

“Occupancy Restrictions and the FHA,” FLCAJ

May 7, 2020

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Many Associations’ Declarations contain occupancy restrictions relating to the number of bedrooms in a home or unit. The standard provision reads two person per bedroom are permitted in a unit or home. However, does this occupancy restriction violates the federal and/or Florida Fair Housing Acts (“FHA”)? The short answer is, it

depends.

Fair Housing Acts

The federal and Florida FHA’s are virtually identical. They prohibit discrimination against members of specified protected classes in a wide range of housing activities and transactions. One of these protected classes is “familial status” which is defined as a household which includes at least one minor child. Restrictions that disparately impact or disparately treat families with children differently than those without children, violate the FHA. Occupancy restrictions have been a topic of debate for a number of years with no definitive answer as to what is considered a reasonable restriction that does not violate the FHA.

By way of background, the federal FHA was enacted in 1968 and amended in 1988 to include “familial status” as a protected class. The FHA did not address a housing provider’s ability to enact occupancy restrictions. Between 1989 and 1991, the first cases charging familial status violations based upon restrictive residential occupancy standards were filed against housing providers with no clear legal standard. Due to confusion and conflicting results, in 1991, Frank Keating (HUD’s General Counsel at the time), adopted internal guidance to instruct HUD’s investigators and lawyers how to evaluate these restrictions. Although there were different versions, the final Keating Memo adopted a two person per bedroom standard as “presumptively reasonable”. Over the next few years, other standards were used, but in 1998, HUD was directed to adopt the Keating Memo as its policy for evaluating occupancy restrictions in familial

status cases. The Keating Memo is published in the Federal Register at Vol. 63, No. 245.

Application of the Keating Memo

The Keating Memo specifically states that “the Department believes that an occupancy policy of two persons in a bedroom, as a general rule, is reasonable under the Fair Housing Act.... However, the reasonableness of any occupancy policy is rebuttable.” The Keating Memo goes on to state that owners and managers of dwellings may develop and implement reasonable occupancy requirements based on factors such as the number and size of sleeping areas or bedrooms and the overall size of the dwelling.

The Keating Memo states that the size of the sleeping areas and overall size of the unit must be taken into consideration. Using hypothetical situations, the Memo explains that smaller units with smaller bedrooms would likely support a 2 person per bedroom restriction, while a unit with large living areas and bedrooms might require increasing the number of occupants.

The age(s) of the child is also a relevant factor. An infant might be permitted to reside in a one bedroom unit while a teenager and his/her parents would not. Unfortunately there is no guidance from HUD concerning at what age it is reasonable to enforce the 2 person per bedroom restriction. The younger the children, generally speaking, HUD would likely find the ages of the children make it reasonable to allow them to occupy a home or unit.

The configuration of the unit can impact the analysis. For example, a two bedroom unit that also has a den might require allowing an increase in the number of occupants.

The physical limitations imposed by the housing are also considerations. This includes things such as the capacity of the septic, sewer or other building systems. The developer of the community likely determined the occupancy restriction was reasonable based upon what the building and its systems could support in terms of the number of occupants when it was built. An Association may want to consider having an analysis performed by an engineer or another professional to determine whether the building’s systems can support an increase in the number of occupants per unit.

State and local laws also play a part in the reasonableness of a restriction. It is explained that a restriction that complies with local or State law occupancy requirements would tend to indicate that the housing provider’s restriction is reasonable. One that is more restrictive would require sufficient evidence to demonstrate that the restriction is reasonable. For example, the Broward County Code of Ordinances, at section 5-58(b)(1), titled “Minimum standards for space, light and ventilation, basic facilities, equipment, and maintenance”, provides:

Each dwelling and each dwelling unit shall have a minimum gross floor area of not less than one hundred fifty (150) square feet for the first occupant and not less than one hundred (100) square feet for each additional occupant.

Broward County's occupancy restriction would only require that a unit occupied by 5 people have a living space of 450 square feet.

HUD also takes into consideration several other factors such as discriminatory statements made indicating a preference for families without children; whether the housing provider has rules that discriminate against children; whether the housing provider has employed other steps to discourage families with children from occupying a unit, and whether the restriction has been applied to families without children.

Association should review their governing documents, including the Rules and Regulations, to ensure there are no discriminatory restrictions.

By way of example, courts have found that certain rules that require all children to be supervised by an adult at the pool are discriminatory. This rule would prohibit a 17 year old, or another "responsible person", from babysitting a younger child. The rule also requires that a 17 year old sitting at the pool must have a parent with him or her at all times. The courts have uniformly found this type of restriction to be discriminatory. In contrast, rules requiring "all occupants" to comply with all the rules, would be acceptable. These types of rules have come under fire in the last few years and are the basis of a number of discrimination claims.

Although there is a two person per bedroom presumption of reasonableness, that presumption is rebuttable. An Association must apply the additional factors to determine if there is a risk in enforcing the restriction based upon the size of the units, the ages of the children, and the county ordinance. Additionally, the provisions directed to "children" in the governing documents may also negatively impact any analysis concerning the restriction. Associations should contact their legal counsel for further input and analysis.