HUD & DOJ Issue Statement on Reasonable Modifications

In March 2008, the Department of Housing and Urban Development (HUD) and the Department of Justice released a Joint Statement on Reasonable Modifications under the Fair Housing Act.[1] A reasonable modification is a "structural change made to existing premises, occupied or to be occupied by a person with a disability[2], in order to afford such person full enjoyment of the premises."[3] Thus, whereas a reasonable accommodation changes a rule, policy, or practice, a modification actually changes the structure of a unit.[4] Failure to provide a reasonable modification may constitute discrimination. The Joint Statement provides technical guidance to people with disabilities and housing providers on the right to reasonable modification under the Fair Housing Act (FHA). Key points are summarized here.

Scope

The bulk of the Joint Statement's guidance applies to reasonable modification under the FHA, distinct from reasonable modification rules under Section 504 of the Rehabilitation Act of 1973.[5] Section 504 applies to housing providers receiving federal financial assistance, such as public housing authorities, HOPE VI recipients, project-based Section 8 owners, or HUD multifamily properties. Section 504 does not cover private owners accepting Section 8 vouchers or Low Income Housing Tax Credit housing providers. Recipients of federal financial assistance should treat reasonable modification requests like reasonable accommodation requests—they must grant the requests and pay for them unless they constitute an undue financial or administrative burden or a fundamental alteration of the program.

For those housing providers covered solely by the FHA, the range of people responsible for providing reasonable modifications includes individuals, corporations, associations, property owners, housing managers, homeowners, condominium associations, lenders, real estate agents, brokerage services, and state and local governments.[6] Anyone else with authority to grant a reasonable modification request must also abide by the FHA.

Process

The process for requesting a reasonable modification is simple. The tenant with disabilities, or a person acting on her behalf, must make clear that she would like a structural change made that relates to her disability. If she does so, a housing provider must permit the modification so long as it is reasonable and relates to the disability.[7] Approval of a reasonable modification may be conditioned on an agreement by the tenant to restore the property to its original condition at the end of the tenancy, excepting normal wear and tear.[8]

The tenant may request the modification for the interior or exterior of a dwelling, as well as common areas. For example, a tenant may request a modification to adjust cabinet height inside the home or to widen the entrance to common laundry facilities.

In some situations, a housing provider will want verification of the need for the reasonable modification. If a disability is not obvious, the housing provider may request that the tenant provide verification that she has a disability as defined by the FHA and needs the modification in order to address a need related to the disability.[9] The verification may come from the individual, "a doctor or other medical professional, peer support group, non-medical service agency, or a reliable third party who is in a position to know about the individual's disability."[10] Such information must be kept confidential. If the disability and the need for the modification are obvious, the housing provider should not request such verification.

In order to ensure quality and safety, the housing provider may also request a description of the modifications as well as proper documentation and appropriate licenses if necessary.[11] These documents are especially useful for larger and more complex requests.

Costs

One of the biggest concerns with regard to reasonable modification is who will pay the costs. As a general rule, if the request for reasonable modification is granted, the tenant must pay the costs for both installation and removal of interior modifications, a major distinction from the reasonable accommodation process.[12] The housing provider may even negotiate with the tenant to have her pay into

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[1]Department of Housing and Urban Development and the Department of Justice, Joint Statement On Reasonable Modifications Under The Fair Housing Act (2008) (hereinafter Joint Statement), *available at* http://www.usdoj.gov/crt/housing/fairhousing/ (last visited on Sept. 23, 2008).

[2]42 U.S.C. § 3602(h): "'Handicap' means, with respect to a person - (1) a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment, but such term does not include current, illegal use of or addiction to a controlled substance (as defined in section 802 of title 21)."

[3]*Joint Statement* at 3.

[4]*See* 42 U.S.C. § 3604(f)(3)(B); *see also* Joint Statement of the Department of Housing and Urban Development and the Department of Justice, Reasonable Accommodation Under the Fair Housing Act (2004).

[5]29 U.S.C.A. § 794 (West, Westlaw (Current through P.L. 110-320 (excluding P.L. 110-315)) approved 9-18-08).

[6]*Joint Statement* at 6.

[7]42 U.S.C. § 3604(f)(3)(A); *see also Joint Statement* at 3.

[8]*Id.*

[9]*Joint Statement* at 4.

[10]*Id.* at 5.

[11]*Id.* at 12.

[12]42 U.S.C. § 3604(f)(3)(A); *see also Joint Statement* at 3.

an interest-bearing escrow account in order to ensure that the unit will be restored to its original condition if it would interfere with future use of the premises. When determining if an escrow account is permissible, the housing provider and tenant should consider the "1) extent and nature of the proposed modifications; 2) the expected duration of the lease; 3) the credit and tenancy history of the individual tenant; and 4) other information that may bear on the risk to the housing provider that the premises will not be restored."[13] The amount put into escrow cannot exceed the cost of restoring the unit and all interest accrues to the benefit of the tenant. Any unused amount must be returned to the tenant.

While the general rule applies to the majority of cases, the details of who pays for the modifications are nuanced. If the building has not yet been constructed, the tenant is responsible for any costs of a reasonable modification request above what the builder would have otherwise paid, unless the request is something already required by the design and construction rules in the FHA.[14] If the modification is something required under the design and construction rules on accessibility under the FHA, she is not responsible for the costs, regardless of whether the building has already been built or not.[15]

There are other costs for which the tenant is not responsible, even in an existing building. First, for modifications to the exterior of a unit or to common areas, the tenant is not responsible for the costs of restoring the premises to their original condition.[16] Second, the housing provider may not require that the tenant obtain special liability insurance or an additional security deposit for the modification.[17] Third, the housing provider may be required to pay the difference if she wants the modification to involve more expensive materials simply for aesthetic reasons or to satisfy a preference for workmanship standards above local code requirements.[18] Finally, while the tenant is generally responsible for the costs of the maintenance of the modification, the housing provider is responsible for maintenance costs if the modification is to a common area.[19] Thus, it's important to consider carefully which costs are assignable to the tenant and which are assignable to the housing provider.

Conclusion

Reasonable modifications help make a greater number of units accessible for people with disabilities. While some low-income families with disabilities live in federally assisted housing that must follow Section 504's rules, a large number of such families live in units solely covered by the FHA. It is vital that both tenants and housing providers understand the extent of the duties and obligations under the reasonable modification provisions of the FHA. ■

[13] *Joint Statement* at 14.
[14] *Id.* at 15.
[15] *Id.* at 7.
[16] *Id.* at 13.
[17] *Id.* at 12.
[18] *Id.* at 11.
[19] *Id.* at 8.

Santa Monica's Inclusionary Zoning Ordinance Withstands Constitutional Challenge

A California appellate court has rejected an apartment association's facial takings challenge to the city of Santa Monica's inclusionary zoning ordinance. In *Action Apartment Association v. City of Santa Monica*,[1] the plaintiff association argued that the ordinance was unconstitutional because there was no nexus or rough proportionality between the construction of market-rate housing and the city's affordable housing shortage. After reviewing the United States Supreme Court's 2005 decision in *Lingle v. Chevron U.S.A., Inc.*,[2] the appellate court concluded that the nexus and rough proportionality test does not apply to facial challenges to land-use regulations and affirmed the trial court's dismissal of the case.

Background

Santa Monica's inclusionary zoning ordinance provides that builders of condominium projects with four or more units must construct between 20 to 25% of the total units as ownership or rental units for moderate- or low-income households, depending on the total number of units in the project.[3] As an alternative, developers are permitted to construct the affordable housing units off-site, but they must build 25% more affordable units than would be required if they built the units on-site.[4] The ordinance permits a developer to request an adjustment or waiver if the ordinance's requirements effectuate an unconstitutional taking or would otherwise have "an unconstitutional application" to the property.[5]

On September 11, 2006, Action Apartment Association (AAA), "an association of rental property owners who united after radical rent control was enacted in 1979,"[6]

[1] Action Apartment Ass'n v. City of Santa Monica, No. B201176, slip. op. (Cal. Ct. App., 1st Dist., Aug. 28, 2008).
[2] 544 U.S. 528 (2005).
[3] Santa Monica Mun. Code § 9.56.050 (2006).
[4] *Id.* § 9.56.060.
[5] *Id.* § 9.56.170.
[6] Action Apartment Association, *Who We Are*, http://www.action-wam.com/about.htm (last visited Sept. 16, 2008).