



SHADES OF GRAY

A historical look at occupancy policies.

THE FAIR HOUSING Amendments Act of 1988 established, for the first time, a federal law prohibiting discrimination against persons with familial status. Although the Act allowed housing providers to adopt reasonable occupancy standards, housing providers were left with uncertainty regarding what occupancy standards would be deemed reasonable under the Act.

It seems like I have been writing about occupancy policies forever. In February 1999, I wrote about the Keating Memorandum (discussed below) and how it affected the current presumed occupancy policy published by the Texas Commission on Human Rights. There has been much confusion over the years about what occupancy policy would constitute as safe harbor in the eyes of the U.S. Department of Housing and Urban Development. Apartment owners have been looking for guidance on what policy would constitute compliance with the Act for years.

Among all this confusion, the only thing that is clear is that we still don't have any firm answers.

Here we go again...

A Recent Complaint Challenging the Two Persons per Bedroom Policy

Local Fair Housing agencies in Indiana, Ohio, Michigan recently filed a Fair Housing complaint with HUD against a property management company with properties in each of those states. The complaint challenged the company's occupancy policy, which provided that a maximum number of two persons per bedroom could occupy a unit. Although HUD has not issued a determination in the complaint, the complaint's allegations warrant discussion. The complaint alleges:

(a) The occupancy policy does not consider the size or configuration of a unit or the size of the unit's bedrooms or other liv-

ing areas. The same two-person per bedroom policy applies to a two-bedroom, three-level 1,600 square foot townhome and a two-bedroom unit half the size.

(b) For at least one of the company's properties, children are counted as occupants at birth, so even a family of five, including an infant who sleeps in a crib, is unable to rent a spacious two-bedroom unit.

(c) The policy applies equally to one-bedroom units, preventing a couple with any children from renting those units at all, regardless of the size or configuration of the unit.

(d) For many of the company's floor plans, the occupancy policy is more restrictive than occupancy limitations imposed by applicable local agency law, which would allow more than two persons per bedroom to live in a number of its units.

The complaint alleged that the management company's occupancy policy was unreasonable and operates both to exclude and limit the number of families with children who can live on the properties, and thus discriminates against, and has a discriminatory adverse impact, on families with children.

Most importantly, the complaint also alleges that the management company ignores everything that HUD specifically directs housing providers to consider in setting occupancy standards and instead enforces the rigid policy, regardless the unit's square footage, bedroom count or any other factors.

The complaint states, under a similar circumstance, HUD issued charges of discrimination against a housing provider for rigidly enforcing a two-person per bedroom occupancy policy, particularly where the policy at issue was more restrictive than the local occupancy code. The complaint cites a HUD negotiated conciliation agreement that required the respondent to revise a two-person per

bedroom occupancy policy. The complainant further cites court cases that found a two-person per bedroom occupancy policy can have a discriminatory disparate impact on families with children in violation of the Act.

The Keating Memorandum

Several years ago, HUD adopted the standards set forth in a memorandum dated March 20, 1991 from Frank Keating, the general counsel of HUD. Unfortunately, the Keating Memorandum is vague and ambiguous with respect to designating any fine lines of what would be considered an acceptable policy.

The Keating Memorandum states that HUD believes that an occupancy policy of two persons per bedroom, as a general rule, is reasonable under the Act. However, the reasonableness of any occupancy policy is rebuttable, and the Keating Memorandum expressly states that HUD will not determine compliance with the Act based solely on the number of people permitted in each bedroom.

In reviewing occupancy policies, a notice provided by HUD on Dec. 18, 1998 designed to advise the public on the Keating Memorandum, provides that HUD will consider the following factors and hypothetical situations to determine whether an occupancy policy is reasonable:

Size of Bedrooms and Unit

Consider two situations in which a housing provider refused to permit a family of five to rent a two-bedroom unit based on a two-person per bedroom policy. In the first situation, the complainant is a family who applied to rent an apartment with two large bedrooms and spacious living areas. In the second, the complainant is a family who applied to rent a mobile home space with the intention to live in a small two-bedroom mobile home. Depending on other factors, the first situation

might be in violation of the Act, but the second would not.

Age of Children

Consider a hypothetical involving two housing providers that refuse to permit three persons to share a one-bedroom unit. In the first, the complainant is a family of two adults who apply to rent the unit with their infant child. In the second, the complainant is a family of two adults and one teenager. Depending on other factors, the first hypothetical may be a violation of the Act, when the second would not be.

Configuration of Unit

A family of two adults and three children is denied based on a two persons per bedroom occupancy policy. However, in one situation, the family was denied occupancy in a two-bedroom unit with a den or study. The same family was also denied occupancy in a two-bedroom unit without a den or study. Depending on other facts, a discrimination charge might be warranted in the first situation, but not in the second.

Other Physical Limitations of Housing

The Keating Memorandum also suggests

that housing providers should consider any other limiting factors, such as the capacity of the septic, sewer or other building systems.

State and Local Law

If a dwelling is governed by state or local government occupancy requirements and the housing provider's occupancy policies reflect those requirements, HUD would consider the governmental requirements as a special circumstance tending to indicate that the housing provider's occupancy policies are reasonable.

Other Relevant Factors

Other relevant factors in determining whether a policy is in compliance with the Act would be evidence that the housing provider has: (i) made discriminatory statements; (ii) adopted discriminatory rules governing the use of common facilities; (iii) taken other steps to discourage families with children from living in its housing; or (iv) enforced its occupancy policies only against families with children.

Occupancy Laws Affecting Housing Properties

The complaint against the property management company mentioned above suggests

that the company should base its occupancy policy on the 2012 International Property Maintenance Code, which would allow occupancy of substantially more persons per unit than the company's two-person per bedroom policy would allow.

In fact, the complaint states that with respect to some of the floor plans, the company could lawfully accommodate up to eight occupants in a two-bedroom unit.

Texas Law

Section 92.010 of the Texas Property Code provides that the maximum number of adults that a landlord may allow to rent a dwelling is three times the number of bedrooms in the dwelling. However, this statute also provides that a landlord may allow an occupancy rate of more than three adults per bedroom to the extent that the landlord is required by a state or federal Fair Housing law to allow a higher occupancy rate.

Houston Ordinance

Section 10-371 of the City of Houston Code of Ordinances provides that an "overcrowded" dwelling unit would constitute a dangerous building. The term overcrowded is defined as:

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(i) a dwelling unit not containing at least 150 square feet of net floor area for the first resident and at least 100 square feet of additional net floor area for each additional resident; or (ii) a dwelling unit of two or more rooms not containing at least 70 square feet of net floor area in each room occupied by one resident for sleeping purposes; or (iii) a dwelling unit of two of more rooms not containing at least 50 square feet of net floor area per resident in each room occupied by more than one resident for sleeping purposes.

In the calculation of net floor area, children younger than 1 years old are not considered residents and children at least 1 year old but younger than the age of 6, are considered half of one resident.

The Keating Memorandum does not appear to require an occupancy policy to be framed by a state or local law that provides a maximum occupancy level. Rather, the memorandum states that if the housing provider's occupancy policies reflect governmental requirements, HUD will consider the governmental requirements as a special circumstance tending to indicate that the housing provider's policies are reasonable. In

other words, there does not appear to be a requirement that the occupancy policy reflect governmental requirements; however, if the policy does reflect governmental requirements, HUD would tend to evaluate the policy as being reasonable.

What Should You Do?

In 1995, the Texas Commission on Human Rights published its terms for a reasonable occupancy policy. The essence of the TCHR's policy was that a family might occupy a dwelling if they do not exceed two persons per bedroom *plus* a child who is less than 6 months old. The two plus one approach is a bit more lenient than the two persons per bedroom policy, which is the subject of the complaint discussed above, but can be used to offset arguments that the other factors outlined in the Keating Memorandum have been considered.

It is important to note that the TCHR abandoned its policy several years ago, and the TCHR is no longer in existence. So, housing providers cannot rely on the TCHR policy. Additionally, Fair Housing complaints have been filed against providers that use a two plus one approach when the extra person is required to be 6 months old or less.

HUD and Fair Housing agencies seem to be more comfortable when the policy requires that the age of the extra person be a maximum of at least 2 years old, as long as no other factors suggest discriminatory conduct against families with children. Obviously, the higher the age of the extra person allowed by the policy, the better chances you will have defending Fair Housing challenges.

It should be noted from a disparate impact standpoint that even if your policy were challenged, if you have a substantial number of families with children residing at your property, you would be better able to defend yourself against a familial status claim.

One might say that 50 shades of gray continue to describe the status of the law with respect to identifying any safe harbors for occupancy policies. However, by reviewing your policies and being familiar with the standards HUD uses to determine whether policies are reasonable, you should be able to avoid unnecessary problems and defend yourself against unwarranted claims.

Good luck! 



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