

PRACTICAL STEPS TO PREPARE FOR A HUD FAIR HOUSING INVESTIGATION

PREPARING FOR A FAIR HOUSING INVESTIGATION

I. Introduction

Multifamily housing manager and owner compliance with Fair Housing laws is a cost of doing business. Significant expense can be avoided by ongoing training and risk avoidance measures. HUD has committed to doubling the number of Fair Housing enforcement actions by 2001. Thus, it is increasingly essential for managers and owners to implement safeguards to ensure compliance and minimize exposure.

This article addresses issues regarding Fair Housing investigations - - what they are and how to respond to them. In an ideal world, proper training and competent property management would suffice to avoid an investigation. Unfortunately, even the best laid plans cannot prevent frivolous claims or investigations based on misunderstandings of fact. As such it is necessary to accept that investigations are likely to happen, and to plan for what to do in response.

II. Fair Housing Investigations

A Fair Housing investigation follows the filing of a complaint with HUD alleging housing discrimination. HUD or similar state or local agency conducts the investigation. Appropriate property manager and owner preparation for an investigation necessitates an understanding of the: (1) factors leading to the filing of a discrimination complaint; and (2) process under which the complaint is processed.

A. Numerous Pitfalls Give Rise To Investigations

Many factors lead to a Fair Housing investigation. First, there is a myriad of federal and state legal requirements which property managers and owners may not fully understand or follow. One example, the federal Fair Housing Act, 42 U.S.C. §§ 3601 et seq., makes it unlawful to refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color religion, sex, familial status, national origin or handicap. There are other federal laws, including the ADA, as well as various state laws collectively imposing significant responsibilities upon property owners and managers. Compliance requires ongoing diligence, training and retraining, and even then, violations may occur.

Second, disgruntled tenants, prospective tenants, and visitors are provided with increasingly easier means by which to file a Fair Housing complaint. HUD permits a complaint to be filed simply by submitting a brief statement of facts through a letter, telephone call, filing a readily available form with a HUD regional office, or now by completing HUD's internet site online form. In a mere matter of minutes, a complaint may be filed commencing an investigation.

Third, public interest groups continue to challenge housing practices through testers, litigation

and dissemination of information. Further, HUD is devoting more resource to increase significantly the number of enforcement actions.

B. Procedure Governing Fair Housing Act Complaints And Investigations

Federal statute and regulation set forth procedures governing the filing and processing of a housing discrimination complaint, and related investigation, conciliation and HUD's assessment of and action upon the alleged discrimination.

1. Complaint

Any person may file a complaint with HUD who claims to have been injured by a discriminatory housing practice, or who believes that he or she will be injured by such a practice that is about to occur. HUD offers assistance to persons prepare the complaint. The complaint should contain a brief statement of facts identifying the person alleging discrimination ("complainant"), as well as the identity of persons or entities who allegedly discriminated ("respondents"). Further, the complaint must contain a brief summary of the facts regarding the alleged discrimination. The complaint may be directed against a person or entity engaged in the sale, rental, advertising or financing of a dwelling who is alleged to have engaged in or to be about to engage in a discriminatory housing practice, or against a person or entity who directs or controls the alleged discriminator (e.g., property owner). While the complaint may be amended, it must be filed with HUD within one year after the alleged discrimination occurred or terminated. After the complaint is filed HUD may process it or refer the matter to an appropriate state or local agency for further action.

2. Answer To Complaint

Within 10 days of the filing of the complaint, HUD or the state or local agency will serve the complaint on each named respondent. Within 10 days of service each respondent may serve an answer responding specifically or generally to the allegations. The answer may assert specific defenses, including, for example, that the claim is barred by the one-year statute of limitations.

3. Investigation

Upon the filing of the complaint HUD will initiate its investigation to: (a) obtain information regarding events related to the alleged discrimination; (b) document policies and practices of the respondents(which may broaden the inquiry beyond the complainant's allegations); and (c) develop facts necessary for HUD's General Counsel to make a determination as to whether or not reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur. Although the investigation is to be completed within 100 days of the filing of the complaint, this time period is routinely extended.

During the investigation HUD will seek the voluntary cooperation of relevant persons to enable HUD inspect property, review and copy documents, and record testimony or statements of persons reasonably necessary to further the investigation. Further, HUD may issue subpoenas and seek court intervention to compel the production of documents and witness statements. In

addition, HUD is authorized to seek information through depositions, document requests, interrogatories, requests for admissions, and in special circumstances, obtain a mental or physical examination. HUD's right to obtain information is very broad, but not unlimited. In general, HUD is entitled to non-privileged information that is either relevant to the complaint or "appears reasonably calculated to lead to the discovery of admissible evidence." Courts have broadly construed HUD's investigative powers, and have ordered that the cost of locating and producing information be borne by the respondents as a cost of doing business.

4. Conciliation

During the investigation phase HUD will attempt to conciliate the complaint. In so doing HUD will bring the complainant and respondents together to attempt to obtain a just resolution of the dispute. Through conciliation HUD will seek assurances that respondents will: (a) remedy any violations of the rights of the complainant; and (b) take action to eliminate discriminatory housing practices. HUD may terminate conciliation if the complainant or respondent fails to participate in good faith.

Any settlement between complainant and respondents will be set forth in a written conciliation agreement subject to HUD's approval taking into account the public interest. Under federal regulation a conciliation agreement may provide for various remedies including, respondents' payment of complainant's damages and attorneys' fees, and equitable and injunctive relief (e.g., a requirement that respondents provide specified services and facilities). The conciliation agreement is made public unless the complainant, respondents, and HUD agree otherwise.

5. HUD Final Investigative Report

Following the investigation HUD will prepare a final investigative report ("FIR"), unless the parties have executed a conciliation agreement approved by HUD. The FIR contains the names and dates of witness contacts, summary and dates of correspondence and other contacts, summary of pertinent records, summary of witness statements and answers to interrogatories. The FIR is made available to the complainant and respondents, and forwarded to HUD's General Counsel for a "reasonable cause" determination.

6. HUD Determination Of Sufficiency Of Evidence Of Alleged Discrimination

HUD's counsel reviews the Final Investigative Report to determine "whether there is sufficient evidence to believe that housing discrimination may have occurred or is about to occur." The standard by which HUD makes this "reasonable cause" determination is "whether the facts concerning the alleged discriminatory practice are sufficient to warrant the initiation of a civil action in federal court." If HUD determines that there is reasonable cause to believe that discrimination has or is about to occur, it will issue a "charge" against respondents, otherwise, HUD will dismiss the complaint.

7. Post-Investigation Litigation/Administrative Proceedings

If HUD issues a charge following a reasonable cause determination, any complainant or respondent may elect to have the charge litigated in the United States District Court, in which case, the charge will be prosecuted by the Department of Justice. If no one makes such an election within the prescribed time, the charge will be handled before a HUD Administrative Law Judge. Regardless of whether the charge is handled through litigation or administrative proceedings, the respondents may be ordered to pay damages, complainant's legal fees, and provide services and amenities if the alleged discrimination is proven.

III. How To Respond To A Fair Housing Investigation

Responding to a Fair Housing investigation entails internal operational considerations and dealings with HUD. Take the matter seriously despite any reaction you may have that the complaint is utterly lacking. The heart of a concerted response involves the acquisition, analysis and dissemination of information.

A. Initial Responses To Investigation

Given the potential liability exposure arising under the Fair Housing Act, it is recommended that you notify your counsel as soon as a complaint is served. Among the suggested steps to follow are:

1. DO NOT RETALIATE AGAINST THE COMPLAINANT

While the complaint may be frivolous, a prompt, professional response is essential. Do not retaliate against the complainant in any manner, as this may compound the claim and lead to far greater liability.

2. Notify Appropriate Personnel

Upon receipt of a fair housing complaint take prompt steps to bring the claim to the attention of your management, building owner, counsel, insurance carrier and risk manager. Further, property management staff should be advised that a claim has been filed and that they should continue to treat the complainant in a professional manner, while referring all inquiries regarding the complainant to a designated management representative.

3. Designate A "Point Person" To Handle Communications

Commencement of a Fair Housing complaint may well be followed by publicity or rumors among building residents and staff. Response to inquiries regarding the complaint and investigation should be centralized in as few persons as possible to promote coherence. Once a determination is made as to the overall position you will take in the investigation (i.e. complete denial of allegations and vigorous defense, or conciliatory attempts to bring quick resolution), a "public position" should be formulated to address inquiries. The position can range from "no comment," or "the matter is in litigation, please contact our counsel," to "we deny any wrongdoing and reassert our strong commitment to Fair Housing laws." Property management staff should be advised to refer to the designated communicator all inquires and communications

regarding the complainant.

4. Gather Information

By far, locating, organizing and analyzing pertinent information are critical steps in responding to a Fair Housing investigation. Prompt gathering and analysis of information permits an early assessment of the risks, strategy, degree of resource to commit, and possible settlement options. Among the recommended steps are:

a. Identify relevant persons

Determine who has had contact with the complainant. Primarily, this includes property management and its staff, but may include other residents or visitors who may have some knowledge of events or issues bearing on the complaint or your defense. Some of these persons should be interviewed as discussed below.

b. Locate and preserve all records related to the complainant

Despite the cost and inconvenience take prompt steps to organize all documents related to the complainant, including tenant files, work orders, leases, accounting files, telephone records, notes of conversations, and electronic records (i.e. email, letters or other documents prepared on computer). Records stored in archives or off-site should be retrieved as well.

Once a fair housing complaint is filed, do not alter or destroy any relevant records, written or electronic. Destruction may lead to criminal liability.

Even before a fair housing complaint is filed, you should document inquiries, events or communications where someone is seeking, but denied tenancy, or whose lease is not being renewed, or whose request for "reasonable accommodation" is denied, or where you seek eviction. Many Fair Housing complaints arise in the context of the formation or termination of the landlord-tenant relationship. Thus, care should be exercised to make a record of the matters bearing on these events as such information will become critical evidence for your defense if a complaint is filed.

Your counsel undoubtedly will want a copy of your complete records as soon as possible. This will facilitate counsel's case analysis, preparation of defenses, witness interviews, and response to later HUD requests for information.

c. Interview Witnesses

If you have engaged counsel to represent you in the investigation, counsel will likely conduct interviews. Beginning with your staff, conduct interviews to elicit facts bearing on the complainant's allegations and your potential defenses. Inquire of all contacts anyone has had with complainant. It may be prudent to interview residents, visitors or others regarding the complaint, although care must be exercised inasmuch as your discussions may create more inquiries or be conveyed to the complainant. The goal is simply to develop a clear understanding of the events and factors giving rise to the complaint so that you can develop a strategy in response.

5. Analyze Information

Review the pertinent documents, witness interviews and determine the strengths and weaknesses of the complainant's allegations and your defenses. To some extent this may be difficult to accomplish if the allegations are very general. Nevertheless, based on the claims asserted and available information, determine whether or not you have a viable defense. Various defenses may be available depending upon the facts involved, including: the claim is untimely, the claimant is not injured or otherwise lacks standing to bring the claim, the alleged discrimination does not involve a protected class (e.g. race, sex, handicap), no "dwelling" as defined under the Fair Housing Act is involved, or the alleged discrimination involves exempted activity (e.g., a dwelling owned by a private club or religious entity).

6. Consider Remedial Action

To the extent that the complaint has merit consider taking immediate action to redress the discrimination. This may lessen your exposure and the ultimate relief (i.e. damages and attorney's fees) complainant may recover from you.

C. Formal Response To Investigation

As discussed above a respondent charged with a housing discrimination complaint may file an answer within 10 days of receipt of the complaint. Because of the multitude of federal and state laws, procedural considerations, and potential exposure, it is strongly recommended that you engage counsel experienced with such matters. Counsel will review the documentary and witness information available and determine what defenses to assert in your answer.

D. Dealing With The Investigation

In large measure the investigative phase entails responding to HUD's requests for information. As soon as respondents receive the complaint they should gather and analyze relevant information noted above and develop a strategy. Amassing relevant information will not only guide the formulation of a defense, but will facilitate the inevitable response to HUD's requests for information.

HUD will seek information from respondents soon after the complaint is filed. HUD may request respondents' records pertaining not only to the complainant, but to other persons similarly situated. For example, if a complaint alleges discrimination on the basis that respondent apartment manager failed to make reasonable accommodations to permit handicap access, HUD may seek files related to the manager's treatment of other requests for accommodations, as well as the tenant records concerning other handicapped residents.

Generally, HUD seeks respondents' voluntary cooperation in producing records and providing witnesses for interviews. In many instances cooperation at an early stage may suffice HUD's informational needs, and reduce the respondent's time, inconvenience and cost. Absent cooperation, HUD will likely invoke its broad subpoena power and discovery options to seek the

production of documents and witnesses.

Courts have enforced HUD's authority to seek documents and witnesses. In addition, courts may sanction respondents who willfully disregard HUD's information requests or falsify evidence in response to HUD's requests. Federal law provides for fines up to \$100,000 and a year's imprisonment in connection with willful discovery abuses. Nevertheless, if HUD's discovery is overly broad, unduly burdensome, or impermissibly harassing, respondents should assert their rights to limit such efforts.

Moreover, respondents' relevant staff should be interviewed and prepped for later inquiries and interviews by HUD. Documents generated or received by these persons related to the complaint should be reviewed as well. Staff should be asked concerning all contacts with the complainant and any other information useful in preparing a defense. Respondents' policies, procedures and Fair Housing training materials should also be reviewed and discussed with staff.

Be cooperative, professional, but firm in dealings with investigators. They are entitled to a broad array of information, but as noted above, their entitlement is not unlimited. To the extent investigators seek information pertaining to non-complainant tenants, you may need to protect certain privacy interests and withhold certain information while advising the investigators of your action.

E. Conciliation

While the investigation is underway HUD will attempt to resolve the dispute through conciliation. While a settlement conciliation agreement is unlikely to arise unless respondents make some concessions (unless the complaint is utterly frivolous), serious thought should be given to resolving the complaint through a negotiated agreement, especially where the complaint has some merit. Such an agreement, subject to HUD approval, ends the investigation, avoids adverse findings in a FIR, and circumvents a later lawsuit or administrative hearing should HUD determine that reasonable cause exists. In short, conciliation may resolve the matter on a less expensive and time-efficient basis.

The conciliation agreement is still a matter of public record unless the parties and HUD agree otherwise. As such, consideration should be given to whether or not a publicized stipulated settlement agreement is preferable to a potential adverse court judgment or administrative finding and resulting order to pay damages and attorneys' fees, or to provide other relief to complainant.

IV. Conclusion

HUD's commitment to increase its enforcement actions in an increasingly litigious society, raises the likelihood that multifamily housing managers and owners will be involved in a Fair Housing complaint at some point. Deal with the complaint in a professional, methodical manner. Resource must be devoted to gather and analyze relevant information, but this will increase the prospect for obtaining a better outcome.

