26 February 2013

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Re: Fair Housing Act Liability Review

Mr. Kovacs:

The City is at a critical juncture.

As the CEO of the City, we look to you for leadership at this time.

The GOGP has been very disappointed by what appears to be a total lack of independent research on the part of City staff to properly advise the City Council on their upcoming public housing decisions. We know that technically the City Attorney

does not work for you, but you are the only person who can direct the staff, and work with the City Attorney, to review the information, shown below, and make the City Council aware of the potential liability BEFORE they make any further missteps.

Most of the discussions on this topic are hidden away in "executive sessions", but what the public is allowed to see looks like the City just does whatever it is told to do by HUD and the GLO without questioning their marching orders. These are rogue agencies that are not to be trusted. HUD has a very long history of violating the Fair Housing Act itself, so their unlawful orders should not be blindly followed in an uninformed pursuit of disaster recovery money without considering the consequences.

There is absolutely no excuse for what five Councilmembers did on 28 September, especially after the campaign promises of four of them, but the vote could have gone much differently, if the Council had been properly briefed by City staff. Since the staff does not have the required expertise themselves, you should have insisted that the City Council get a QUALIFIED lawyer to advise them on their fair-housing liability and to protect the rights of the City.

Left to rely on their own resources, and under pressure from HUD and the GLO to violate the FHA, in return for disaster recovery money, the Council simply caved! We could all see them acting confused, uncertain, and fearful, and since they did not get the support that they needed, the outcome was tragic. However, the City now has a second chance to get it right.

The City Council needs to be properly briefed on the information shown below, so that they have the appropriate support to make well-informed decisions without succumbing to extortion from HUD and the GLO. We ask you to make sure that the necessary resources are acquired to give the Council the confidence and support that they need to follow the law!

Disparate Impact:

There are two ways that the City of Galveston can violate the Fair Housing Act (FHA). The City can intentionally discriminate against minorities, and other protected classes, or it can "merely" implement a policy, with no provable intent to discriminate, but that has the effect of discrimination none the less.

The intent to discriminate is usually difficult to prove; the fact that policies have the effect of discrimination often is not. Over the last 40 years, many FHA lawsuits began by trying to prove intent, and failed that test, but the courts could clearly see that there was still discrimination involved, no matter what the provable intent, so they began to find for the plaintiffs on the basis of the "effect" of the policies, regardless of intent; developing the legal theory known as "disparate impact".

Disparate impact allows a finding of discrimination against defendants regardless of intent, and, over time, each federal circuit/district adopted this standard with slight variations. Although the precedent provided by many fair-housing cases was already strong and persuasive, HUD has just decided to codify disparate impact into the federal regulations governing the enforcement of the FHA. This will remove any doubt that disparate impact applies no matter where cases are filed; it is now a federal regulation that is uniform throughout the nation.

The 83-page notice (see link below) of the new federal regulation spells things out very clearly. (Note: most of the substance is contained in the first twelve pages, where key items have been highlighted. Most of the remainder is public comment.)
http://www.GalvestonOGP.org/GHA/HUD-Rule-on-Discriminatory-Effects-Liability-2-8-2013-Marked.pdf

Final published regulation:
http://portal.hud.gov/hudportal/documents/huddoc?id=discriminatoryeffectrule.pdf

"This regulation is needed to formalize HUD's long-held interpretation of the availability of "discriminatory effects" liability under the Fair Housing Act, 42 U.S.C. 3601 et seq., and to provide nationwide consistency in the application of that form of liability. HUD, through its longstanding interpretation of the Act, and the eleven federal courts of appeals that have addressed the issue agree that liability under the Fair Housing Act may arise from a facially neutral practice that has a discriminatory effect."

"HUD v. Carlson, No. 08-91-0077-1, 1995 WL 365009 (HUD ALJ June 12, 1995) ("A policy or practice that is neutral on its face may be found to be violative of the Act if the record establishes a prima facie case that the policy or practice has a disparate impact on members of a protected class, and the Respondent cannot prove that the policy is justified by business necessity.");"

"In the proposed rule, HUD defined a housing practice with a "discriminatory effect" as one that "actually or predictably: (1) Results in a disparate impact on a group of persons on the basis of race, color, religion, sex, handicap, familial status, or national origin; or (2) Has the effect of creating, perpetuating, or increasing segregated housing patterns on the basis of race, color, religion, sex, handicap, familial status, or national origin.""

How will HUD's new disparate impact regulation be applied to the City of Galveston?

It will be noted that the only two large multi-family public housing developments to be built in the City are both planned to be built north of Broadway, in census tracts with high concentrations of minorities and poverty. This, along with a great deal of other data, will be the prima facie case that building in these locations will create disparate impact and increased segregation.

"If the charging party or plaintiff proves a prima facie case, the burden of proof shifts to the respondent or defendant to prove that the challenged

practice is necessary to achieve one or more of its substantial, legitimate, nondiscriminatory interests."

What substantial, legitimate, nondiscriminatory interests would justify the City building public housing in those two locations? The key word is "legitimate".

If the City somehow discovered a "legitimate interest", then:

"If the respondent or defendant satisfies this burden, then the charging party or plaintiff may still establish liability by proving that the substantial, legitimate, nondiscriminatory interest could be served by a practice that has a less discriminatory effect."

In order to satisfy this burden, it would only be necessary to show that these units could and should be built in better locations, i.e. high-opportunity census tracts, in the City, or better yet, on the Mainland, and that by doing so they would have far less discriminatory effect, and would decrease segregation, than building them at Cedar Terrace and Magnolia Homes.

Please note that there is no mention in the new regulation about using "mixed-income development" as a way to mitigate potential disparate impact violations! In fact there is no mention of mixed-income at all.

City Councilmembers have a real dilemma. Will the majority continue to support a plan that will result in a disparate impact violation, simply because HUD and the GLO are threatening to cut off a portion of the City's disaster recovery funding, if they don't do as they are told? Will a federal judge accept a "Nuremberg defense" from the City Council, i.e. "we are just following orders" as a justification for a disparate impact violation; even as HUD has just issued a new regulation making disparate impact a clear violation of the FHA? Or, will the City Council follow the law?

The City Council needs to understand that HUD has routinely and consistently violated the FHA itself, since its inception, (as documented in "Living Apart: How the Government Betrayed a Landmark Civil Rights Law"; see link below) so looking to HUD for guidance on the proper course of action is a fool's errand!
http://www.propublica.org/article/living-apart-how-the-government-betrayed-a-landmark-civil-rights-law

It is time for the City staff to do their homework and properly advise the Council on the City's liability if they proceed with a plan that will build public housing in a discriminatory manner that will further segregate its residents!

Damages:

In most fair-housing cases, the plaintiffs simply seek a remedy to correct housing discrimination, but in the public comment portion of the proposed new regulation (see page 54), it says:

"Issue: A commenter stated that the most appropriate remedy for a violation of the Act under an effects theory is declaratory or injunctive relief. This commenter expressed the opinion that the use of penalties or punitive damages generally does not serve the underlying purpose of the Fair Housing Act to remedy housing discrimination.

HUD Response: HUD disagrees with the commenter. The Fair Housing Act specifically provides for the award of damages—both actual and punitive—and penalties. See 42 U.S.C. 3612-14."

"42 USC § 3613 - Enforcement by private persons

(a) Civil action

(1)
(2)
(3)
(c) Relief which may be granted

(1) In a civil action under subsection (a) of this section, if the court finds that a discriminatory housing practice has occurred or is about to occur, the court may award to the plaintiff actual and punitive damages, and subject to subsection (d) of this section, may grant as relief, as the court deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order (including an order enjoining the defendant from engaging in such practice or ordering such affirmative action as may be appropriate).
(2) In a civil action under subsection (a) of this section, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs. The United States shall be liable for such fees and costs to the same extent as a private person."

Low-Income Housing Tax Credits (LIHTCs):

A recent document on the GHA web site (see link below) shows that they plan to use LIHTCs to rebuild Cedar Terrace and Magnolia Homes. The State of Texas recently lost a fair-housing case in Dallas over the misuse of LIHTCs (see link below ICP v. TDHCA). The State, through the TDHCA, was granting LIHTCs in such a way that they promoted discrimination under the disparate impact rule.
http://www.ghatx.org/documents/10%20Attachment%20B,%206.0%20Plan%20Elements%20-%20Updates%20-%20Resolution%202662%20Approved%20Budget%20for%20Reconstruction.pdf

http://www.tdhca.state.tx.us/multifamily/htc/inclusive-communities-project.htm

"In a memorandum of opinion and order filed March 20, 2012, the court found in favor of ICP on its disparate impact claim under 3604(a) and 3605(a) of the Fair Housing Act (FHA)…"

The court adopted a remedy which is designed to prevent the TDHCA from making further FHA violations, and while the TDHCA has not yet adopted it as an administrative remedy statewide, and the court did not order it as a statewide judicial remedy, it is

very instructive as to what might and might not pass judicial scrutiny on the use of LIHTCs in the City of Galveston.

"The Plan embraces the notion of providing maximum permissible incentives for areas that truly reflect the greatest opportunity, namely those areas with the highest income, lowest poverty, and best public education opportunities."

Are the Cedar Terrace and Magnolia Homes sites going to meet those criteria under any reasonable definition?

"In order to qualify as being in an HOA (High Opportunity Area), a development must be in a census tract that has BOTH a low incidence of poverty AND an above median income as well as being located in an area served by either recognized elementary schools or having a significant and accessible element of public transportation."

The actual scoring system used in the remedy is looking for placement in census tracts where the poverty rate is less than 15%, AND household income is in the top quartile for the county, and the schools are rated exemplary or recognized by the TEA.

Cedar Terrace: Poverty Rate 61%
Magnolia Homes: Poverty Rate 26%

These sites should fail the definition of HOAs without even going any further.

However, Cedar Terrace certainly cannot qualify on the income requirement, and Magnolia won't likely either, AND developments at neither site will be able to send their residents to an exemplary or recognized school.

Based on the ruling in Dallas, is a federal court likley to rule that LIHTCs are lawful to use to rebuild Cedar Terrace and Magnolia Homes?

Finally, the new scoring system is looking for factors that should be used to exclude certain locations from eligibility to receive LIHTCs so as not to violate the FHA. These factors include:

"developments adjacent to or within 300 feet of active railroad tracks." **Magnolia is very close to the Port railroad.**

"developments adjacent to or within 300 feet of heavy industrial uses." **Magnolia is across the street from the Port.**

"developments adjacent to or within 300 feet of solid waste or sanitary landfills". **Cedar Terrace and Magnolia are surrounded by sites "of interest to" the EPA.**

"As a part of the Plan, the Department will continue to include the same or similar criteria in its QAPs for disqualifying proposed sites that have undesirable features. Additionally, the Department will incorporate a more robust process to identify and address other potentially undesirable site features in future QAPs. Under this criterion, an applicant proposing development of multifamily housing with tax credits must disclose to the Department and may obtain the Department's written notification of pre-clearance if the site involves any negative site features at the proposed site or within 1000 feet of the proposed site such as the following:

a. A history of significant or recurring flooding; **(Cedar Terrace and Magnolia)**

b. A hazardous waste site or a source of localized hazardous emissions, whether remediated or not; **(Cedar Terrace and Magnolia)**

c. Heavy industrial use; **(Cedar Terrace and Magnolia)**

d. Active railways (other than commuter trains); **(Magnolia)**

e. Landing strips or heliports;

f. Significant presence of blighted structures; **(Cedar Terrace and Magnolia)**

g. Fire hazards which will increase the fire insurance premiums for the proposed site;

h. Locally known presence of gang activity, prostitution, drug trafficking, or other significant criminal activity that rises to the level of frequent police reports." **(Cedar Terrace and Magnolia)**

The use of LIHTCs by the City of Galveston, in their rebuilding plan, creates still another opportunity for it to violate the Fair Housing Act that must be considered by City Council.

It is time for the City staff to gather the necessary resources to give the Council much better advice on the City's potential liability BEFORE they move forward to build on these sites! It will require a very long executive session to properly consider the points listed above.

Best regards,

David Stanowski
President