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Municipal Lawyer

THE JOURNAL OF LOCAL GOVERNMENT LAW

Ten Tips for Lawyer Well-Being in the Age of Coronavirus

MAY
JUN
2021
VOL.62
NO.03



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Avoiding A Collision When Code Enforcement and Fair Housing Intersect

BY: PATRICIA (TRISH) LINK,
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Introduction

Local governments adopt laws and policies that regulate fire safety, public health, nuisance issues, zoning, and structural hazards and other unsafe building conditions and are intended to improve public health, safety, and welfare. Many of these laws and policies apply to residential property and uses. When those laws are violated, a code enforcement officer acts with the goal of achieving compliance, preferably voluntary compliance.

Fair housing choice exists when an individual has the opportunity and options to live where the individual chooses without unlawful discrimination and other barriers related to race, color, religion, sex, familial status, national origin, or disability. The purpose of the Federal Fair Housing Act (the "Act")[1] is to provide for fair housing choice. However, there are times when local government laws, policies, and actions affect fair housing choice, even when intended to protect public health, safety, and welfare. This is particularly true in the code enforcement context because compliance with those laws and policies has the potential to reduce fair housing choice. This potential consequence is where code enforcement and fair housing intersect.

This article will explain the Act, four ways that code enforcement actions can collide with the Act, and how to reduce the likelihood that the collision will result in liability for our local government clients.

THE ACT

Congress passed the Act shortly after the assassination of Dr. Martin Luther King, Jr. and the release of the Report of the National Advisory Commission on Civil Disorders (the "Kerner Report"). The Act, also referred to as Title VIII, prohibits discrimination related to the pursuit and retention of housing. To that end, the Act, as it was passed in 1968, prohibited discrimination based on race, color, religion, and national origin. In 1988, the Act was amended to also prohibit discrimination based on familial status,[2] disability,[3] and sex.

1. Application to Local Governments.

The Act prohibits discrimination by a person. The courts have ruled that a person includes local government.[4] This means that the Act prohibits government practices, policies, and regulations that discriminate based on race, color, religion, national origin, familial status, disability, and sex (collectively "protected classes"). This includes enforcement actions where discrimination is the motivating factor, certain actions with a discriminatory effect, and retaliation. In addition to its prohibitions, the Act also requires a local governmental entity to grant reasonable accommodations to disabled individuals. Lastly, the Act preempts local laws that allow or require actions that constitute housing discrimination.[5]

2. Enforcement of the Act.

The Act is enforced through administrative investigations conducted by the U.S. Department of Housing and Urban Development ("HUD").[6] It can also be enforced in a lawsuit filed by the U.S. Department of Justice ("DOJ") or by a person aggrieved by a discriminatory housing

practice.[7] The filing of a complaint with HUD must occur within one year from the date the discriminatory practice occurred or was terminated.[8]

The DOJ will file a lawsuit during an investigation if the Secretary of HUD believes temporary or preliminary relief is necessary.[9] However, the more likely result is a lawsuit that is filed after an investigation because the Secretary determines that there is reasonable cause to believe the Act was violated and one party to the investigation requests a judicial determination.[10] Additionally, a person aggrieved by a discriminatory housing practice may file a lawsuit within two years from the date the discriminatory practice occurred or was terminated.[11] It is important to note that a person aggrieved by a discriminatory housing practice is not required to file a complaint with HUD before filing a lawsuit.

The consequences for violating the Act include damages, injunctive relief, and payment of costs and attorney's fees.[12] Additionally, if the case is brought by the DOJ, the court may assess civil penalties.[13] Lastly, for local governments who receive federal funding from HUD, a finding that discrimination occurred could result in a loss of that funding and, in some instances, another lawsuit under the False Claims Act.[14]

TYPES OF DISCRIMINATION

An administrative investigation or lawsuit will allege one or more types of discrimination. There are four types that are likely to arise in the code enforcement context. The first is a claim that the local government failed to grant a reasonable accommodation. The second and third types, disparate treatment and disparate impact, are somewhat related in that they claim that the local government's policies or actions were discriminatory. The fourth is retaliation for exercising a right or assisting another with exercising a right.

The consequences for violating the Act include damages, injunctive relief, and payment of costs and attorney's fees. Additionally, if the case is brought by the DOJ, the court may assess civil penalties.Lastly, for local governments who receive federal funding from HUD, a finding that discrimination occurred could result in a loss of that funding and, in some instances, another lawsuit under the False Claims Act.

1. Failure to Grant a Reasonable Accommodation

One of the most common allegations lodged against a local governmental entity is that it failed to grant a reasonable accommodation. This type of discrimination can arise easily in code enforcement activities. A reasonable accommodation is an exception to or modification of a policy or law that is reasonable and necessary to afford an individual with a disability an equal opportunity to use and enjoy the housing of their choice.[15] It is specific to an individual with a disability.

In code enforcement, a request for a reasonable accommodation typically arises during an investigation. One example is an investigation involving over-occupancy. After sending a notice of violation, the code enforcement officer may receive a letter from an attorney representing the occupants who request an accommodation to the occupancy limit. In such an instance, the reasonable accommodation will bring the property into compliance with occupancy requirements. It can also arise during the remedial portion of the enforcement process. For example, a code officer investigates the exterior of a house for unsanitary conditions and requires the property owner to abate the nuisance condition within a particular timeframe. The code enforcement officer may receive a request for additional time to abate the nuisance condition because the property owner's disability causes delays.[16]

a. Accommodations.

An individual qualifies as disabled under the Act if the individual has: (1) a physical or mental impairment which substantially limits one or more major life activities, (2) a record of such an impairment, or (3) being regarded as having such an impairment.[17] An accommodation is necessary when it provides an individual with a disability an equal opportunity to use and enjoy the housing of their choice. This standard can also be articulated as: "but for the accommodation" the individual with a disability cannot "use and enjoy his or her residence as a non-disabled

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person could."[18] Also important to this standard is the phrase "housing of their choice", which reflects the unique nature of property and means a specific property, not "an opportunity to live somewhere in the city."[19] Examples of reasonable accommodations include: increasing the number unrelated adults that qualify as a family;[20] increasing impervious cover to allow the homeowner to add an elevator or a ramp; or reducing a side set back to widen the driveway for the individual's disability-accessible van.

b. Process.

The right to a reasonable accommodation is not triggered until a request is made.[21] The purpose of a request is to put a person on notice that the individual is disabled and needs an accommodation. It should be considered on a case-by-case basis. Once a request is made, enforcement process should cease while the request is considered. A request does not need to include any specific language.[22] The request can be made by the individual with a disability or it can be made on behalf of the individual with a disability.[23] If the local government establishes a process, a requestor needs to follow the process.[24] However, failure to follow the process is not a basis to deny an accommodation and a local government should be prepared to work with a requestor. Likewise, the process cannot be overly burdensome.[25]

As the Joint Statements from HUD and the DOJ explain, the amount of information the local government can seek from a requestor is limited.[26] For example, if the disability is obvious, the local government cannot ask for information confirming the disability. But if the disability is not obvious, then the local government can ask about the disability within certain limitations. Sometimes the connection between the disability and the need for the accommodation is not clear. To address that situation, the local government can request information that shows why the accommodation is necessary to allow the individual with a disability an equal opportunity to use and enjoy the dwelling.[27]

c. Denials.

A person violates the Act when they fail to grant a reasonable accommodation (also referred to as "denying the reasonable accommodation"). A local government denies a reasonable accommodation when there is an unreasonable delay in the decision-making process, which is also referred to as a constructive denial, or with an explicit denial. Either situation can result in liability for your client.

Unreasonable delay can occur when there is uncertainty about the request process, indecisiveness about the decision on a request, or the request gets lost in the shuffle.[28] To avoid unreasonable delay, it is important to establish, before a request is received, the decision-making process, timeframes for decision-making, and the decision-maker. This can be accomplished through regulations like those adopted by Laguna Beach, California; Boynton Beach, Florida; and Austin, Texas.[28]

There are three possible reasons why your client may deny a requested accommodation.[30] First, your client may conclude that the requestor is not disabled. Alternatively, the information provided may reveal that there is not a disability-related need for the accommodation. Lastly, your client may refuse to grant an accommodation because it is not reasonable.

There are two standards that determine whether an accommodation is unreasonable. However, establishing one or both standards is difficult. For this reason, determining that a request is unreasonable should be the exception, not the norm.

First, an accommodation under the Act is not reasonable when it will create an undue financial or administrative burden on the local government. To determine whether the accommodation is unreasonable under this standard, the local government should consider "the nature and extent of the administrative burden and the cost of the requested accommodation to the local government, the financial resources of the local government, and the benefits that the accommodation would provide to the persons with disabilities who will reside in home."[31] This means that, depending on the size and resources of the local government, it may be difficult to demonstrate a financial or administrative burden.

The reasonableness of the requested accommodation is also judged against whether it will constitute a fundamental alteration in the nature of the local government's land use and zoning regulations. The court in *Schwarz v. City of Treasure Island* described the fundamental alteration standard as a modification that would "eliminate an 'essential' aspect of the relevant activity."[32] The Court's opinion illustrates this standard using two zoning-related cases.

If the requested accommodation is not reasonable, then the Act requires the parties to discuss whether an alternative accommodation is appropriate.[33] This is typically referred to as the "interactive process." Enforcement should not move forward during the interactive process.

An alternative accommodation should be something that addresses the needs of both parties. An alternative accommodation may be the requested accommodation plus conditions that make it reasonable. For example, an alternative accommodation may grant an increase in the number of unrelated individuals (the requested accommodation) but the limit the number of cars parked at the property (a condition that mitigates the number of individuals residing at the property). If the alternative accommodation is acceptable to both parties, then it should be granted.[34]

To defend a decision that an accommodation is not reasonable when the interactive process fails, your client will be required to demonstrate why the request is not reasonable. For example, your client may receive a request to extend the compliance time frame because

the property owner is disabled and was hospitalized (due to the disability) during the compliance time frame. If your client determines this is not a reasonable accommodation, then your client will need to demonstrate how extending the compliance timeframe creates a financial or administrative burden for the city, or results in a fundamental alteration to the land use or zoning regulations. If your client receives a request to increase the occupancy limit so that six unrelated adults constitutes a family instead of four unrelated adults, your client will need to demonstrate how this modification would result in a fundamental alteration to the city's zoning regulations.

2. Disparate Treatment

Disparate treatment is different treatment because the person (or group of persons) is a member of a protected class. This type of discrimination occurs when the local government enforces its regulations *because* the person (or group of persons) is a member of a protected class. A person is not required to show an express intent to discriminate to prove different treatment. Instead, a person can establish discrimination by showing that it is more likely than not that the government was improperly motivated to act because of discrimination.

When improper motivation is alleged, courts will typically focus on five considerations:[35] (1) historical background of the decision; (2) the specific sequence of events leading up to the decision; (3) departures from the normal procedural sequence; (4) substantive departures;[36] and (5) the legislative history or discriminatory impact of the government's decision.[37] It is important to note that improper motive does not need to be the sole reason for taking action.[38]

The community's role related to the considerations described above will be included in the analysis. This means that the community's fears, prejudices, stereotypes, or assumptions about individuals can be attributed to the government and be evidence of animus (an improper motive). This applies even if the decision-making body does not express those same beliefs. The Second Circuit's decision in *Innovative Health Systems, Inc. v. City of White Plains* shows how community animus supports a finding of improper motivation:

> Although the City may certainly consider legitimate safety concerns in its zoning decisions, it may not base its decisions on the perceived harm from such stereotypes and generalized fears…a decision made in the context of strong, discriminatory opposition becomes tainted with discriminatory intent even if the decision makers personally have no strong views on the matter.[39]

Improper motive can be shown through direct or circumstantial evidence.[40] For this reason, community members and decision-makers are not required to use explicit references to race, national origin, color, religion, sex, familial status, or disability.[41] Instead, a person may use "code words" or euphemisms to demonstrate discriminatory intent.[42] Whether language constitutes discriminatory "code words" is considered in light of local customs and historical usage of the words.[43]

How improper motivation and, therefore, disparate treatment, can occur during code enforcement is best shown through the following example.[44] A city limits the number of unrelated individuals who can reside in a dwelling. However, the city rarely takes enforcement action against over-occupied homes within residential neighborhoods. One day, the city begins to receive multiple complaints from neighbors who reside in the same area as a home used by individuals recovering from substance abuse. The neighbors claim that the property is over-occupied and that it should be shut down.

A code enforcement officer responds to the complaints and confirms that the property is over-occupied because there are eight unrelated adults living there when the occupancy limit is six unrelated adults. During the investigation, the individuals who reside in the home explain they have lived in the home for almost a year, they are disabled, and that it is necessary for eight unrelated adults to live at the home. The code enforcement officer documents this information and informs a supervisor about the investigation. Subsequently, the supervisor receives calls and emails from members of the city council and neighbors demanding the city shut down the house since the neighbors believe there will be an increase in crime and other related ills because the residents are disabled. After further discussions with city council members and neighbors, the code enforcement officer begins proceedings to shut down the home. The residents sue the city for violating the Act and allege disparate treatment based on disability.[45]

When the case goes to trial, the plaintiffs provide evidence of the specific sequence of events leading up to the decision; that, by moving to shut down the house, the city substantively departed from its normal response to over-occupancy; and that the enforcement action had a discriminatory impact on individuals with disabilities. Additionally, the plaintiffs provide evidence of the role the council members and neighbors played in those considerations. In this example, it is likely a judge or jury would find that the evidence shows that enforcement was improperly motivated by discrimination.

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Code Enforcement *cont'd from page 21*

Conclusion

As shown above, the potential for a collision between code enforcement and fair housing is real. In Part 2 of this article, to be published in the July-August *Municipal Lawyer*, we'll examine disparate impact and retaliation; and ways to reduce the risk when code enforcement and fair housing collide. ML

Notes

1. 42 U.S.C. § 3601 et seq.
2. Familial status means an adult who lives with one or more individuals who have not reached age 18. The adult is a parent, guardian, or other individual with legal custody of the individuals who have not reached age 18. This term also includes the designee of a parent, guardian, or other individual with permission from the individual with legal custody. This status applies to someone who is pregnant or in the process of securing legal custody of any individual who has not attained the age of 18 years.
3. The Act uses the term "handicap." However, this article (and many other publications) use the term "disability" in lieu of "handicap" since the two terms have the same meaning.
4. U.S. v. City of Parma, 661 F.2d 562, 573 (6th Cir. 1981).
5. 42 U.S.C. § 3615.
6. 42 U.S.C. § 3610.
7. 42 U.S.C. §§ 3613, 3614.
8. 42 U.S.C. § 3610(a).
9. 42 U.S.C. § 3610(e)
10. 42 U.S.C. § 3614.
11. 42 U.S.C. § 3613.
12. 42 U.S.C. §§ 3612, 3613, and 3614.
13. 42 U.S.C. § 3614.
14. The consequences for a False Claims Act violation include repaying the funds provided by the federal government and treble damages. 31 U.S.C. § 3729. An example of this type of case is U.S. ex rel. Anti-Discrimination Center v. Westchester County, 668 F. Supp. 2d 548 (S.D.N.Y. 2009.
15. Austin v. Town of Farmington, 826 F.3d 622, 627-628 (2d Cir. 2016).
16. McGary v. City of Portland, 386 F.3d 1259 (9th Cir. 2004).
17. 24 C.FR. § 100.201.
18. Anderson v. City of Blue Ash, 798 F.3d 338, 361 (6th Cir. 2015).
19. Oxford House, Inc. v. City of Baton Rouge, 932 F. Supp. 2d 683, 694 (M.D. La. 2013).
20. Unlike occupancy limits that are based on an overall maximum number of individuals without regard to relationship, occupancy limits that allow a family or a certain number of unrelated individuals will occupy the dwelling are subject to the Act. City of Edmonds v. Oxford House, Inc., 514 U.S. 725 (1995). These limits are also very susceptible to legal challenges.
21. Bhogaita v. Altamonte Heights Condominium Ass'n, Inc., 765 F.3d 1277, 1285-1286 (11th Cir. 2014); Oxford House, Inc. v. City of Virginia Beach, 825 F. Supp. 1251, 1261-1262 (E.D. Va. 1993).
22. Joint Statement of the Department of Housing and Urban Development (HUD) and the Department of Justice (DOJ): State and Local Land Use Laws and Practices and the Application of the Fair Housing Act, November 10, 2016, Q. No. 22, pp. 16-17, https://www.justice.gov/opa/file/912366/download (last visited April 7, 2021).
23. This person may live with the individual with a disability, provide housing to the individual with a disability, or be the individual's representative. The most important part of a request is that an individual with a disability will reside in the residence that is the subject of the requested accommodation.
24. This is true unless a plaintiff can show that following the request is futile. United States v. Vill. of Palatine, 37 F.3d 1230, 1234 (7th Cir. 1994).
25. Joint Statement Nov. 10, 2016, *supra* note 22, Q. No. 23, pg. 17, https://www.justice.gov/opa/file/912366/download (last visited April 7, 2021)
26. *Id.*; Joint Statement of the Department of Housing and Urban Development (HUD) and the Department of Justice (DOJ): Reasonable Accommodations Under the Fair Housing Act, May 17, 2004, Q. Nos. 17 and 18, pgs. 12-13, https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/joint_statement_ra.pdf (last visited April 7, 2021).
27. Joint Statement May 17, 2004, *supra* note 26, Q. No. 18 pg. 14, https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/joint_statement_ra.pdf (last visited April 7, 2021).
28. Groome Resources Ltd., L.L.C. v. Parish of Jefferson, 234 F.3d 192, 199-200 (5th Cir. 2000) and Joint Statement May 17, 2004, *supra* note 26, Q. No. 15 pg. 11, https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/joint_statement_ra.pdf (last visited April 7, 2021).
29. *See* Laguna Beach Code of Ordinances Section 25.05.080; Boynton Beach Code of Ordinances Part III, Chapter 2, Article II, Section 4; and Austin City Code Chapter 2-14.
30. In many instances, drug or alcohol abuse recovery is considered a disability under the Act. However, at least one district court ruled that it is not a *per se* disability. *See* City of Baton Rouge, 932 F. Supp. 2d at 688-689.
31. Joint Statement Nov. 10, 2016 *supra* note 22, Q. no. 21, pg. 15, https://www.justice.gov/opa/file/912366/download (last visited

April 7, 2021).
32. Schwarz v. City of Treasure Island, 544 F.3d 1201, 1220-1221 (11th Cir. 2008).
33. Joint Statement Nov. 10. 2016, *supra* note 22, Q. No. 21, pg. 16, https://www.justice.gov/opa/file/912366/download (last visited April 7, 2021).
34. *Id.*
35. *City of Baton Rouge*, *supra* note 19 (citing to Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266-268 (1977).) This is not an exhaustive list of considerations. *See* Tsombanidis v. West Haven Fire Dept., 352 F.3d 565, 580 (2d Cir. 2003).
36. This means factors that the decision-making body considers important strongly favor a decision contrary to the one reached. *Village of Arlington Heights, supra* note 35 at 266-268.
37. *Tsombanidis*, *supra* note 35 at 580.
38. Avenue 6E Investments, LLC v. City of Yuma, 818 F.3d 493, 504 (9th Cir. 2016).
39. Innovative Health Sys., Inc. v. City of White Plains, 117 F. 3d 37, 49 (2d Cir. 1997).
40. *City of Yuma*, *supra* note 38 at 504.
41. *Id. at 504-507.*
42. *Id.*
43. *Id.*
44. This is an abbreviated example of how the community can improperly motivate the local government. For additional fact patterns, see *City of Baton Rouge*, *supra* note 19; *Tsombanidis, supra* note 35; and People Helpers, Inc. v. City of Richmond, 789 F. Supp. 725 (E.D. Va. 1992).
45. As discussed under "Failure to Grant a Reasonable Accommodation," this would also likely constitute a constructive denial of a reasonable accommodation.



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