy, i.e. paired testers seeking a one bedroom apartment. In this scenario a complaint was filed when the minority tester received a price quote that was higher than the white tester. After a lengthy and costly investigation, guest cards completed by both testers revealed evidence which caused the complaint to be dismissed. While one tester sought pricing for a one bedroom unit, the other tester requested pricing for a one bedroom/den, thus explaining the difference. A simple mistake by the tester resulted in an unfair complaint of discrimination lodged against a housing provider with an otherwise excellent reputation with residents, employees and the community. This complaint did not arise from an actual aggrieved resident or prospective resident but from a random/targeted testing program. NMHC/NAA members can cite countless complaints that arose from testers employed by private fair housing groups that have eventually been dismissed due to sloppy testing practices or simply an unfair description of the treatment received. If lessons can be learned from these unfortunate experiences, it would be irresponsible to not take advantage of this opportunity to improve the testing protocol going forward.

But what happens to this information? Does the sponsoring fair housing organization use this feedback to reform its testing protocol training coursework in an effort to improve its overall effectiveness? Countless reports and studies cite these results but mainly to quantify levels of housing discrimination. While these examples lightly touch on the likely inconsistencies that are certain to exist on a grander scale, they underscore the need for a full review of the testing standards and protocol being utilized today before repeating the same mistakes with increased funding levels.

Such a study should be carefully designed to include at a minimum a full review of:

a) reasons for the tests; b) types of tests performed and number; c) varying protocols used; d) alleged discriminatory acts; e) specific protected class; f) the type of property /year built; g) specific investigation process details including start and closed time period; h) approximate cost to complainant and respondent; i) tester training requirements; and j) outcome. The process should evaluate the investigative procedures that lead to a charge of discrimination or a determination of no reasonable cause. If the case is dismissed, the reason for the dismissal including an itemization of tester errors or other testing flaws if applicable. Additionally, information about the reason for the test, i.e. random or follow up to a complaint, is also relevant and informative in assessing these programs. In addition, tester education should be compiled and evaluated to ensure adequate training is provided in the areas of federal, state and local fair housing laws, including the design and construction requirements as included in the 1998 FHAA and its accompanying requirements for reasonable accommodations and modifications. The tester should also be fully versed at playing the role of the tester; conducting the test, the debriefing process, have knowledge of current rental apartment marketing practices, and relevant documentation. There is significant risk of harm that can result from poorly executed testing unless the tester is well equipped with knowledge about the test he/she is about to undertake.

The NMHC/NAA believe such a study should be conducted and the results used to reform outdated testing programs and even then, we strongly believe such testing should be limited to those cases in which there is an aggrieved party and not just for the purposes of random testing by fair housing organizations to beef up the number of complaints. But until such a review is done, funding the same programs at higher levels will not yield the desired results and should be placed on hold.

A significant number of complaints are dismissed citing "no reasonable cause"

In HUD's 2008 Annual Report on Fair Housing, HUD/FHAP agencies reported 10,552 complaints. The numbers have held relatively constant at this level for the last several years. Of these, HUD closed 2156 cases. Of these, 44% were dismissed for no reasonable cause. It is not clear how many of those complaints were the result of testing, clearly a percentage of them. Therefore when a complaint is investigated and dismissed, it is equally important to investigate the facts and circumstances of those cases, especially if we are to learn anything from these results relative to enforcement activities that include testing.

What the testing programs and the studies do not reveal is the damage caused by an unfair complaint. Just as home seekers can be "victims" when subjected to housing discrimination, property owners who are wrongly accused are "victims" too. The success of an apartment community is largely due to its reputation, which is developed over time by quality service and product. When a property owner is wrongly accused of discrimination, the damage caused can be severe and long lasting. Anyone can file a complaint, even if only based on the suspicion of a violation. Residents, prospective residents, and visitors are provided with increasingly easier means and encouragement to file a complaint. Every complaint sets a range of activities in motion. The investigation process involves identifying relevant people who have had contact with the complainant, including property management leasing staff, maintenance professionals, and others but may also include residents or visitors who may have knowledge of the events. All records need to be collected including resident files, work orders, leases, accounting files, telephone records, notes from conversations, guest cards and electronic records. It can cost a property owner thousands of dollars, countless staff hours, emotional anguish and compromised reputation. When such complaints are initiated by a testing organization rather than out of an alleged act of discrimination against a resident or prospective resident and found to be baseless, the harm is much greater.

Consider an example of a complaint served upon an apartment owner in the aftermath of Hurricane Katrina. According to the fair housing group conducting the tests, 65 properties in 5 states were tested and results showed a level of discrimination of 66% against African American evacuees. Complaints were filed with HUD against 5 apt owners described as the most egregious instances of different treatment occurring. The property owner I reference, a member of the NMHC and NAA, learned of the complaint while watching the NBC nightly news. It appeared the fair housing group notified the press as it simultaneously served the complaint. After an approximately 9 month investigation, the complaint was dismissed for lack of evidence of discriminatory behavior. The bottom line relative to fair housing testing enforcement, this complaint will just become another data piece that will feed into the 2009 HUD Report of the State of Fair Housing. However, the damage done to the company and the leasing staff involved is much deeper. Death threats were received by the staff, forcing one of the professionals to resign due to the stress of the ordeal. The company had to endure the negative publicity generated from the national news coverage throughout the investigation process. Importantly, this was a company who volunteered over 2,000 hours to hurricane relief efforts during the period preceding the complaint, donated \$50,000 to the Red Cross relief efforts, raised funds from its residents and staff to direct to New Orleans victims, and organized a company wide rebuilding effort in that city in which they helped to build a community center and refurbish a firehouse. This company was also one of the first that stepped up and offered in some cases free housing to evacuees and in other cases reduced rent and flexible lease terms. NMHC/NAA are very proud of how the apartment industry responded to the needs of the hurricane victims and evacuees, especially those in need of housing. In fact the city of Houston along with the Houston Apartment association worked tirelessly and effectively to develop and facilitate a voucher program to assist evacuees with transitional housing until they could return to New Orleans.

II. Alternative Approaches should be Considered

Increasing the number of tests just to increase the number of complaints is short sighted and misses the goal of reducing discrimination. More is not always best, at least not until the evidence proves otherwise. We believe there are alternative approaches to the enforcement process that HUD should consider.

- Development of a standard testing protocol. As mentioned above two similar tests can yield very different results. What we do know relative to this specific case which resulted in a filed complaint is that the paired testers did not ask for the same type of unit. Even if their requests were similar, the tests do not appear to recognize the reality that pricing of apartments is in many markets a sophisticated process. There are various pricing methodologies employed in today's market and are dependant on several variables such as: vacancy rate, location of unit, square footage, move in date, etc. And so it is very likely that several pricing options are disclosed to a prospective shopper. Testing protocols must adapt this sophistication into its models and strategies.
- Disclose the test results. If a property owner receives a complaint of housing discrimination based on tester results from a site visit, the details of the test along with test results should be made available to the respondent. If tests are conducted in a professional manner according to strict testing standards and protocol, intake personnel adequately educated about fair housing laws and its various interpretations and nuanced nature, then there should be no reason to withhold test results that form the basis for the complaint. Otherwise, it is unfair to expect an apartment owner to respond in a meaningful way to an anonymous alleged complaint of discrimination offering no details of the alleged practice or act triggering the complaint.
- Offer the owner a reasonable opportunity to respond or address the alleged violation. For example, if a tester visits a leasing office to inquire about a unit and makes a request for a reasonable accommodation, and the leasing agent hesitates or informs the tester that he or she doesn't think they can meet their request, rather than immediately assuming this reaction constitutes a violation of the Fair Housing Acts' reasonable accommodation requirements, the testing protocol should include a requirement that the tester inform the agent of the law's obligation and ask for reconsideration or take the request to a higher level manager. There are many provisions of the FHA Act that given the complex array of probable scenarios require additional analysis before a decision can be rendered. This is particularly true in requests for reasonable accommodations and modifications. Even the Department of Justice (DOJ) recognizes the sometimes confusing nature of these provisions as it recently released another version of a Q & A on these topics. But in a testing scenario, it is not unusual for a tester to take the initial response and if not in the affirmative, record it and it gets interpreted as a violation. Much more can be accomplished if the tester prodded the agent to revisit the request with her manager and upon doing so, a satisfactory result can be reached and an enhanced understanding of the law's obligations is expressed. In the case of an actual prospect, this would be the preferred result of an apartment search. In addition, in situations involving design and construction claims, HUD should instruct agency and enforcement staff to demonstrate

that a property owners' design for accessibility was not a reasonable interpretation of the law before filing a complaint.

III. Expand Industry Education Efforts and Outreach

In a 2005 study, HUD and the Urban Institute revealed that ½ of Americans do not know that it is illegal to deny a reasonable accommodation or modification to a disabled person. While I cannot speak to the accuracy of these numbers, clearly this statistic implies a steep learning curve for both consumers and industry. Rather than exploit this weakness through testing, a better role for government is to identify educational outreach programs to enhance the industry's understanding in this very complex area of law.

The FHIP program limits the use of grant money for educational efforts to no more than 10%. This appears counterintuitive when HUD studies report a high level of unawareness of the fair housing laws and its protections, both by consumers and industry. In 2004, HUD introduced their Housing Accessibility Website and training modules. This site has been very helpful to both industry and fair housing community to help navigate the very technical and often confusing requirements of the FHA Design and Construction Requirements. HUD reports having held 22 training sessions in 18 at which 1,724 building professionals received instruction on the laws requirements. These kinds of educational efforts directed at industry are welcomed and encouraged. A review of the use and effectiveness of its HOTLINE would be useful in deciphering the kinds of questions posed by industry and the responses to those questions.

While I cite the Fair Housing Accessibility First Training program as an example of the kinds of efforts HUD should engage relative to education of industry, we also believe some adjustments are in order to more fully match the requirements of the law. For example, the training program teaches compliance to a specific safe harbor, which is simply that, a safe harbor and not the mandatory minimum requirements. As you know, the design and construction requirements for accessibility have been the source of many testing efforts and subsequent claims of violations by fair housing organizations. These claims insist that any owner who did not build according to a HUD safe harbor is in violation of the law and declare all such properties within a stated portfolio as inaccessible to the disabled residents and visitors. This, along with the issue of fair housing group testing, is certain to work its way through the courts, but I raise it as an example of the very technical nature of these laws and the challenges of measuring compliance using outdated, ineffective and unfair testing programs.

Efforts to conduct a thorough education program as well as supporting website and hotline are the kind of educational tools the industry supports and benefits from. HUD should continue to complement these education initiatives with FHIP funding.

NMHC and NAA are grateful for the privilege to be here today and the opportunity to express our views on these important issues. We hope our observations, experiences and recommendations will be considered as you proceed with further action on this legislation. We look forward to working with you to help shape effective programs to enhance awareness and understanding of the fair housing laws, its obligations on industry and the rights granted to all Americans. Thank you.