STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. HG13BW-65449
HUD NO. 02-16-0022-8

Diallo Hall & Bethlehem Girma, Complainants, v. Montclair Gardens, LLC d/b/a The Chanler, and the Vanguard Group, Respondents.	)	Administrative Action **FINDING OF PROBABLE CAUSE**

This is a housing discrimination matter. On July 21, 2015, Essex County residents Diallo Hall and Bethlehem Girma (Complainants) filed a verified complaint with the New Jersey Division on Civil Rights (DCR) alleging that Montclair Gardens, LLC, d/b/a The Chanler, and the Vanguard Group (Respondents)[1] refused to rent a two-bedroom apartment to them because of their familial status, in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. Respondents denied the allegations of discrimination in their entirety. DCR's investigation found as follows.

The Chanler is a 48-unit apartment complex located in Montclair. All 48 units are two-bedroom. The Vanguard Group provides tenant services and/or retail brokerage services and/or property management services to the property. On or about May 20, 2015, Complainants and their three young children (two boys ages 4 and 18 months, and an 8-year-old girl) visited the Chanler and were shown a unit that had a partially finished basement with an extra bathroom. Hoping to rent the unit, Complainant submitted a rental application to Vanguard Group Administrator Carol Grapes, on which they listed their children's names and ages, references, housing and employment

[1] The verified complaint identified respondents as "The Chanler and Vanguard Group." The caption is hereby modified based on information that "The Chanler" is a fictitious DBA name and that the entity's legal name is Montclair Gardens, LLC.

information, and paid a $70 application fee. The couple planned to have the children sleep in the master bedroom and take the second bedroom for themselves, or have the youngest child sleep with them in the master bedroom. Complainant understood that Grapes would check their references and credit ratings.

On or about June 8, 2015, Grapes told Complainants that they had too many children to move into the apartment.

On July 21, 2015, Complainants initiated the instant action alleging discrimination based on familial status.

During the course of the DCR investigation, Respondents stated that allowing Complainants and their three children to occupy the apartment would have violated the local municipal ordinance, i.e., Township of Montclair Municipal Code § 190-18, and that their position was supported by the U.S. Department of Housing and Urban Development (HUD) and N.J. Division of Consumer Affairs. They noted in part:

> [Complainants'] occupancy would have violated local ordinance section 190-18 . . . The bedrooms at issue are 186 square feet and 89 square feet respectively. The total square footage is approximately 700 square feet. Complainants were not denied an apartment due to their family status or because they have children. It was solely due to the amount of people. Under Complainants' theory, even if they had ten children, respondent still had to rent them an apartment regardless of the size of their unit. Respondents even contacted HUD and the Division of Consumer Affairs . . . and were advised by the government that their general rule is 2 heartbeats per bedroom.
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> [See Respondents' Response to Document and Information Request, Sept. 3, 2015, p.1]

DCR asked Respondent for information as to the date and identity of the people it spoke with at HUD and Division of Consumer Affairs. Respondent's counsel replied in part:

> I placed a phone call to both agencies and both agencies advised that respondents' actions were legal. To the best of my recollection, these phone calls occurred sometime in late August or early September of 2015. I do not recall with whom I spoke as it was a few months ago and I had no reason to believe these phone calls would be an issue. One of agencies, I believe the Division of Consumer Affairs,

advised that they have general a rule of "two heartbeats per bedroom" and do not provide two bedroom units to a family of more than four.

[See Letter from Joshua Beinhaker, Esq., to DCR, Jan. 8, 2016]

During the course of the investigation, Respondents produced a copy of the unit's floor plan, which shows the bedrooms' dimensions to be 9' 9" x 11' 9" and 11' 10" x 16' 5". See Facsimile from Beinhaker to DCR, "Floor Plan w/ Dimensions HG13Bw-65449," Sept. 17, 2013.

Respondents also told DCR that as per their lease agreements, basements are not to be used as living space because they are not heated and sometimes leak. Respondents did not identify any physical limitations within the building, or any other factors as the basis for their refusal to rent to the Complainants.

Analysis

The LAD makes it illegal for any person, including an owner, landlord, "assignee or managing agent" of any real property, to refuse to "rent, lease, assign, or sublease" an apartment to an applicant based on the latter's "familial status." N.J.S.A. 10:5-12(g). The LAD defines "familial status" as:

> the natural parent of a child, the adoptive parent of a child, the resource family parent of a child, having a "parent and child relationship" with a child as defined by State law, or having sole or joint legal or physical custody, care, guardianship, or visitation with a child, or any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years.

[N.J.S.A. 10:5-5(ll).]

The Fair Housing Act ("FHA"), 42 U.S.C. §§ 3601 et seq., is the federal analog to the LAD. The FHA—like the LAD—prohibits discrimination in housing against families with children under eighteen. See 42 U.S.C. §3604. However, the FHA carves out an exception for occupancy codes. Id. at §3607(b)(1) ("Nothing in this title limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling.").

Although the LAD does not contain an exception for "reasonable local, State, or Federal [occupancy] restrictions," the Director has no hesitation in adopting that exception. Government-created occupancy codes serve public health needs by limiting the number of occupants "in reasonable relation to available sleeping and bathroom facilities or requiring a minimum amount of habitable floor area per occupant." See Kirsch Holding Co. v. Borough of Manasquan, 59 N.J. 241, 254 (1971); see also State v. Baker, 81 N.J. 99, 110 (1979). Moreover, DCR typically attempts to interpret the LAD in a manner that keeps the State and federal statutes substantially equivalent. N.J.S.A. 10:5-9.2; see generally Grigoletti v. Ortho Pharmaceutical Corp., 118 N.J. 89, 97 (1990) (noting that New Jersey courts are not bound by federal precedent in construing the LAD but have consistently "looked to federal laws as a key source of interpretive authority").[2]

In this case, Respondents rely on a township code provision that states in part:

a. Every dwelling unit shall contain at least 150 feet of floor space for the first occupant thereof and at least 100 additional square feet of floor space for every additional occupant thereof, the floor space to be calculated on the basis of total habitable room area.

b. In every dwelling unit of two or more rooms, every room occupied for sleeping purposes by one occupant shall contain at least 70 square feet of floor space, and every room occupied for sleeping purposes by more than one occupant shall contain at least 50 square feet of floor space for each occupant thereof.

See Montclair Municipal Code at § 190-18.

Respondents appear to have misinterpreted or misapplied the Montclair occupancy code. The code requires five occupants to have a minimum of 550 square feet of floor space. Respondent acknowledges that the unit at issue has approximately 700 square feet (excluding the basement). Thus, there is sufficient room to house five occupants. And although the basement is

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[2] This discussion deals with occupancy codes created by public bodies, e.g., city or state governments. Private policies are not given the same deference as governmental codes. Pfaff v. U.S. Dept. of Housing, 88 F.3d 739, 746 (9th Cir. 1996).

not to be considered habitable space, it provides an additional bathroom and storage space, adding floor space to consider as a practical matter.

The code also states that "every room occupied for sleeping purposes by more than one occupant shall contain at least 50 square feet of floor space for each occupant thereof." The bedrooms are approximately 194.24 sq. ft. and 114.56 sq. ft., respectively. Respondents' assertion that the rooms are "186 square feet and 89 square feet respectively," is contradicted by the floor plans produced by Respondents, which gives that the bedrooms' dimensions as 11' 10" x 16' 5 and 9' 9" x 11' 9". Complainants did not know whether the three children would sleep in the master bedroom and the couple would take the second bedroom, or if the couple and the youngest child would sleep in the master bedroom, with the two other children in the second bedroom. But under either configuration, there would be three occupants in the master bedroom (which would require 150 sq. ft.), and two occupants in the second bedroom (which would require 100 sq. ft.). Because the bedrooms' actual square footage exceeds those requirements, there would be no code violation.

Respondents cannot reasonably argue that they relied on advice from the Division of Consumer Affairs and/or HUD because, based on their own timeline of events, their decision to deny Complainants' application was reached months before their attorney contacted the Division of Consumer Affairs and HUD. Moreover, it is unclear what knowledge or jurisdiction the Division of Consumer Affairs would have regarding occupancy issues.[3] And HUD has made clear that it is not wed to an ironclad mathematical formula when reviewing occupancy cases. Instead, HUD looks to practical considerations such as the size of the bedrooms, overall size off the unit, ages of children, configuration of the unit, physical limitations of the housing ("such as the capacity of the septic,

[3] The Department of Community Affairs has promulgated a State Housing Code, N.J.A.C. 5:28-1.1, et seq.. which "sets standards consistent with minimum health and safety requirements and covering, but not limited to, matters such as water supply, plumbing, garbage storage, lighting, ventilation, heating, egress, maintenance and use and occupancy." N.J.S.A. 2A:42-76. The municipal language that Respondents cite is taken almost verbatim from the State Housing Code. Thus, the circumstances of this case would not violate the State provision.

sewer, or other building systems"), state and local laws, and any other relevant factors. See 63 F.R. 70982 to 70987, Vol. 63, No. 245Sec. 22, 1998. Given HUD's statement that factors other than the number of occupants and bedrooms should be considered, any suggestion that HUD strictly imposes a two-persons-per-bedroom policy is simply incorrect.[4]

At the conclusion of an investigation, the Director is required to determine whether "probable cause exists to credit the allegations of the verified complaint." N.J.A.C. 13:4-10.2. "Probable cause" for purposes of this analysis means a "reasonable ground of suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious person in the belief that the [LAD] has been violated." Ibid. A finding of probable cause is not an adjudication on the merits, but merely an initial "culling-out process" whereby the DCR makes a threshold determination of "whether the matter should be brought to a halt or proceed to the next step on the road to an adjudication on the merits. Frank v. Ivy Club, 228 N.J. Super. 40, 56 (App. Div. 1988), rev'd on other grounds, 120 N.J. 73 (1990), cert. den., 111 S.Ct. 799 (1991). Thus, the "quantum of evidence required to establish probable cause is less than that required by a complainant in order to prevail on the merits." Ibid.

In this case, there was no explicit evidence that Respondents harbored a bias against families with children in general. On the other hand, it appears that Respondents, who control at least 48 separate apartments in Essex County, needlessly prevented this family (and possibly other families) from obtaining housing based on a misapplication of the governing laws. In other words, Respondents may not have intended to discriminate against Complainants for having three children under 18-years-old. However, it appears to be undisputed that if Complainants had no children, or fewer children, then they would not have been denied housing. And since all units in the complex contain only two-bedrooms, Respondents' strict application of a "two-heartbeat per bedroom" rule,

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[4] Regulations promulgated by the Department of Community Affairs state that when calculating floor space for additional occupants, "children under the age of two shall not be considered additional occupants." N.J.A.C. 5:10-22.3. One of Complainants' children was under 2-years old at the time. However, for purposes of this discussion, DCR counted the child an "additional occupant."

regardless of the size of the bedrooms or children's ages, would discriminate against other two-parent families with three children. In view of the above, the Director is satisfied at this threshold stage in the process that there is a sufficient basis to warrant "proceed[ing] to the next step on the road to an adjudication on the merits." Frank, supra, 228 N.J. Super. at 56.

DATE: 2-11-16

Craig Sashihara, Director
NJ DIVISION ON CIVIL RIGHTS