



SEPTEMBER 13, 2016

**Office of General Counsel Guidance on
Application of Fair Housing Act Standards to the
Enforcement of Local Nuisance and Crime-Free Housing Ordinances Against Victims
of Domestic Violence, Other Crime Victims, and Others Who Require Police or
Emergency Services**

I. Introduction

The Fair Housing Act (or the Act) prohibits discrimination in the sale, rental or financing of dwellings and in other housing-related activities on the basis of race, color, religion, sex, disability, familial status, or national origin.¹ The Department of Housing and Urban Development's (HUD's) Office of General Counsel issues this guidance to explain how the Fair Housing Act applies to ensure that the growing number of local nuisance ordinances and crime-free housing ordinances do not lead to discrimination in violation of the Act.²

This guidance primarily focuses on the impact these ordinances may have on domestic violence victims, but the Act and the standards described herein apply equally to victims of domestic violence and other crimes and to those in need of emergency services who may be subjected to discrimination prohibited by the Act due to the operation of these ordinances. This guidance therefore addresses both the discriminatory effects and disparate treatment methods of proof under the Act, and briefly describes the obligation of HUD fund recipients to consider the impacts of these ordinances in assessing how they will fulfill their affirmative obligation to further fair housing.³ HUD will issue subsequent guidance addressing more specifically how the Fair Housing Act applies to ensure that local nuisance or crime-free housing ordinances do not lead to housing discrimination because of disability.⁴

¹ 42 U.S.C. §§ 3601-19.

² State and local governments use a variety of terms, including "nuisance," "chronic nuisance," "crime-free," or "disorderly behavior" to describe the types of ordinances addressed by this guidance.

³ Local governments and landlords who receive federal funding may also violate the Violence Against Women Act, which, among other things, prohibits them from denying "assistance, tenancy, or occupancy" to any person because of domestic violence-related activity committed by a household member, guest or "other person in control" of the tenant if the tenant or an "affiliated individual" is the victim. 42 U.S.C. § 14043e-11(b)(3)(A).

⁴ Discrimination prohibited by the Fair Housing Act includes "a refusal to make a reasonable accommodation in rules, policies, practices, and services, when such accommodation may be necessary to afford a person with a disability an equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604(f)(3)(B).

II. Background

A. Nuisance Ordinances

A growing number of local governments are enacting a variety of nuisance ordinances that can affect housing in potentially discriminatory ways. For example, in Illinois alone, more than 100 such ordinances have been adopted.⁵ These ordinances often label various types of conduct associated with a property—whether the conduct is by a resident, guest or other person—a “nuisance” and require the landlord or homeowner to abate the nuisance under the threat of a variety of penalties.⁶ The conduct defined as a nuisance varies by ordinance and has ranged from conduct affecting the appearance of the property – such as littering,⁷ failing to tend to one’s lawn⁸ or abandoning a vehicle,⁹ to general prohibitions related to the conduct of a tenant or guest – such as disorderly or disruptive conduct,¹⁰ disrupting the quiet use and enjoyment of neighboring properties,¹¹ or any criminal conduct occurring on or near the property.¹² Nuisance conduct often

⁵ The Sargent Shriver National Center on Poverty Law noted that in August 2013, “more than 100 municipalities in the state of Illinois alone ha[d] adopted some kind of [nuisance or crime-free] ordinance,” with the number continuing to increase. Emily Werth, SARGENT SHRIVER NATIONAL CENTER ON POVERTY LAW, *The Cost of Being “Crime Free”: Legal and Practical Consequences of Crime Free Rental Housing and Nuisance Property Ordinances* 1 (2013), <http://povertylaw.org/sites/default/files/files/housing-justice/cost-of-being-crime-free.pdf>.

Other research has identified 37 nuisance ordinances in Pennsylvania. News Release, Pennsylvania Coalition Against Domestic Violence, *Executive Director Dierkers Praises Legislators for Shielding Domestic Violence Victims from Eviction* (Oct. 16, 2014) [hereinafter News Release], http://www.pcadv.org/Resources/HB1796_PR_10162014.pdf. Additionally, 59 nuisance ordinances have been identified across every region of the country, including in large metropolitan cities and small towns, 39 of which define domestic violence, assault, sexual abuse, or battery as nuisance activities. Matthew Desmond & Nicol Valdez, *Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women* (online supplement), 78 AM. SOCIOLOGICAL REV. 2–3, 4–18 (2013) [hereinafter Desmond & Valdez (online supplement)], http://scholar.harvard.edu/files/mdesmond/files/unpolicing.asr2013.online.supplement_0.pdf.

⁶ Although nuisance ordinances have been enacted that apply to both owner-occupied and rental housing, this guidance focuses on the application of the Fair Housing Act to a local government’s enactment and enforcement of nuisance and crime-free ordinances against persons who reside in rental housing. Much of the legal analysis in this guidance applies equally to owner-occupied housing as well.

⁷ See, e.g., PORTLAND, OR., CODE § 14.B.60.010(D)(9) (2013), <https://www.portlandoregon.gov/citycode/?c=28531>; CARSON CITY, NEV., CODE § 8.08.70 (2005), https://www.municode.com/library/nv/carson_city/codes/code_of_ordinances?nodeId=TIT8PUPESAMO_CH8.08NU_8.08.110JUABUNVE#!.

⁸ See, e.g., JEFFERSON, WIS., CODE § 197-6(F) (2002), <http://ecode360.com/9781229>.

⁹ See, e.g., ADAIR VILLAGE, OR. CODE § 40.610(5) (2012), <http://www.adairvillage.org/wordpress/wp-content/uploads/2012/06/Chapter-40-Public-Nuisance-2012.pdf>; CARSON CITY, NEV., CODE § 8.08.110 (2005), https://www.municode.com/library/nv/carson_city/codes/code_of_ordinances?nodeId=TIT8PUPESAMO_CH8.08NU_8.08.110JUABUNVE#!; see also Werth, *supra* note 5, at 17.

¹⁰ See, e.g., WATERTOWN, WIS. CODE § 12.08(d)(ii) (2014), http://www.ci.watertown.wi.us/document_center/Chapter_12.pdf; WEST CHICAGO, ILL., CODE § 10-53 (2008), https://www.municode.com/library/il/west_chicago/codes/code_of_ordinances?nodeId=COOR_CH10NU_ARTVII_CHNUPRAB_S10-52VI.

¹¹ See, e.g., ARIZ. REV. STAT. § 13-2917 (2006).

¹² See SPOKANE, WASH., CODE § 10.08A.20(H) (2016), <https://my.spokanecity.org/smc/?Section=10.08A.020>; see also ACLU WOMEN’S RIGHTS PROJECT & THE SOC. SCI. RESEARCH COUNCIL, *Silenced: How Nuisance Ordinances Punish Crime Victims in New York* 8 (2015) [hereinafter *Silenced*], <https://www.aclu.org/report/silenced-how-nuisance-ordinances-punish-crime-victims-new-york> (citing as examples of harmful nuisance ordinances PATTERSON, N.Y., CODE § 72-2(K) (2009),

includes what is characterized by the ordinance as an “excessive” number of calls for emergency police or ambulance services, typically defined as just a few calls within a specified period of time by a tenant, neighbor, or other third party, whether or not directly associated with the property.¹³

In some jurisdictions, an incident of domestic violence is defined as a nuisance without regard to whether the resident is the victim or the perpetrator of the domestic violence.¹⁴ In other jurisdictions, incidents of domestic violence are not specifically defined as nuisances, but may still be categorized as such because the ordinance broadly defines nuisance activity as the violation of any federal, state or local law, or includes conduct such as disturbing the peace, excessive noise, disorderly conduct, or calls for emergency services that exceed a specified number within a given timeframe.¹⁵ Some ordinances specifically define “excessive” calls for police or emergency services as nuisances, even when the person in need of services is a victim of domestic violence or another crime or otherwise in need of police, medical or other emergency assistance.¹⁶ Even where ordinances expressly exclude victims of domestic violence or other crimes, victims are still frequently deemed to have committed nuisance conduct because police and other emergency service providers may not log the call as domestic violence, instead categorizing it incorrectly as property damage, disturbing the peace or another type of nuisance conduct.¹⁷ Some victims also are hesitant or afraid to identify themselves as victims of abuse.¹⁸

The ordinances generally require housing providers either to abate the alleged nuisance or risk penalties, such as fines, loss of their rental permits, condemnation of their properties and, in some extreme instances, incarceration.¹⁹ Some ordinances may require the housing provider to evict the resident and his or her household after a specified number of alleged nuisance

http://www.pattersonny.org/PDFs/Codes/Chapter72-Chronic_Public_Nuisance_Abatement.pdf; SCOTIA, N.Y., CODE § 196-12 (2009), <http://ecode360.com/13862484>; GLENS FALLS, N.Y., CODE § 146-2(C)(7) (2000), <http://ecode360.com/14410432>; AUBURN, N.Y., CODE § 213-3(D)(1) (1997), <http://ecode360.com/8969396>; ROCHESTER, N.Y., CHARTER § 3-15(B)(1)(w) (1984), <http://ecode360.com/28971339>); News Release, *supra* note 5.

¹³ See Werth, *supra* note 5, at 4, 18 n.70.

¹⁴ See, e.g., SPOKANE, WASH., CODE § 10.08A.20(H)(2)(q) (2016), <https://my.spokanecity.org/smc/?Section=10.08A.020>; see also Silenced, *supra* note 12, at 12; Anna Kastner, *The Other War at Home: Chronic Nuisance Laws and the Revictimization of Survivors of Domestic Violence*, 103 CALIF. L. REV. 1047, 1058 (2015); News Release, *supra* note 5.

¹⁵ See Kastner, *supra* note 14, at 1058 (“Similarly, the ordinance could cause survivors to be evicted either because the 911 call was not coded as ‘domestic violence’ or because the landlord was not aware that domestic violence was occurring and could not create a plan to remediate the issue properly.”).

¹⁶ See Gretchen Arnold & Megan Slusser, *Silencing Women's Voices: Nuisance Property Laws and Battered Women*, L. & SOC. INQ. 15-17 (2015), <http://nhlp.org/files/001.%20Silencing%20Women's%20Voices-%20Nuisance%20Property%20Laws%20and%20Battered%20Women%20-%20G%20Arnold%20and%20M%20Slusser.pdf>.

¹⁷ See, e.g., BEACON, N.Y., CODE § 159-3(A)(20) (2011) (exempting domestic violence victims from being penalized under nuisance ordinance where a police officer properly “observes evidence that a domestic dispute occurred”).

¹⁸ See, e.g., Arnold & Slusser, *supra* note 16, at 15–16.

¹⁹ See, e.g., Desmond & Valdez (online supplement), *supra* note 5, at 4-18; Cari Fais, *Denying Access to Justice: The Cost of Applying Chronic Nuisance Laws to Domestic Violence*, 108 COLUM. L. REV. 1181, 1189 (2008).

violations—often quite low—within a specific timeframe.²⁰ For example, in at least one jurisdiction, three calls for emergency police or medical help within a 30-day period is considered to be a nuisance,²¹ and in another jurisdiction, two calls for such services within one year qualify as a nuisance.²² Even when nuisance ordinances do not explicitly require evictions, a number of landlords resort to evicting the household to avoid penalties.²³

In many jurisdictions, domestic-violence-related calls are the largest category of calls received by police.²⁴ “Intimate partner violence, sexual violence, and stalking are widespread” and impact millions of Americans each year.²⁵ “On average, 24 people per minute are victims of rape, physical violence, or stalking by an intimate partner in the United States” – more than 12 million individuals over the course of a year.²⁶ From 1994 to 2010, approximately 80 percent of the victims of intimate partner violence in the nation were women.²⁷ Women with disabilities are more likely to be subjected to domestic violence than women without disabilities.²⁸

Studies have found that victims of domestic violence often do not report their initial incident of domestic violence and instead suffer multiple assaults before contacting the police or seeking a protective order or other assistance.²⁹ Victims of domestic violence often are reluctant to

²⁰ See Werth, *supra* note 5 at 4 n.9.

²¹ See, e.g., CINCINNATI, OH. CODE § 761-3(a) (2013), <http://www.municode.com/resources/gateway.asp?pid=19996&sid=35>.

²² See ST. LOUIS, MO., CODE § 15.42.020(G) (2014), https://www.municode.com/library/mo/st._louis/codes/code_of_ordinances?nodeId=TIT15PUPEMOWE_DIVIVOFAGPUPE_CH15.42PUNU#!.

²³ See Arnold & Slusser, *supra* note 16, at 13–15 (2015), <http://nhlp.org/files/001.%20Silencing%20Women's%20Voices-%20Nuisance%20Property%20Laws%20and%20Battered%20Women%20-%20G%20Arnold%20and%20M%20Slusser.pdf>. While local governments might not explicitly require eviction as the primary nuisance abatement method in their ordinances, in practice, governments may indicate to landlords that eviction is the only acceptable nuisance abatement method. See, e.g., Matthew Desmond & Nicol Valdez, *Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women*, 78 AM. SOC. REV. 117, 135 (2013), http://scholar.harvard.edu/files/mdesmond/files/desmond.valdez.unpolicing.asr_0.pdf (“[T]he [Milwaukee Police Department] cleared landlords who evicted domestic violence victims—‘Plan Accepted!’—but pressured those who refused to do so.”).

²⁴ Andrew R. Klein, NATIONAL INST. OF JUSTICE, U.S. DEP’T. OF JUSTICE, *Practical Implications of Current Domestic Violence Research* 1 (2009), <https://www.ncjrs.gov/pdffiles1/nij/225722.pdf>.

²⁵ CTRS. FOR DISEASE CONTROL AND PREVENTION, U.S. DEP’T. OF HEALTH & HUMAN SERV., *Injury Prevention & Control* (last updated Sep. 8, 2014), <http://www.cdc.gov/violenceprevention/nisvs/infographic.html>.

²⁶ CTRS. FOR DISEASE CONTROL AND PREVENTION, U.S. DEP’T. OF HEALTH & HUMAN SERV., UNDERSTANDING INTIMATE PARTNER VIOLENCE (2014), <https://www.cdc.gov/violenceprevention/pdf/ipv-factsheet.pdf>.

²⁷ See SUSAN CASTALANO, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T. OF JUSTICE, *Intimate Partner Violence, 1993–2010* 1 (2015), <http://www.bjs.gov/content/pub/pdf/ipv9310.pdf>. See also NATIONAL LAW CENTER ON HOMELESSNESS & POVERTY, *There’s No Place Like Home: State Laws that Protect Housing Rights for Survivors of Domestic and Sexual Violence* 5 (2012) [hereinafter *No Place Like Home*], https://www.nlchp.org/Theres_No_Place_Like_Home (“In some areas of the country 1 in 4 homeless adults reported that domestic violence was a cause of their homelessness, and between 50% and 100% of homeless women have experienced domestic or sexual violence at some point in their lives.”).

²⁸ OFFICE ON WOMEN’S HEALTH, U.S. DEP’T. OF HEALTH AND HUMAN SERV., *Violence Against Women With Disabilities* (last updated Sep. 4, 2015) [hereinafter WOMEN’S HEALTH], <http://www.womenshealth.gov/violence-against-women/types-of-violence/violence-against-women-with-disabilities.html>.

²⁹ KLEIN, *supra* note 24, at 6.

seek assistance because of, among other things, fear of reprisal from their attackers.³⁰ Nuisance ordinances (and crime-free housing ordinances) are becoming an additional factor that operates to discourage victims from reporting domestic violence and obtaining the emergency police and medical assistance they need.³¹

For example, a woman in Norristown, Pennsylvania who had been subjected to domestic violence by her ex-boyfriend was warned by police that if she made one more 911 call, she and her young daughter would be evicted from their home pursuant to the local nuisance ordinance.³² The ordinance operated under a “three strike” policy, allowing her no more than two calls to 911 for help. As a result, the woman was too afraid to call the police when her ex-boyfriend returned to her home and stabbed her. Rather than call for an ambulance, she ran out of her house in the hope she would not lose her housing.³³ A neighbor called the police and, due to the serious nature of her injuries, the woman was airlifted to the hospital. A few days after she returned home from the hospital, she was served with eviction papers pursuant to the local nuisance ordinance.³⁴

B. Crime-Free Lease Ordinances and Crime-Free Housing Programs

A number of local governments enforce crime-free lease ordinances or promote crime-free housing programs that incorporate the use of crime-free lease addenda.³⁵ Some of these ordinances operate like nuisance ordinances and penalize housing providers who fail to evict tenants when a tenant, resident or other person has allegedly engaged in a violation of a federal, state and/or local law, regardless of whether the tenant or resident was the victim of the crime at issue.³⁶ Others mandate or strongly encourage housing providers to include lease provisions that require or permit housing providers to evict tenants where a tenant or resident has allegedly engaged in a single incident of criminal activity, regardless of whether the activity occurred on or off the property.³⁷

These provisions often allow housing providers to evict tenants when a guest or other person allowed onto the property by the tenant or resident allegedly engages in criminal activity on

³⁰ See Arnold & Slusser, *supra* note 16, at 15.

³¹ *Id.* at 22; Fais, *supra* note 19, at 1202; Werth, *supra* note 5, at 8.

³² Complaint at 9–17, *Briggs v. Borough of Norristown et al.*, No. 2013 C 2191 (E.D. Pa. Apr. 24, 2013) [hereinafter Complaint], http://www.aclu.org/files/assets/norristown_complaint.pdf.

³³ *Id.*; Lakisha Briggs, *I Was a Domestic Violence Victim. My Town Wanted Me Evicted for Calling 911*, GUARDIAN, (Sep. 11, 2015), <https://www.theguardian.com/commentisfree/2015/sep/11/domestic-violence-victim-town-wanted-me-evicted-calling-911>.

³⁴ *Id.* See also Press Release, U.S. Department of Housing and Urban Development, HUD and Philadelphia Area Borough Settle Allegations of Housing Discrimination Against Victims of Domestic Violence (Oct. 2, 2014), http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2014/HUDNo_14-121.

³⁵ See, e.g., HESPERIA, CAL., HEALTH AND SAFETY CODE § 8.20.50 (2015), https://www.municode.com/library/ca/hesperia/codes/code_of_ordinances?nodeId=TIT8HESA_CH8.20CRFRREH_OPR_8.20.050CRFRREHOPR.

³⁶ See Werth, *supra* note 5, at 3 n.8.

³⁷ See, e.g., SAN BERNARDINO, CAL., HEALTH AND SAFETY CODE § 15.27.050 (2011), <https://www.ci.san-bernardino.ca.us/civicax/filebank/blobdload.aspx?blobid=19233>; City of San Bernardino Crime Free Multi-Housing Program Crime-Free Lease Addendum, <https://www.ci.san-bernardino.ca.us/civicax/filebank/blobdload.aspx?blobid=11259> (“A single violation of any of the provisions of this added addendum shall be deemed a serious violation and a material and irreparable non-compliance. It is understood that a single violation shall be good cause for termination of the lease.”).

or near the property, regardless of whether the resident was a victim of the criminal activity or a party to it.³⁸ The criminal activity that constitutes a lease violation is frequently broadly and ambiguously defined and may include any violation of federal, state or local laws, however minor.³⁹ Thus, disorderly conduct, excessive noise and similar activity may constitute a crime resulting in eviction.⁴⁰ Crime-free lease addenda often do not provide exceptions for cases where a resident or tenant is the victim of domestic violence or another crime.⁴¹ And, as previously noted, even where exceptions do exist, victims of domestic violence and other crimes may be mistakenly categorized and face eviction despite the exception.⁴² For example, police often arrest both the victim and the perpetrator under “dual arrest” policies when a victim has defended herself or himself from the perpetrator.⁴³

Furthermore, some crime-free housing ordinances mandate or strongly encourage housing providers to implement lease provisions that require eviction based on an arrest alone, or do not require an arrest or conviction to evict a tenant, but rather allow housing providers to rely on a preponderance of the evidence standard while remaining silent on who is responsible for determining that this standard has been met.⁴⁴ The principles discussed in HUD’s “Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions”⁴⁵ are instructive in

³⁸ See, e.g., HESPERIA, CAL., HEALTH AND SAFETY CODE § 8.20.50 (2015), https://www.municode.com/library/ca/hesperia/codes/code_of_ordinances?nodeId=TIT8HESA_CH8.20CRFRREHOPR_8.20.050CRFRREHOPR (mandating that all landlords include the Hesperia Crime-Free Lease Addendum, which requires that a single violation of the addendum, whether committed by resident, guest, or other person, provides good cause for termination of tenancy); Hesperia Crime-Free Lease Addendum, <http://www.cityofhesperia.us/DocumentCenter/View/13394>.

³⁹ See Werth, *supra* note 5, at 17.

⁴⁰ See, e.g., WATERTOWN, WIS. CODE § 12.08(d)(ii) (2014), http://www.ci.watertown.wi.us/document_center/Chapter_12.pdf.

⁴¹ See Werth, *supra* note 5, at 8.

⁴² See, e.g., OPEN COMMUNITIES & SARGENT SHRIVER NATIONAL CENTER ON POVERTY LAW, *Reducing the Cost of Being Crime Free: Alternative Strategies to Crime Free/Nuisance Property Ordinances in Illinois* 3 (2015) <http://povertylaw.org/sites/default/files/images/advocacy/housing/reducing-the-cost-of-crime-free.pdf>.

⁴³ See, e.g., Kastner, *supra* note 14, at 1065; see Werth, *supra* note 5, at 21.

⁴⁴ See, e.g., Werth, *supra* note 5, at 12 (noting that some ordinances allow evictions based on arrests or citations alone); LAS VEGAS, NEV., CODE § 6.09.20 (2012) (requiring landlords to complete training encouraging use of Crime-Free Addendum, which permits eviction based on single alleged violation, as shown by preponderance of evidence, rather than criminal conviction); Las Vegas Crime Free Multi-Housing Program Crime-Free Addendum (2014), http://www.lvmpd.com/Portals/0/pdf/prevention/English_CFAAddendum01_2014.pdf); SAN BERNARDINO, CAL., HEALTH AND SAFETY CODE § 15.27.050 (2011), <https://www.ci.san-bernardino.ca.us/civicax/filebank/blobdload.aspx?blobid=19233> (requiring landlords to use Crime-Free Lease Addendum, which permits eviction based on single alleged violation of addendum as shown by preponderance of evidence, rather than criminal conviction); City of San Bernardino Crime Free Multi-Housing Program Crime-Free Lease Addendum, <https://www.ci.san-bernardino.ca.us/civicax/filebank/blobdload.aspx?blobid=11259>); Hesperia, Cal., Health and Safety Code § 8.20.50 (2015), https://www.municode.com/library/ca/hesperia/codes/code_of_ordinances?nodeId=TIT8HESA_CH8.20CRFRREHOPR_8.20.050CRFRREHOPR (providing chief of police discretion as to whether or not to notify the landlord of the evidence or documents, if any, used to determine that a resident engaged in criminal activity); see also Werth, *supra* note 5, at 4.

⁴⁵ See HELEN R. KANOVSKY, GENERAL COUNSEL, U.S. DEP’T OF HOUS. & URBAN DEV., *Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions* (2016), https://portal.hud.gov/hudportal/documents/huddoc?id=HUD_OGCGuidAppFHASStandCR.pdf.

evaluating the fair housing implications of crime-free lease ordinances and crime-free lease addenda mandated or encouraged by localities and enforced by housing providers.⁴⁶

III. Discriminatory Effects Liability and Enforcement of Nuisance Ordinances and Crime-Free Housing Ordinances

A local government’s policies and practices to address nuisances, including enactment or enforcement of a nuisance or crime-free housing ordinance, violate the Fair Housing Act when they have an unjustified discriminatory effect, even when the local government had no intent to discriminate.⁴⁷ Under this standard, a facially-neutral policy or practice that has a discriminatory effect violates the Act if it is not supported by a legally sufficient justification.⁴⁸ Thus, where a policy or practice that restricts the availability of housing on the basis of nuisance conduct has a disparate impact on individuals of a particular protected class, the policy or practice is unlawful under the Fair Housing Act if it is not necessary to serve a substantial, legitimate, nondiscriminatory interest of the local government, or if such interest could be served by another practice that has a less discriminatory effect.⁴⁹

Discriminatory effects liability is assessed under a three-step, burden-shifting standard requiring a fact-specific analysis.⁵⁰ The following sections discuss the three steps used to analyze whether a local government’s enforcement of a nuisance or crime-free housing ordinance results in a discriminatory effect in violation of the Act. As explained in Section IV, below, a different analytical framework is used to evaluate claims of intentional discrimination.

A. Evaluating Whether the Challenged Nuisance Ordinance or Crime-Free Housing Ordinance Policy or Practice Has a Discriminatory Effect

In the first step of the analysis, a plaintiff (or HUD in an administrative enforcement action) has the burden to prove that a local government’s enforcement of its nuisance or crime-free housing ordinance has a discriminatory effect, that is, that the local government’s nuisance or crime-free housing ordinance policy or practice results or predictably will result in a disparate impact on a group of persons because of a protected characteristic.⁵¹ This is also true for a local

⁴⁶ In addition to being liable for their own discriminatory conduct, housing providers may have a cause of action under the Fair Housing Act against a locality if a locality’s ordinance requires housing providers to discriminate based on a protected characteristic. *See, e.g., Waterhouse v. City of Am. Canyon*, 2011 U.S. Dist. LEXIS 60065, *1, 13–15 (N.D. Cal. 2011) (concluding that “forcing the owners of a mobile-home park to discriminate on the basis of familial status through a series of city ordinances . . . violates the federal Fair Housing Act.”).

⁴⁷ 24 C.F.R. § 100.500; *accord Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, ___ U.S. ___, 135 S. Ct. 2507, 2511 (2015).

⁴⁸ For purposes of this guidance, the term “policy or practice” encompasses governments’ nuisance and crime-free ordinances as well as their enforcement of the ordinances. It also includes government activities related to crime-free housing programs that may not be specified by ordinance.

⁴⁹ 24 C.F.R. § 100.500; *see also Inclusive Cmty. Project*, 135 S. Ct. at 2514–15 (summarizing HUD’s Discriminatory Effects Standard in 24 C.F.R. § 100.500).

⁵⁰ *See* 24 C.F.R. § 100.500.

⁵¹ 24 C.F.R. § 100.500(c)(1). A discriminatory effect can also be proven with evidence that the policy or practice creates, increases, reinforces, or perpetuates segregated housing patterns. *See* 24 C.F.R. § 100.500(a). This guidance addresses only the method for analyzing disparate impact claims, which in HUD’s experience are more commonly asserted in this context.

government's policy or practice encouraging or incentivizing housing providers to adopt crime-free lease addenda (and the discussion throughout the guidance applies equally to such actions). This burden is satisfied by presenting evidence proving that the challenged policy or practice actually or predictably results in a disparate impact.

Different data sources may be available and useful to demonstrate that a government's ordinance actually or predictably results in a disparate impact, which is ultimately a fact-specific and case-specific inquiry. While state or local statistics typically are presented where available and appropriate based on the local government's jurisdiction or other facts particular to a given case, national statistics may be relevant and appropriate, depending on the specific case and the nature of the claim.

Local statistics are likely to be available for use in establishing whether a local government's enforcement of its nuisance or crime-free ordinance has a disparate impact. Other evidence – for example, resident data and files, demographic data, city and police records including data on enforcement of nuisance or crime-free ordinances, citations and correspondence between housing providers and city officials and court records regarding nuisance abatement – may also be relevant in determining whether a challenged nuisance or crime-free housing ordinance policy or practice causes a disparate impact.

Evidence of nationwide disparities in the enforcement of nuisance or crime-free ordinances based on protected characteristics may be relevant to consider, depending on the specific case and the nature of the claim.⁵² Also, in some cases, national statistics may provide grounds for HUD to investigate complaints challenging the enforcement of nuisance ordinances. For example, nationally, women comprise approximately 80 percent of all individuals subjected to domestic violence each year,⁵³ which may provide grounds for HUD to investigate under the Fair Housing Act allegations that the adverse effects of a nuisance ordinance fall more heavily on victims of domestic violence.

Whether in the context of an investigation or administrative enforcement action by HUD or private litigation, a local government will have the opportunity to offer evidence to refute the claim that its nuisance ordinance causes a disparate impact on one or more protected classes.

B. Evaluating Whether the Challenged Nuisance Ordinance or Crime-Free Housing Ordinance is Necessary to Achieve a Substantial, Legitimate, Nondiscriminatory Interest

In the second step of the discriminatory effects analysis, the burden shifts to the local government to prove that the challenged nuisance or crime-free housing ordinance is necessary

⁵² Compare *Dothard v. Rawlinson*, 433 U.S. 321, 330 (1977) (“[R]eliance on general population demographic data was not misplaced where there was no reason to suppose that physical height and weight characteristics of Alabama men and women differ markedly from those of the national population.”), with *Mountain Side Mobile Estates P’ship v. Sec’y of Hous. & Urban Dev.*, 56 F.3d 1243, 1253 (10th Cir. 1995) (“In some cases national statistics may be the appropriate comparable population. However, those cases are the rare exception and this case is not such an exception.”) (citation omitted).

⁵³ See CASTALANO, *supra* note 27, at 1.

to achieve a substantial, legitimate, nondiscriminatory interest of the local government.⁵⁴ The interest of the local government may not be hypothetical or speculative, meaning the local government must be able to prove with evidence what the government interest is, that its interest is legitimate, substantial and nondiscriminatory, and that the challenged practice is necessary to achieve that interest.⁵⁵ Assertions based on generalizations or stereotypes about persons deemed to engage in nuisance or criminal conduct are not sufficient to prove that an ordinance or its enforcement is necessary to achieve the local government’s substantial, legitimate, nondiscriminatory interest.

As explained in the preamble to HUD’s 2013 Discriminatory Effects Final Rule, a “substantial” interest is a core interest of the organization that has a direct relationship to the function of that organization.⁵⁶ The requirement that an interest be “legitimate” means that the local government’s justification must be genuine and not false or fabricated.⁵⁷ A number of local governments have nuisance or crime-free ordinances that encourage, require or are likely to result in housing providers evicting or taking other adverse housing actions against residents, including victims of domestic violence and other crimes, because the residents requested police, medical or other emergency assistance, without regard to whether the calls were reasonable under the circumstances.⁵⁸ Where such a practice is challenged and proven to have a disparate impact, the local government would have the difficult burden to prove that cutting off access to emergency services for those in grave need of such services, including victims of domestic violence or other crimes, thereby potentially endangering their lives, safety and security,⁵⁹ in fact achieves a core interest of the local government and was not undertaken for discriminatory reasons or in a discriminatory manner. Similarly, if the local government’s policy or practice requires or encourages housing providers to evict victims of domestic violence or other crimes or others in need of emergency services, the local government would have the burden to prove that such a policy or practice in fact is necessary to achieve the local government’s substantial, legitimate, nondiscriminatory interest.

C. Evaluating Whether There Is a Less Discriminatory Alternative

The third step of the discriminatory effects analysis is applicable only if a local government successfully proves that its nuisance or crime-free housing ordinance, policy or practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest. If the analysis reaches the third step, the burden shifts back to the plaintiff or HUD to prove that such interest could be served by another policy or practice that has a less discriminatory effect.⁶⁰

⁵⁴ 24 C.F.R. § 100.500(c)(2).

⁵⁵ Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. 11460, 11471 (Feb. 15, 2013) (preamble to final rule codified at 24 C.F.R. pt. 100).

⁵⁶ 78 Fed. Reg. at 11470.

⁵⁷ *Id.*

⁵⁸ See Werth, *supra* note 5, at 8.

⁵⁹ When domestic violence victims are evicted on the basis of a nuisance citation, they may often lack alternative housing and experience homelessness. See, e.g., Amanda Gavin, *Chronic Nuisance Ordinances: Turning Victims of Domestic Violence into “Nuisances” in the Eyes of Municipalities*, 119 PENN ST. L. REV. 257, 260 (“on any given day, over 3000 people face homelessness because they are unable to find shelter away from their abusers . . . making domestic violence a leading cause of homelessness in the United States”).

⁶⁰ 24 C.F.R. § 100.500(c)(3); accord *Inclusive Cmty. Project*, 135 S. Ct. at 2515.

The identification of a less discriminatory alternative will depend on the particulars of the policy or practice at issue, as well as the specific nature of the underlying problem the ordinance seeks to address.

IV. Intentional Discrimination and Enforcement of Nuisance Ordinances or Crime-Free Housing Ordinances

A local government may also violate the Fair Housing Act if it intentionally discriminates in its adoption or enforcement of a nuisance or crime-free housing ordinance. This occurs when the local government treats a resident differently because of sex, race or another protected characteristic. The analysis is the same as is used to analyze whether any housing ordinance was enacted or enforced for intentionally discriminatory reasons.

Generally, two types of claims of intentional discrimination may arise. One type of intentional discrimination claim arises where a local government enacts a nuisance ordinance or crime-free housing ordinance for discriminatory reasons. Another type is where a government selectively enforces a nuisance or crime-free housing ordinance in a discriminatory manner. For the first type of claim, in determining whether a facially neutral ordinance was enacted for discriminatory reasons, courts generally look to certain factors. The factors, all of which need not be satisfied, include, but are not limited to: (1) the *impact* of the ordinance at issue, such as whether the ordinance disproportionately impacts women compared to men, minority residents compared to white residents, or residents with disabilities or a certain type of disability compared to residents without disabilities; (2) the *historical background* of the ordinance, such as whether there is a history of discriminatory conduct by the local government; (3) the *specific sequence of events*, such as whether the locality adopted the ordinance only after significant community opposition motivated by race or another protected characteristic; (4) *departures from the normal procedural sequence*, such as whether the locality deviated from normal procedures for enacting a nuisance ordinance; (5) *substantive departures*, such as whether the factors usually considered important suggest that a local government should have reached a different result; and (6) the *legislative or administrative record*, such as any statements by members of the local decision-making body.⁶¹

For the second type of intentional discrimination claim, selective enforcement, where there is no “smoking gun” proving that a local government is selectively enforcing a nuisance or crime-free housing ordinance in a discriminatory way, courts look for evidence from which such an inference can be drawn. The evidence might be direct or circumstantial. For example, courts have noted that an inference of intentional sex discrimination could arise directly from evidence

⁶¹ *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977). See also *Hidden Vill., LLC v. City of Lakewood*, 867 F. Supp. 2d 920, 942 (N.D. Ohio 2012) (utilizing *Arlington Heights* factors to analyze whether municipal action was motivated by discriminatory intent); see, e.g., *Valdez v. Town of Brookhaven*, 2005 U.S. Dist. LEXIS 36713, *47 (E.D.N.Y. 2005) (explaining factors probative of discriminatory intent in case involving town’s alleged disproportionate enforcement of zoning and housing codes against Latinos).

that a housing providers seeks to evict female residents shortly after incidents of domestic violence.⁶²

A common method of establishing intentional discrimination indirectly, through circumstantial evidence, is through the familiar burden-shifting method of proving intentional discrimination originally established by the Supreme Court in the employment context.⁶³ In the standard complaint alleging selective enforcement of a nuisance or crime-free ordinance for discriminatory reasons, the plaintiff first must produce evidence to establish a prima facie case of disparate treatment. This may be shown, for example, by evidence that: (1) the plaintiff (or complainant in an administrative enforcement action) is a member of a protected class; (2) a local government official (or housing provider, depending on the circumstances) took action to enforce the nuisance or crime-free ordinance or lease addendum against the plaintiff or complainant because the plaintiff or complainant allegedly engaged in nuisance or criminal conduct; (3) the local government official or housing provider did not take action to enforce the nuisance or crime-free ordinance or lease addendum against a similarly-situated resident not of the plaintiff or complainant's protected class who engaged in comparable conduct; and (4) the local government or housing provider subjected the plaintiff or complainant to an adverse housing action as a result of the enforcement of the nuisance or crime-free ordinance or lease addendum. It is then the burden of the local government and/or housing provider, depending on the circumstances, to offer evidence of a legitimate, nondiscriminatory reason for the adverse housing action.⁶⁴ The proffered nondiscriminatory reason for the challenged decision must be clear, reasonably specific and supported by admissible evidence.⁶⁵ Purely subjective or arbitrary reasons will not be sufficient to demonstrate a legitimate, nondiscriminatory basis for differential treatment.⁶⁶

⁶² See *Bouley v. Young-Sabourin*, 394 F. Supp. 2d 675, 678 (D. Vt. 2005) (explaining that landlord's attempt to evict victim 72 hours after domestic violence incident could give rise to inference of discrimination on the basis of gender). See, e.g., *Dickinson v Zanesville Metro. Hous. Auth.*, 975 F. Supp. 2d 863, 872 (S.D. Ohio 2013) (articulating that a housing provider's failure to comply with the Violence Against Women Act and assignment of blame to the victim for the results of domestic violence could give rise to an inference of sex discrimination); *Meister v. Kansas City*, 2011 U.S. Dist. LEXIS 19166, *19–20 (D. Kan. 2011) (“[E]vidence that defendant knew that domestic violence caused damage to plaintiff’s housing unit would help support a claim that she was evicted under circumstances giving rise to an inference of sex discrimination.”).

⁶³ See, generally, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (articulating burden-shifting standard of proving intentional discrimination under Title VII).

⁶⁴ See, e.g., *Lindsay v. Yates*, 578 F.3d at 415 (articulating that if plaintiff presents evidence from which a reasonable jury could conclude that there exists a prima facie case of housing discrimination, then the burden shifts to the defendant to offer evidence of a legitimate, nondiscriminatory reason for the adverse housing decision); *Bouley*, 394 F. Supp. 2d at 678 (explaining that once a plaintiff has established a prima facie case of discrimination, the burden then shifts to the defendant to assert a legitimate, nondiscriminatory rationale for the challenged decision).

⁶⁵ See, e.g., *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1040 (2d Cir. 1979) (“A prima facie case having been established, a Fair Housing Act claim cannot be defeated by a defendant which relies on merely hypothetical reasons for the plaintiff’s rejection.”).

⁶⁶ See, e.g., *Soules v. U.S. Dep’t of Hous. and Urban Dev.*, 967 F.2d 817, 822 (2d Cir. 1992) (“In examining the defendant’s reason, we view skeptically subjective rationales concerning why he denied housing to members or protected groups. Our reasoning, in part, is that ‘clever men may easily conceal their [discriminatory] motivations.’” (quoting *United States v. City of Black Jack*, 508 F.2d 1179, 1185 (8th Cir. 1974))).

If the defendant (or respondent in a HUD administrative enforcement action) establishes a legitimate, nondiscriminatory reason for the adverse housing action, a plaintiff or HUD may still prevail by showing that the proffered reason was not the true reason for the adverse housing decision, and was instead a mere pretext for unlawful discrimination.⁶⁷ For example, the fact that the defendant (or respondent) acted upon comparable nuisance or criminal conduct differently for one or more individuals of a different protected class than the plaintiff or complainant is strong evidence that the defendant (or respondent) was not considering such conduct uniformly. Additionally, shifting or inconsistent explanations offered by the defendant (or respondent) for the adverse housing action may provide evidence of pretext. Similarly, a local government's claim that its nuisance citations would not cause tenant evictions because the citations were issued to the housing provider and not the residents could be evidence of pretext.⁶⁸ Ultimately, the evidence that may be offered to show that defendant's or respondent's stated justification is pretext for intentional discrimination will depend on the facts of a particular case.

V. Assessment of Nuisance Ordinances and Crime-Free Housing Ordinances as Part of the Duty to Affirmatively Further Fair Housing

In addition to prohibiting discrimination, the Fair Housing Act requires HUD to administer programs and activities relating to housing and urban development in a manner that affirmatively furthers the policies of the Act.⁶⁹ The purpose of the Act's affirmatively furthering fair housing (AFFH) mandate is to ensure that recipients of Federal housing and urban development funds do more than simply not discriminate: recipients also must take meaningful action to overcome fair housing issues and related barriers to fair housing choice and disparities in access to opportunity based on sex, race, national origin, disability, and other characteristics protected by the Act. Congress has repeatedly reaffirmed the AFFH mandate by requiring HUD program participants to certify that they will affirmatively further fair housing as a condition of receiving Federal funds.⁷⁰

In 2015, HUD issued a rule on affirmatively furthering fair housing which requires grantees who receive Community Development Block Grant, HOME, Housing Opportunities for Persons with AIDS, or Emergency Solutions Grant funding to conduct an assessment of fair housing for purposes of setting goals to affirmatively further fair housing. In conducting their assessments of fair housing, state and local governments should assess their nuisance ordinances, crime-free housing ordinances and related policies or practices, including the processes by which nuisance ordinance and crime-free housing ordinances are enforced, and consider how these ordinances, policies or practices may affect access to housing and access to police, medical and other governmental services based on sex, race, national origin, disability, and other characteristics protected by the Act. One step a local government may take toward meeting its duty to affirmatively further fair housing is to eliminate disparities by repealing a nuisance or

⁶⁷ See, e.g., *Bouley*, 394 F. Supp. 2d at 678.

⁶⁸ See *Hidden Vill.*, 867 F. Supp. 2d at 952 (noting that “[d]efendants appear blind to the possibility that repeatedly issuing citations to a landlord, based upon the actions of its tenants, would logically create an incentive for the landlord to evict his problem tenant . . . produc[ing] the same result—the eviction of [predominantly African American youth] but by different means.”).

⁶⁹ 42 U.S.C. § 3608(d), (e)(5).

⁷⁰ 42 U.S.C. §§ 5304(b)(2), 5306(d)(7)(B), 12705(b)(15), 1437C-1(d)(16).

crime-free ordinance that requires or encourages evictions for use of emergency services, including 911 calls, by domestic violence or other crime victims.

VI. Conclusion

The Fair Housing Act prohibits both intentional housing discrimination and housing ordinances, policies or practices that have an unjustified discriminatory effect because of protected characteristics. While the Act does not prohibit local governments from appropriately considering nuisance or criminal conduct when enacting laws related to housing, governments should ensure that such ordinances and related policies or practices do not discriminate in violation of the Fair Housing Act.

Eighty percent of domestic violence victims are women, and in some communities, racial or ethnic minorities are disproportionately victimized by crime. Where the enforcement of a nuisance or crime-free ordinance penalizes individuals for use of emergency services or for being a victim of domestic violence or other crime, a local government bears the burden of proving that any discriminatory effect caused by such policy or practice is supported by a legally sufficient justification. Such a determination cannot be based on generalizations or stereotypes.

Selective use of nuisance or criminal conduct as a pretext for unequal treatment of individuals based on protected characteristics violates the Act. Repealing ordinances that deny access to housing by requiring or encouraging evictions or that create disparities in access to emergency services because of a protected characteristic is one step local governments can take to avoid Fair Housing Act violations and as part of a strategy to affirmatively further fair housing.

Helen R. Kanovsky, General Counsel