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WALKING A TIGHTROPE:
HARMONIZING CODE ENFORCEMENT AND THE FAIR HOUSING ACT

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The federal Fair Housing Act ("FHA" or "FHAA") prohibits discrimination in the sale or rental of housing. 42 U.S.C. §3601, *et seq*. A governmental entity can incur liability under the FHA related to its code enforcement activities, particularly when the entity enforces zoning, building, or other housing-related regulations. The purpose of this paper is to inform you of the basics of the Fair Housing Act so that your jurisdiction is better equipped to balance the obligations of the federal Fair Housing Act with the necessity of code enforcement.

The Fair Housing Act

The FHA was passed by Congress after the Kerner Commission concluded that the United States was "moving toward two societies, one black, one white – separate and unequal." Report of the National Advisory Commission on Civil Disorders, Summary of Report, Introduction, pg.1 (1968). It was signed into law by President Johnson. *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project*, 135 S.Ct. 2507, 2516 (2015). The FHA was amended in 1974 and 1988. The purpose of the FHA is "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. §3601 (*Declaration of Policy*). It applies to governmental entities, individuals, and private entities.

Prohibitions

The FHA prohibits discrimination against an individual or entity based on race, color (skin tone), national origin, familial status, religion, sex, and disability[2]. 42 U.S.C. §3604. More specifically, the FHA makes it unlawful to:

- refuse to rent, sell, or otherwise make a dwelling[3] unavailable;
- impose discriminatory terms, conditions, or privileges of sale or rental of a dwelling or in the provision of services;[4]
- misrepresent that a dwelling is not available for inspection, sale, or rental when in fact it is so available;

[1] The opinions expressed in this paper are my own, not an official opinion of the City of Austin or its City Attorney.
[2] The FHA actually uses the term "handicapped"; however, this paper uses "disability" because it is the preferred term.
[3] The FHA defines "dwelling" as any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof. 42 U.S.C. §3602(b).
[4] This can include delay tactics, regardless of sophistication. *Williams v. Matthews*, 499 F.2d 819, 826 (8th Cir. 1974).

- impose discriminatory terms in real estate-related transactions;
- induce a person to sell/rent because of the types of individuals that may enter the neighborhood; and
- make, print, or publish discriminatory statements, notices, or advertisements.

42 U.S.C. §§3604, 3605, and 3606. The protections provided by the FHA are interpreted broadly in favor of accomplishing the declared policy of the FHA. *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1289 (7th Cir. 1977); *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731 (1995); *Walker v. City of Lakewood*, 272 F.3d 1114, 1129 (9th Cir. 2001); *Community Housing Trust v. Dept. of Consumer and Regulatory Affairs*, 257 F.Supp.2d 208, 220 (D.C. Cir. 2003).

Protections Specific to Disability

In addition to the protections described above, the FHA imposes certain duties on property owners, property managers, and governmental entities related to individuals with disabilities. An individual with a physical or mental impairment that substantially limits one or more major life activities is disabled under the FHA definition. 42 U.S.C. §3602(h). A physical or mental impairment includes orthopedic, visual, speech and hearing impairments, autism, emotional illness, and recovering drug addicts and alcoholics. Reasonable Accommodations under the Fair Housing Act, Joint Statement of the Department of Housing and Urban Development and the Department of Justice, ¶3, pg. 3 (May 17, 2004).

The duties imposed by the FHA are to provide reasonable accommodations, reasonable modifications, and to design and construct multifamily properties to be accessible to an individual with a disability. 42 U.S.C. §3604(f). Congress created these specific duties because, over time, communities have adopted regulations that may be neutral but nevertheless have a "discriminatory effect on the housing choices available for the disabled." *Groome Resources Ltd., L.L.C. v. Parish of Jefferson*, 234 F.3d 192, 201-202 (5th Cir. 2000).

A reasonable accommodation[5] is a change, exception, or adjustment to a rule, policy, practice, or service that is necessary to afford a person with a disability an equal opportunity to use and enjoy a dwelling. An accommodation is reasonable when it (1) does not impose an undue financial or administrative burden, and (2) does not equate to a fundamental alteration of a jurisdiction's zoning and land use regulations. *Tsombanidis v. West Have Fire Dept.*, 352 F.3d 565, 580 (2nd Cir. 2003); *Oxford Housing, Inc. v. City of Baton Rouge*, 923 F.Supp.2d 683, 692 (M.D. Louisiana 2013); *See generally* Group Homes, Local Land Use, and The Fair Housing Act, Joint Statement of the Department of Housing and Urban Development and the Department of Justice (August 18, 1999). Whether a requested accommodation is reasonable is a fact-specific analysis that must be done on a case-by-case basis. *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096, 1104 (3rd Cir. 1996).

[5] This paper focuses on reasonable accommodations because of its applicability to code enforcement.

Retaliation

In addition to prohibiting discrimination, the FHA prohibits retaliation against someone that exercises his or her rights under the FHA or against an individual who aids or encourages another to exercise or enjoy his or her rights under the FHA. 42 U.S.C. §3617. Retaliation includes coercion, interference, intimidation, and threats. *Walker*, 272 F.3d at 1128-1129. An individual or entity can be subject to liability for retaliation. *City of Baton Rouge*, 932 F.Supp.2d at 699-700. What constitutes interference, a form of retaliation, has been viewed broadly. *Walker*, 272 F.3d. at 1129.

A retaliation claim can be established utilizing the *McDonnell Douglas* framework. *Walker*, 272 F.3d. at 1128. The prima facie case shows (1) complainant engaged in protected activity, (2) respondent subjected complainant to an adverse action, and (3) a causal link existed between the protected activity and the adverse action. *Id*. If a complainant makes a prima facie case, the respondent has the burden to articulate a nondiscriminatory reason for its action. If the respondent is able to articulate a nondiscriminatory reason, the complainant has the ultimate burden to show that the reason is pretext. *Id*.

Theories of Liability for Housing Discrimination

Liability for housing discrimination as it concerns a governmental entity may be based on one or more of these three theories: intentional discrimination, disparate impact, and failure to make a reasonable accommodation. *Tsombanidis*, 352 F.3d at 573.

Intentional Discrimination

To establish intentional discrimination, the complainant needs to prove that his or her status was the motivating factor behind the respondent's action(s). *Tsombanidis*, 352 F.3d at 579. The complainant can rely on direct or circumstantial evidence or by making a prima facie case under the *McDonnell Douglas* framework. *South Middlesex Opportunity Council, Inc. v. Town of Framingham*, 752 F.Supp.2d 85, 96 (D. Mass. 2010).

When analyzing a claim based on intentional discrimination and a governmental entity, the courts will consider the following factors: "(1) the discriminatory impact of the governmental decision; (2) the decision's historical background; (3) the specific sequence of events leading up to the challenged decision; (4) departures from the normal procedural sequences; and (5) departures from normal substantive criteria." *Tsombanidis*, 352 F.3d at 580 (citing *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 266-268 (1977). It is important to note that courts will impute discrimination to government action that is taken in response to "significant community bias." *Community Housing Trust*, 257 F.Supp.2d at 227.

Disability

A law that singles out the disabled for different treatment is subject to a claim of intentional discrimination. *Community Housing Trust*, 257 F.Supp.2d at 222. The FHA does not allow a jurisdiction to apply land-use regulations in a manner that excludes individuals with disabilities from living in a residential area. *Howard v. City of Beavercreek*, 276 F.3d. 802, 807 (6th Cir. 2002). A city can refute a claim if it can establish that the differential treatment is based upon the "unique and special needs and abilities of those handicapped persons to whom the regulations apply." *Community Housing Trust*, 257 F.Supp.2d at 228 (citing *Marbrunak, Inc. v. City of Stow*, 974 F.2d 43, 47 (6th Cir. 1992). The different treatment must convey a benefit to an individual with a disability or be in response to a legitimate public health and safety issue. *Id*. It cannot deny an individual with a disability the opportunity to enjoy the dwelling of his or her choice. *Trovato v. City of Manchester*, 992 F.Supp. 493, 497 (D. New Hampshire 1997).

Disparate Impact

After two other attempts to decide the issue of whether disparate impact is cognizable under the FHA, the United States Supreme Court in June of 2015 ruled disparate impact is a viable cause of action under the FHA. *Texas Department of Housing and Community Affairs, et al v. Inclusive Communities Project, Inc., et al.*, 135 S.Ct. 2507 (2015). While the Supreme Court's decision recognizing a disparate impact cause of action under the FHA is recent, federal appellate courts began recognizing the disparate impact cause of action in 1974. By 1988, nine Courts of Appeals recognized a disparate impact cause of action under the FHA.[6]

A disparate impact claim alleges that a facially neutral government regulation or action has a significant adverse impact on members of a protected class. See *Gallagher v. Manger*, 619 F.3d 823, 833 (8th Cir. 2010). A claim for disparate impact will succeed if it shown that the policy acts as an "artificial, arbitrary, and unnecessary burden." *Inclusive Communities Project, Inc.*, 135 S.Ct. at 2524. Disparate impact liability serves to remove "artificial, arbitrary, and unnecessary barriers" that perpetuate segregation or are arbitrary. *Id.*, 135 S.Ct. at 2522.

To prevail on a disparate impact claim, a complainant must establish that a specific policy or policies cause a statistical disparity. 24 C.F.R. § 100.500(c)(1). Assuming a complainant meets that burden, in order to avoid liability, the government must show that the policy or policies are "necessary to achieve a valid interest." *Inclusive Communities Project, Inc.*, 135 S.Ct. at 2523. More specifically, the U.S. Department Housing and Urban Development ("HUD") regulations require the government to prove that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the government. 24 C.F.R. § 100.500(c)(2). The Supreme Court likened this burden to the business necessity defense utilized in Title VII actions. *Id.*, 135 S.Ct. at 2522-2523. Even if the government proves the necessity of the

[6] A list of the cases decided prior to 1988 can be found at *Inclusive Communities Project, Inc.*, 135 S.Ct. at 2519.

regulation, a complainant can prevail on a disparate impact if he or she can show that the substantial, legitimate and nondiscriminatory interests can be served by a different practice with less discriminatory effect. 24 C.F.R. § 100.500(c)(3).

Failure to Reasonably Accommodate

Denial of a reasonable accommodation constitutes discrimination. The elements of a failure to reasonably accommodate claim are: (1) complainant demonstrates that he or she suffers from a disability as defined by the FHA; (2) the city knew or reasonably should have known of the disability; (3) the accommodations may be necessary to afford the individual with a disability an equal opportunity to use and enjoy the dwelling; and (4) the city refused to make such an accommodation. *Budnick v. Town of Carefree*, 518 F.3d 1109, 1119 (9th Cir. 2008). Based on the existing case law, the most contested elements of a reasonable accommodations claim are the necessity of the accommodation and refusal to make the accommodation.

Necessity

An individual with a disability needs the accommodation in order to use and enjoy the dwelling. *City of Beavercreek*, 276 F.3d at 806. This is established when the requestor shows a nexus between the request and the disability. *City of Baton Rouge*, 923 F.Supp.2d at 693. To determine whether there is a nexus, a city may request information related to the disability only to the extent necessary to show how the accommodation is necessary in light of the individual's disability. Reasonable Accommodations under the Fair Housing Act, Joint Statement of the Department of Housing and Urban Development and the Department of Justice, ¶¶17-18, pp. 12-14 (May 17, 2004).

Refusal

Unless the complainant can show the request would be futile, a city cannot be liable for a failure to reasonably accommodate if the complainant does not give the city an opportunity to grant the accommodation. *Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1219 (11th Cir. 2008); *City of Baton Rouge*, 923 F.Supp.2d at 691. That being said, a municipality refuses to make a reasonable accommodation if it denies a request solely on the basis that the requestor did not follow the established process. Reasonable Accommodations under the Fair Housing Act, Joint Statement of the Department of Housing and Urban Development and the Department of Justice, ¶15, pg.11 (May 17, 2004).

When considering a claim for a failure to reasonably accommodate, courts look at whether the denial is based on facts specific to that property or whether the denial is based upon generalizations. *Schwarz*, 544 F.3d at 1221-1222. Denial of a reasonable accommodation can be constructive or actual. *Groome*, 234 F.3d at 199. Unjustifiable delay is considered a constructive denial. *Id*.

Occupancy Limits

The most common ordinance to generate a claim for failure to reasonably accommodate is a zoning ordinance that sets limits on the number of non-related occupants that can reside in the home (referred to as a "zoning occupancy limit").

Prior to the Supreme Court's decision in *City of Edmonds v. Oxford House, Inc.*, a municipality might have argued that its zoning occupancy limit for single-family homes was exempt from the FHA as a maximum occupancy limit.[7] However, in the *City of Edmonds*, the Supreme Court held that occupancy limits delineating between related and unrelated (or that defines family) are not exempt for the FHA. *City of Edmonds*, 514 U.S. at 738. Because zoning occupancy limits are subject to the FHA, a city must provide reasonable accommodations to an individual with a disability. When considering a request for a reasonable accommodation to a zoning occupancy limit, a city needs to determine if the request will equate to a fundamental alteration of a jurisdiction's zoning and land use regulations. *Tsombanidis*, 352 F.3d at 580.

Enforcement of the FHA

Federal Enforcement

HUD is the federal agency charged with enforcing the FHA. 42 U.S.C. §§3608 (*Administration*), 3610 (*Administrative Enforcement; Preliminary Matters*). HUD investigates housing discrimination complaints. If, after an investigation, HUD determines that there is cause to believe discrimination occurred, it will issue a charge of discrimination. 42 U.S.C. §3610. A charge of discrimination may be decided in a court of law or through an administrative hearing. 42 U.S.C. §3612 (*Enforcement by Secretary*). If a party elects to have the charge decided in court, the Department of Justice ("DOJ") represents HUD. 42 U.S.C. § 3614 (*Enforcement by the Attorney General*).

Private Cause of Action

The FHA may be enforced through private litigation. 42 U.S.C. §3613 (*Enforcement by Private Persons*). Filing a complaint with HUD is not a prerequisite to filing. *Id*. The statute of limitations is two years from the date of the discriminatory act or the termination of the discriminatory practice. *Id*.

[7] When Congress amended the FHA in 1988 to add familial status protections, there were concerns that the protection would create public health and safety issues because landlords and the government could not limit the number of individuals residing in a property. *City of Edmonds v. Oxford House, Inc.*, 514 U.S. at n. 9. To address that concern, Congress included an exemption for an overall maximum occupancy limit to prevent overcrowding. *Id.* and 42 U.S.C §3607(b)(1).

Penalties

The statutory consequence for violating the FHA include actual and punitive damages, injunctions, attorney's fees and costs, and if the case is prosecuted by the DOJ, civil penalties. *See* 42 U.S.C. §§ 3612 through 3614.

If a local jurisdiction (including a state) is found to have engaged in housing-related discrimination, it may impact its funding from HUD. More specifically, a finding that the jurisdiction engaged in housing discrimination may result in a claim that the jurisdiction violated its duty to affirmatively further fair housing. Such a claim is brought under the Federal False Claims Act (31 U.S.C. §3729) because, as a condition of HUD funding, the jurisdiction certifies that it will affirmatively further fair housing. See generally *U.S. ex rel. Anti-Discrimination Center of Metro New York, Inc. v. Westchester County*, 668 F.Supp.2d 548 (S.D. New York 2009). The Federal False Claims Act provides for a civil penalty of not less than $5,000 and not more than $10,000 and 3 times the amount of damages sustained by the government. 31 U.S.C. §3729(a).