

Advanced Fair Housing Topics

Familial Status and Occupancy and Homeowners' & Condo Associations and Fair Housing

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I. Familial Status and Occupancy



What is an occupancy policy?

- ▶ The occupancy policy is a guideline for determining the use of rooms within a dwelling (home, rental unit, etc.).



What are the guidelines when determining an occupancy policy?

- ▶ The U.S. Department of Housing and Urban Development (HUD) has provided guidance when evaluating the use of occupancy policies in relation to familial status cases in the Frank Keating Memorandum

Where can I find the Frank Keating Memo on occupancy standards?

- ▶ <http://www.hud.gov/offices/fheo/library/occupancystds.pdf>

What is familial status?

- ▶ Under the Fair Housing Act, 42 U.S.C. Section 3602(k) familial status means one or more individuals (who have not attained the age of 18 years) being domiciled (living) with
 - A parent or another person having legal custody of such individual or individuals; or
 - The designee of such parent or other person having such custody, with written permission of such parent or other person.
 - Examples: grandparents raising grandkids, women who are pregnant, adoptive parents, foster parents, group homes for kids, etc.

What is the reasonable occupancy policy under the Fair Housing Act?

- ▶ HUD believes that an occupancy policy of two persons per bedroom, as a general rule, is reasonable.

What will HUD consider when reviewing occupancy cases?

- ▶ The size and number of bedrooms and other special circumstances.
 - If a family of five applies for a spacious two-bedroom apartment with two large bedrooms, the “two people per bedroom” policy may not be warranted.
 - If a family of five applies for a small two-bedroom mobile home, the “two people per bedroom” policy would be reasonably warranted.

Age of children

- If a family of two adults and one infant applies for a spacious one-bedroom apartment, the “two people per bedroom” policy may not be warranted.
- If a family of two adults and one teenager applies for a one-bedroom apartment, the “two people per bedroom” policy may be reasonably warranted.

Configuration of unit

- If a family of two adults and three children applies for a two-bedroom with a den or study, the “two people per bedroom” policy may not be warranted.
- If a family of two adults and three children applies for a two-bedroom without a den or study, the “two people per bedroom” policy may be reasonably warranted.

Other physical limitations of housing

- In addition to the size and configuration of the dwelling and the size of the bedrooms, HUD will also consider limiting factors identified by the housing providers.
- Capacity of the septic, sewer, or other building systems.

State and local Law

- Some dwellings are governed by State or local governmental occupancy requirements. If the housing provider's occupancy policies reflect governmental requirements, HUD will consider the policies reasonable.

Other factors

- Housing providers may not do the following to enforce occupancy policies:
 - Make discriminatory statements;
 - Adopt discriminatory rules for the use of common facilities;
 - Take steps to discourage families with children from applying;
 - Enforce occupancy policies only against families with children; or
 - Limits the number of units occupied by families with children.

What guide should I use to determine the number of people per unit?

- ▶ Many housing providers and some case law use two people per bedroom plus one as guide.

What are other considerations?

- ▶ Because of litigation and or complaints and shortage of units for large families, some housing providers do not count children under 5 years old when determining whether a family meets their occupancy limits.
- ▶ For example, if you have a three-bedroom unit available and a family of eight would like to rent it, you might say your policy is two people per bedroom plus one, so seven people could rent it. But then you discover that one of the eight persons is under five years old. Then as a housing provider, you do not count that person so it's as if there are only seven in the family.

General tips:

- ▶ “An occupancy policy which limits the number of children per unit is less likely to be reasonable than one which limits the number of people per unit.”
- ▶ **Watch Out:** Make sure your occupancy policy is not being used to restrict or deny housing to families with children, certain religious/non-religious groups, and persons based on national origin/race

II. Homeowners' and Condo Associations



Idaho Law

- ▶ Idaho Code §67-6530 prohibits zoning laws that restrict persons with disabilities/elderly from living in a home with up to eight unrelated persons in a group home setting.
- ▶ Idaho Code §67-5901 protects persons with disabilities and other protected classes from discrimination in real estate transactions and public accommodations.

The Fair Housing Act

- ▶ If a City/County/Municipality and or a Home Owner Association's Covenants, Conditions and Restrictions (CC&Rs) prohibit a business which is a group home or group homes, the prohibition may violate the Fair Housing Act.
- ▶ See The Department of Justice and The Department of Housing And Urban Development's Joint Statement on Group Homes, Local Land Use and the Fair Housing Act:
<http://www.idaholegalaid.org/sites/idaholegalaid.org/files/HUD-DOJ%20Statement%20ReGrpHm-LocalLandUseandTheFairHousingAct.pdf>.

Reasonable Accommodations

- ▶ An owner of a home, property manager for the owner, or tenant who operates such a group home may request an exception to the rule which prohibits businesses/group homes by requesting a Reasonable Accommodation under 42 U.S.C. §3604 to allow an exception to the HOA's CCRs prohibiting "a business."
- ▶ See the HUD/DOJ Statement on Reasonable Accommodation found at www.hud.gov/offices/fheo/library/huddojstatement.pdf.

Turning Point v. Caldwell

- ▶ “In addition to not discriminating against people with disabilities, cities and counties have an affirmative duty to provide reasonable accommodation in land use and zoning rules, policies, practices and procedures where it may be necessary to provide individuals with disabilities equal opportunity in housing. While the Act intends that all people have equal access to housing, the law also recognizes that people with disabilities may need extra tools to achieve equality. In the land use and zoning context, reasonable accommodation means providing individuals with disabilities, or developers of housing for people with disabilities, flexibility in land use and zoning regulations and procedures, or waiver of certain requirements when it is necessary to achieve equal access to housing.” *Turning Point, Inc. v. City of Caldwell*, 74 F. 3d 941 (1996).

Turning Point, Inc. v. Caldwell (1996)

- ▶ In *Turning Point, Inc.*, shelter providers for persons who are homeless argued that Caldwell set the occupancy limitation so low that it failed to make reasonable accommodation for persons with disabilities.
- ▶ Turning Point also alleged that Caldwell's required annual review of occupancy conditions was discriminatory toward persons with disabilities and denied persons with disabilities housing.
- ▶ The Court ruled that the City should have eliminated the annual review of a special use permit and unreasonable occupancy limits because Caldwell had the power to declare and abate nuisances such as too many people living under one roof in an unsafe manner.
- ▶ However, the City could set reasonable occupancy limits that did not discriminate.

Alamar Ranch v. Boise County *(2009)*

- ▶ Alamar Ranch sued Boise County alleging three separate violations of the Fair Housing Act: (1) failure to grant a reasonable accommodation for the construction of housing for persons with disabilities, (2) adverse treatment of persons with disabilities and (3) intentional interference with the construction of housing for youth with disabilities by giving into the community opposition to the housing center.
- ▶ Alamar Ranch prevailed and the jury awarded Alamar \$4 million in damages

The FHA Applies to HOAs and Condo Associations

- ▶ *Housing Opportunities Project for Excellence, Inc. v. Key Colony No. 4 Condominium Assoc.*, 510 F.Supp. 2d 1003 (S.D. Fla. 2007). Plaintiff sued HOA and HOA board members under FHA, and Florida housing laws claiming that occupancy restrictions and rules for pool and clubhouse discriminated against families with children.

More cases

- ▶ *Savanna Club Worship Service, Inc. v. Savanna Club Homeowners' Association*, 456 F. Supp. 2d 1223 (S.D. Fla. 2005). Owners of a religious club sued HOA and board members because the HOA prohibited religious services in common areas. **Note:** The Court dismissed the Plaintiff's claims because the HOA applied its restrictions in a neutral manner. The Court recognized, however, that HOA's are governed by the FHA since they control and regulate certain property rights, such as use of common areas and facilities.
- ▶ *Tokh v. Water Tower Court Home Owner Association*, 327 Fed. Appx. 630 (7th Cir. 2009). In *Tokh*, a member of an HOA sued his HOA and its Management Company for national origin and race discrimination after being fined for enlarging a patio in violation of the HOA's covenants.

HOA/Condo Cases

- ▶ Condo Association denies modification for a man who needs to install a lift to get to and from his second floor condo because of his obvious mobility impairment. Man offers to pay for lift and install it in workman-like manner and according to city code.
- ▶ HOA denies reasonable accommodation to CCR for a certified family home in its neighborhood.
- ▶ HOA fines and then puts a lien on a family's property when they install a fence along river line of their property without HOA permission but for urgent necessity to protect their children.
- ▶ HOA allows play structures for white families but not Asian or mixed-race families.

FHA prohibits retaliation

- ▶ Under 42 U.S.C. §3617, it is also a violation of the Fair Housing Act to retaliate against parties because they have asserted their fair housing rights—requested a reasonable accommodation or other fair housing assistance.

Resources

U.S. Department of Housing
and Urban Development
(HUD)
1-800-669-9777
-or-
1-800-927-9275 (TDD)
www.hud.gov

Intermountain Fair Housing
Council
(208) 383-0695 in Boise
-or-
1-800-717-0695 (toll-free)

Web Resources:

- www.fairhousinglaw.org
- www.nationalfairhousing.org
- <http://fairhousing.jmls.edu/>
- <http://www.usdoj.gov/crt/housing/>
- www2.state.id.us/ihrc/about.htm
- www.hud.gov
- www.bazelon.org
- www.idaholegalaid.org
- www.ifhcidaho.org

Questions?

