

HOUSING FOR PUBLIC EMPLOYEES

Fair Housing Issues and Options

21 Elements – TAC Meeting #35

March 6, 2018

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OVERVIEW

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- As the housing crisis continues, many public agencies are exploring housing assistance programs for employees
- Worker preferences in housing can be fraught with fair housing issues
- Various assistance models:
 - ▣ Agency-Owned and Operated Rental Housing
 - ▣ Developer-Owned and Operated Housing on Agency Land
 - ▣ Mandatory Employee Preferences as Financing Condition
 - ▣ Direct Financial Assistance

LEGAL FRAMEWORK

Federal Law

- Fair Housing Act (FHA) prohibits housing discrimination based on disability, family status, ethnicity, race, etc.
- HUD's "Affirmatively Furthering Fair Housing" Rules apply to projects receiving federal funds

State Law

- Fair Employment and Housing Act (FEHA) and Unruh Act include FHA protections; FEHA also prohibits "source of income" discrimination
- Gov't Code Sec. 65008 applies to land use decisions; also prohibits "lawful occupation" discrimination

DISCRIMINATION

Facial Discrimination

- Prohibited unless a restriction benefits the disabled or responds to legitimate safety concerns (not stereotypes)
 - ▣ *Community House v. City of Boise* (9th Circuit)

Facially Neutral but Discriminatory Intent

- Actions invalid if a discriminatory reason more likely than not motivated decision
 - ▣ *Pacific Shores v. City of Newport Beach* (9th Cir.)

DISPARATE IMPACT

- Actions that cause a “disparate impact” may be prohibited
 - ▣ Neutral policy causes disparate impact on protected group
- Agency may demonstrate legitimate reason for policy
 - ▣ Even if disparate impact exists, plaintiff will only win if it shows there is another means to achieve the purpose with less impact
- *Inclusive Communities v. Texas Dept. of Housing* (US Supreme Court)

OTHER KEY STATE LAWS

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Gov't Code Sec. 54700.1-54702.15

- Employee Rental Housing (ERH) Chapter authorizes public agencies to “construct or cause to be constructed” housing for public employees
- At least 20% of units must be reserved for lower income households (80% AMI or below)

SB 1413 (HSC Sec. 53570-53574)

- “Teacher Housing Act” of 2016 authorizes school districts to acquire, construct, rehab, or preserve employee housing
- Majority of units must be reserved for moderate income households (120% AMI or below)

AGENCY OWNED AND OPERATED RENTAL HOUSING

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Advantages

- Authorized under ERH Chapter and Teacher Housing Act
- Likely complies with FEHA
- Facially-neutral policy for FHA

Potential Issues

- Liability under FHA if there is a disparate impact
- Agency assumes risks of developing and operating housing

DEVELOPER OWNED AND OPERATED RENTAL HOUSING

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Advantages

- Potential to reduced cost to agency by leveraging other financing sources
- Potentially complies with ERH Chapter and Teacher Housing Act
- Third party assumes risk of developing and operating housing

Potential Issues

- Liability under FHA if there is a disparate impact
- Housing funded with LIHTC must be available to “general public”
 - Conflicts with employee housing requirement
- HOME and CDBG prohibit employment requirements, though preferences may be ok
 - BUT some risk of “source of income” facial challenge under FEHA

EMPLOYEE PREFERENCES AS FUNDING CONDITION

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Advantages

- No additional cost to agency
- Risk-shifting to third party

Potential Issues

- Source of income discrimination under FEHA
- Disparate impact risk under FHA and FEHA
- Broader live/work preferences defensible, but offer little direct assistance to public employees

DIRECT FINANCIAL ASSISTANCE

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Advantages

- Minimizes fair housing concerns
 - ▣ FHA and FEHA regulate lenders, but don't apply to public agency compensation packages

Potential Issues

- High cost to public agency to provide assistance resulting in meaningful access to housing

TAKEAWAYS

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- No option completely eliminates fair housing risks
 - ▣ Very little case law re: source of income and legal occupation issues
- Strategies to minimize risk
 - ▣ Perform demographic analysis to understand potential for disparate impact
 - ▣ Consider HUD Handbook 4350.3, Section 4-6(C) (permits live/work preference)
 - ▣ Apply preferences only to some units in a project and don't reopen waiting list
- Must also consider other state laws:
 - ▣ CEQA applies to public agency projects
 - ▣ Cal. Const. Article 34 requires voter approval for “low rent housing projects” developed by public agencies
 - Exemption for projects that do not restrict more than 49% of units

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