CITY OF SAN JOSE
CAPITAL OF SILICON VALLEY

Memorandum

TO: Community and Economic Development Committee

FROM: Richard Doyle
City Attorney

SUBJECT: **Legal Analysis for Tenant Housing Preferences**

DATE: May 2, 2018

BACKGROUND

This memo summarizes the relevant legal authority pertaining to tenant housing preferences under both federal and California law. In particular, this memo discusses the federal Fair Housing Act, Rehabilitation Act, Fourteenth Amendment; as well as California's Fair Employment and Housing Act, Unruh Civil Rights Act, and Proposition 209.

A. FEDERAL LAW

1. Fair Housing Act – 42 U.S.C. §§ 3600, et seq.

In general, the Fair Housing Act of 1968 ("FHA") and the subsequent Fair Housing Amendments Act of 1988 ("FHAA") prohibit discrimination in the sale, rental, financing, or advertising of housing based on one's race, color, religion, sex, familial status, national origin, or disability. (42 U.S.C. § 3604). With respect to disabled tenants, the FHA imposes an affirmative duty on housing providers to offer reasonable accommodations. (42 U.S.C. § 3604(f)(3)(B)). Such accommodations may include changes to rules and procedures for equal access to the facility. (See Shapiro v. Cadman Towers, Inc. (1995) 51 F.3d 328, 335). For example, in Shapiro, the Court required a landlord to relax its "first come/first served" parking policy so a tenant suffering from multiple sclerosis could get a spot in the parking garage.

a. *Facial Discrimination*

A municipality seeking to establish a preferential tenant housing policy may violate the FHA either directly or indirectly. A policy that expressly discriminates against a protected group listed under the FHA constitutes *facial discrimination* and is unlawful. Facially discriminatory housing policies are reviewed under the criteria established in (International Union, UAW v. Johnson Controls, Inc. (1991) 499 U.S. 187, 197). Under that decision a plaintiff must initially show that a protected group has been subjected to explicitly differential or discriminatory treatment. In International, the employer's policy contained language that explicitly barred women from positions involving exposure to lead. The express differential treatment between men and women is what made the employer's policy discriminatory on its face. (*Id.* at 197).

The burden then shifts to the municipality to prove either: "(1) the restriction benefits the protected class; or (2) that it responds to legitimate safety concerns raised by the individuals affected, rather than being based on stereotypes."

As a rebuttal to the municipality's claim, the plaintiff may then raise serious questions regarding the merits of the municipality's justifications. (See Community House, Inc. v. City of Boise (9th Cir. 2007) 490 F.3d 1041, 1050; Bangerter v. Orem City Corp. (10th Cir. 1995) 46 F.3d 1491, 1501). In Community, the municipality allowed an operator of a homeless shelter to adopt a policy that segregated men and women into different facilities, and to segregate homeless singles from homeless families. It believed that the difficulties of serving the homeless population "are exacerbated in a mixed gender shelter environment". While the Court in Community held that safety concerns, at times, could justify an all-men policy, the plaintiffs raised serious questions against that justification because the City did not support its claim with any documentation. Specifically, "the City did not submit a single police report, incident report, or any other documentation that supported any safety concerns." (Community, 490 F.3d at 1051).

b. *Disparate Treatment*

A policy that does not discriminate through express language may still be unlawful if it intentionally treats members of a protected group differently from others. Such discrimination constitutes *disparate treatment* and is unlawful. Under a disparate treatment analysis, the plaintiff must first establish that: (1) she is a member of a protected class; (2) she applied and qualified for the municipal resource; (3) she was denied the resource despite her qualifications; and (4) the municipality approved of other applicants who were similarly situated near the time plaintiff was denied. Satisfying these four elements creates a presumption that disparate treatment occurred. (Budnick v. Town of Carefree (9th Cir. 2008) 518 F.3d 1109, 1114).

Alternatively, a plaintiff may establish her initial case by producing direct or circumstantial evidence "demonstrating that a discriminatory reason more likely than not motivated' the challenged [policy]." (*Ibid.*). From there, if a plaintiff can show disparate treatment through either option, the burden then shifts and the municipality must give a legitimate and nondiscriminatory reason for treating the group differently. For example, in Budnick, the Court held that achieving zoning goals and preserving the character of a neighborhood were both legitimate and nondiscriminatory reasons.

After that, the burden shifts again and the plaintiff must show, by a preponderance of the evidence, that the municipality's reason was pretextual in order to prevail. (*Id. at 1114-1115*).

c. *Disparate Impact*

Last, an otherwise neutral policy may still indirectly violate the FHA if the policy or practice results in differential impact of a protected group. Such an effect, whether intentional or not, is known as a *disparate impact*. A cause of action for disparate impact requires the plaintiff to establish "the occurrence of certain outwardly neutral practices, and a significantly adverse or disproportionate impact on persons of a particular type produced by the defendant's facially neutral acts or practices." (McDonald v. Coldwell Banker (2008) 543 F.3d 498, 505). Without sufficient statistical data concerning the impact on particular persons, however, proving a disparate impact case is difficult.

Nonetheless, a municipality may rebut a disparate impact claim by offering a legitimate and nondiscriminatory reason for the practice. (Ramirez v. Greenpoint Mortg. Funding, Inc. (N.D. Cal. 2010) 268 F.R.D. 627, 640). The burden then shifts and the plaintiff must show that less discriminatory alternatives, which serve the municipality's claimed interest, exist before a court can reject a municipality's justification. (Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc. (2015) 135 S.Ct. 2507, 2518).

2. Rehabilitation Act – 29 U.S.C. § 794

In general, section 504 of the Rehabilitation Act ("RA") prohibits disability discrimination for programs that receive federal funding. To elaborate, the RA forbids entities, who receive federal funding, from discriminating based on disability when providing housing or rendering services. (29 U.S.C. § 794; 24 C.F.R. § 8.4). Moreover, section 504 requires a greater duty to provide for reasonable accommodations than the FHA. For example, the RA requires an owner to pay for unit modifications under certain circumstances unless doing so would: (1) alter the nature of the program; or (2) pose an undue financial and administrative burden. (24 C.F.R. §§ 8.21(b)-(c), 8.24(a)(2)). Thus, municipalities and owners alike must comply with section 504 if they are receiving federal funds.

3. Equal Protection Clause of the Fourteenth Amendment – U.S. Const. amend. XIV, § 1

The Equal Protection Clause of the U.S. Constitution applies to the states via the Fourteenth Amendment. The clause states that a government may not deny a person equal protection under the law. Housing policies that seek to grant preferential treatment to certain groups will be subject to the Equal Protection Clause. As such, a different level of scrutiny is applied depending on the classification in question. The application of these tests and their respective classifications has largely been determined through case precedent.

a. *Strict Scrutiny*

The first level of scrutiny applies to all policies that discriminate against a suspect class, like race, are subject to *strict scrutiny*. Strict scrutiny is the highest of the three standards of scrutiny and is difficult to overcome because of the degree of specificity required by a municipality to justify the action. Under this standard, the government must prove that the policy in question is narrowly tailored to a compelling government interest such that no less restrictive alternative exists. (Johnson v. California (2005) 543 U.S. 499, 505). In Johnson, the Court applied strict scrutiny against a state's policy because it placed new inmates with other inmates of the same race during their initial evaluations. (*Id.*).

b. *Intermediate Scrutiny*

The second level of scrutiny applies to policies that discriminate against a quasi-suspect class, such as gender, are subject to *intermediate scrutiny*. Under this standard, the government must prove that the policy in question is substantially related to an important governmental objective. (Craig v. Boren (1976) 429 U.S. 190, 218; Warden v. State Bar (1999) 21 Cal.4th 628, 652). In Craig, the Court applied intermediate scrutiny to a state law that required males to be 21 years of age before buying beer whereas females only had to wait until they were 18. (*Id.*).

c. *Rational Basis*

Last, policies that discriminate against other groups of individuals that are not considered a suspect class, like wealth and age, are subject to a *rational basis* review. Rational basis is the lowest of the three standards and is the easiest to satisfy because it does not require the municipality to state its motivating reason for issuing the policy. (See FCC v. Beach Communications, Inc. (1993) 508 U.S. 307, 315). Under this standard, the government must prove that the policy in question is rationally related to a legitimate government interest. (*Ibid.*). In FCC, the Court applied rational basis to a Federal Communications Commission policy because it was in an area of social/economic policy that did not infringe on any fundamental constitutional rights or "proceed[] along suspect lines[.]" (*Id.* at 312).

4. Privileges and Immunities Clause– U.S. Const. amend. XIV, § 1

The Privileges and Immunities Clause aims to prevent the states from executing policies that discriminate against nonresidents for economic reasons. (Supreme Court v. Piper (1985) 470 U.S. 274, 285). The clause asks: (1) whether a city's policy burdens a nonresident's protected privilege or immunity; and (2) whether the discrimination stemming from the policy is justified by a "peculiar source of evil" Posed by nonresidents. (United Bldg. and Const. Trades Council of Camden County and Vicinity v. Mayor and Council of City of Camden (1984) 465 U.S. 208, 218). Accordingly,

nonresidents could potentially challenge a housing policy that granted such a preferential treatment to locals. Thus, municipalities who have data that points to an inherentt disadvantage that only applies to residents are better prepared to withstand a challenge under the Privileges and Immunities Clause.

B. CALIFORNIA LAW

1. Fair Employment and Housing Act – Cal. Gov. Code §§ 12900, et seq.

The Fair Employment and Housing Act ("FEHA") is California's counterpart to the federal FHA. While similar to the FHA is many respects, it is important to note that FEHA contains additional protections. For example, California's statute explicitly prohibits discrimination based on one's marital status, ancestry, sexual orientation, and source of income in addition to those traits listed under the FHA. (Cal. Gov. Code § 12955). To add, FEHA also expressly prohibits policies that cause a disparate impact. Specifically, the government must show that its policy "is necessary to achieve an important purpose sufficiently compelling to override the discriminatory effect and effectively carries out the purpose it is alleged to serve." (Cal. Gov. Code § 12955.8(b)). This standard should be considered when making findings regarding preferences, especially preferences that may not reflect the diversity of the local area. Furthermore, unlike the FHA, FEHA requires reasonable accommodations to include physical accessibility for disabled tenants. (Cal Gov. Code § 12955.1). Thus, a municipality must be thorough when creating a preferential housing policies to comply with the limits in both FHA and FEHA.

2. Unruh Civil Rights Act – Cal. Civ. Code §§ 51, et seq.

The Unruh Civil Rights Act prohibits discrimination based on one's sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status in *all* business establishments regarding any full and equal accommodations, advantages, facilities, privileges, or services. (Cal. Civ. Code § 51(b)). The provisions of the Unruh Act apply to both government and private entities.

The statute is interpreted and applied broadly as the courts have determined that listed characteristics are "illustrative, rather than restrictive." (In re Cox (1970) 3 Cal.3d 205, 212). For instance, the definition of sexual orientation is broadly construed and is not limited to one's characteristics. Rather, sexual orientation is intended to include how one self-identifies or perceives themselves. (Cal. Civ. Code § 51(e)(5)-(6)).

As another example, while not explicitly mentioned in the statute's language, age is treated as a protected category if used arbitrarily, unreasonably, or invidiously. (Javorsky v. Western Athletic Clubs, Inc. (2015) 242 Cal.App.4th 1386, 1400; Lazar v. Hertz Corp. (1999) 69 Cal.App.4th 1494, 1502). In Javorsky, a claim was made that

Western Athletic's membership discount that only applied to 18 to 29-year-olds was discriminatory against older members. Although the claim was covered by the Unruh Act, the court upheld the discount because facilitating access for an age group with lower income was not arbitrary, unreasonable, or invidious. (*Id.* at 1405).

3. Proposition 209 – Cal. Const. Art. 1, § 31

Proposition 209 ("Prop 209"), amended the California Constitution, to expressly state that "[California] shall not discriminate against, or *grant preferential treatment* to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." (Cal. Const. Art. 1, § 31(a)). The application of Prop 209 to government housing contracts is not clear. If it applies to government housing contracts it would place an extremely high burden on municipalities that wanted to create a preferential tenant housing policy.

Prop 209 , however, provides for some exceptions to the prohibitions. The most relevant being the exception that allows local governments to grant preferential treatment when necessary "to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds[.]" (Cal. Const. Art. 1, § 31(e)). In addition, the Supremacy Clause of the U.S. Constitution requires Prop 209 to allow preferential measures when *required* by federal law as opposed to when permitted by federal law. (See Woods v. Horton (2008) 167 Cal.App.4th 658, 667; Coral Construction, Inc. v. City and County of San Francisco (2010) 50 Cal.4th 315, 327). In Coral, even though the City was following federal regulations set forth by the Environmental Protection Agency and Secretary of Transportation, the federal funding exception did not apply to the City's ordinance because the federal provisions regarding affirmative action were expressly permissive and not required. (Coral, 50 Cal.4th at 335).

Nonetheless, these narrow exceptions still leave little room for policymakers to work. For example, unlike the Equal Protection Clause, Prop 209 lacks a compelling state interest exception, which increases the statute's reach on preferential treatment policies regardless of underlying state concerns. (See C & C Const., Inc. v. Sacramento Municipal Utility Dist. (2004) 122 Cal.App.4th 284, 293). More importantly, case precedent holds that Prop 209 neither necessarily conflicts nor is preempted by federal law. (See Cal. Const. Art. 1, § 31(h); Coalition for Economic Equity v. Wilson (9th Cir. 1997) 122 F.3d 692, 709; Hi-Voltage Wire Works, Inc. v. City of San Jose (2000) 24 Cal.4th 537, 676). Thus, even if a policy were to survive a strict scrutiny analysis under the Equal Protection Clause of the 14th Amendment, California's Prop 209 could still preclude it.

4. State Funding Regulations

Further, there are other California laws that include anti-discrimination provisions. Most state financing source provisions in State or local law will include an anti-discrimination provision and so it is important to understand which laws and regulations apply to a program. For example, Section 11135 of the California Government Code applies to housing that receives State financing. This Section of the Government Code prohibits discrimination on the basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, or disability in "any program or activity that is conducted by the state or a state agency or financed by the state."

CONCLUSION

Before restricting housing to a specific tenant population, housing providers, including the City, should consider 1) the funding source that is financing the project and whether the funding source prohibits or authorizes reserving the housing for a specific tenant population and 2) the fair housing laws applicable to the project. Further, an examination of whether federal or state anti-discrimination laws explicitly prohibit discrimination against or preference for certain groups of people. Courts analyze each situation based on the facts involved so each proposed tenant preference will need to be analyzed based on its own merits.

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