



**SCHOOL OF LAW**  
THE UNIVERSITY OF TEXAS AT AUSTIN

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Mark Rogers  
Executive Director  
Guadalupe Neighborhood Development Corporation  
813 E 8<sup>th</sup> St  
Austin, TX 78702

Re: Legal Opinion on Fair Housing Laws and Prioritizing Families for Larger Affordable Housing Units

Dear Mark:

You asked me to research whether it is a violation of fair housing laws for a housing provider to prioritize larger households, for example families with children, over smaller households, for example one-person households, when determining who may rent or purchase two, three-bedroom, or four-bedroom housing units and units with larger yards.

It is my opinion that housing providers may prioritize families with children over households without children for larger affordable housing units under federal, state, and local fair housing laws. Specifically, a decision by a public or private housing provider to give a preference to families with children over single individuals when renting or selling housing units with two or more bedrooms and units with larger yards would not violate fair housing laws.

**I. Fair Housing Laws**

**A. Federal Fair Housing Act**

The federal Fair Housing Act, as enacted in 1968 and amended in 1988, prevents housing discrimination based on race, color, religion, sex, familial status, national origin, or disability.<sup>1</sup> The statute makes it unlawful to refuse to sell, or rent, or to otherwise make unavailable a housing unit to a potential occupant based on one of the seven, enumerated characteristics.<sup>2</sup> Only two of the seven protected characteristics are further defined in the statute: disability and familial status.<sup>3</sup> The other five protected characteristics—race, color, religion, sex, and national origin—are not defined in the statute.

Familial status is specifically defined as follows:

“(k) Familial status means one or more individuals (who have not attained the age of 18 years) being domiciled with—

- (1) a parent or another person having legal custody of such individual or individuals; or
- (2) the designee of such parent or other person having such custody, with the written permission of such parent or other person.

<sup>1</sup> 42 U.S.C.A. § 3604.

<sup>2</sup> 42 U.S.C.A. §§ 3604–06.

<sup>3</sup> 42 U.S.C.A. § 3604 (h) and (k).

The protections afforded against discrimination on the basis of familial status shall apply to 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.”<sup>4</sup>

“Familial status” protects families with children from discrimination but does *not* extend the same protection from discrimination to households without children. The definition of “familial status” expressly states that it covers only families with children under the age of 18 years. The definition of “handicap” similarly describes the specific individuals who are protected under that part of the statute and in so doing makes clear that individuals without disabilities are not entitled to the same protections.<sup>5</sup> In contrast, the statute does not define “race, color, religion, sex, or national origin” to include only certain races, colors, religions, sexes, or national origins, which leaves those protected categories open to people of *all* races, colors, religions, sexes, or national origins.

**B. Texas Fair Housing Act**

The Texas Fair Housing Act has the same protected categories as the Fair Housing Act and defines familial status in a similar manner,

“A discriminatory act is committed because of familial status if the act is committed because the person who is the subject of discrimination is:

- (1) pregnant
- (2) domiciled with an individual younger than 18 years of age in regard to whom the person:
  - (a) is the parent or legal custodian; or
  - (b) has the written permission of the parent or legal custodian for domicile with that person; or
- (3) in the process of obtaining legal custody of an individual younger than 18 years of age.”<sup>6</sup>

Like the federal Fair Housing Act, the Texas law expressly protects families with children from housing discrimination. It does not also protect households without children from housing discrimination.

**C. Austin City Code**

The Austin City Code has more protected categories than the state or federal housing laws, including “race, color, creed, religion, sex, national origin, disability, student status, marital status, familial status, sexual orientation, gender identity, age, or source of income.”<sup>7</sup> The three main protected groups that could potentially be an issue in the context of prioritizing families with children over households without children are familial status, marital status, and student status. This city ordinance defines familial status in the same way as the Texas Fair Housing Act.<sup>8</sup> Marital status is defined as “an individual’s status as single, married, divorced, widowed, or separated person.”<sup>9</sup> Student status is defined as “an individual’s status as a student enrolled in any type of educational program or institution.”<sup>10</sup> For both the marital

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<sup>4</sup> *Id.* § 3602(k).

<sup>5</sup> 42 U.S.C.A. § 3604 (h).

<sup>6</sup> Tex. Prop. Code § 301.004.

<sup>7</sup> AUSTIN, TX, CIVIL RIGHTS CODE, § 5-1-1.

<sup>8</sup> *Id.* § 5-1-13(16).

<sup>9</sup> *Id.* § 5-1-13(20).

<sup>10</sup> *Id.* § 5-1-13(25).

status and student status categories, housing providers may not treat those applicants for housing differently *because of* their marital status (e.g., refusing to rent or sell to unmarried couples living together or refusing to sell to someone because she is divorced or single) or *because of* their student status (e.g. refusing to rent or sell to students), but housing providers may treat those same applicants differently for other reasons – here, because they have fewer individuals in their household.

The question of what marital status housing discrimination protects has not been litigated in Texas, but it has been litigated in other state courts across the country.<sup>11</sup> The issue that comes up repeatedly in these cases is whether a landlord or seller can discriminate against a buyer or renter because of his or her personal religious beliefs.<sup>12</sup> The facts in these cases are similar: an unmarried couple want to live together, and the landlord or seller does not want to rent or sell the property to them because of his or her religious beliefs that living together without being married is a sin.<sup>13</sup> Courts have come out opposite ways on this issue, with some courts holding that the landlord or seller may discriminate based on their religious beliefs, and other courts finding this to be discrimination on the basis of marital status that is not allowed under state or local laws.<sup>14</sup>

After looking at the plain language of the statute and the holding of these cases, it is clear that marital status protection does not prevent housing providers from giving single people a lower priority with regard to access to larger affordable housing units. In fact, there is at least one state, Massachusetts, that has a system that prioritizes families over single people in larger affordable housing units, and that state's fair housing law also includes a protection against marital status discrimination.

## II. Massachusetts Plan

Massachusetts has an expanded set of protected categories when it comes to housing discrimination, including race, color, religious creed, national origin, ancestry, sex, marital status, veteran status, age, handicap/disability, gender identity, sexual orientation, children, public assistance, children/lead paint, and public assistance recipient (e.g., Section 8 voucher holder or MRVP voucher holder).<sup>15</sup> Even with these expanded protected categories, Massachusetts has created a system that mandates affordable housing developers prioritize families over single individuals living alone.<sup>16</sup>

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<sup>11</sup> See, e.g., *Smith v. Fair Employment and Hous. Com.*, 12 Cal. 4th 1143 (Cal. 1996) (holding that a landlord may not discriminate against an unmarried couple because of his own personal religious beliefs); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994) (holding that a landlord may discriminate against potential tenants due to their marital status because it is his right under the free exercise clause); *County of Dane v. Norman*, 174 Wis.2d 683 (Wisc. 1993) (holding that a landlord's policy discriminating against tenants on the basis of marital status did not violate the ordinance preventing marital status discrimination because "[l]iving together is 'conduct' not 'status'"); *State v. French*, 460 N.W.2d 2 (Minn. 1990) (holding that a landlord who refused to rent out his home to plaintiffs because they were not married (but engaged) was allowed to discriminate because of his religious beliefs); *Attorney Gen. v. Deilets*, 418 Mass. 316 (Mass. 1994) (vacating the lower court judgment for the landlord and remanding to lower court for consideration); *N.D. Fair Hous. Council, Inc. v. Peterson*, 2001 N.D. 91 (N.D. 2001) (holding that a landlord could refuse to rent to an unmarried couple).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Attorney General Maura Healey, *Housing Discrimination*, Mass.Gov, <http://www.mass.gov/ago/consumer-resources/your-rights/civil-rights/housing/housing-discrimination.html>, last visited Nov. 3, 2015; see also M.G.L. c. 151B (Massachusetts Antidiscrimination Law prohibiting discrimination in advertising, public housing, and actions taken by realtors, landlords, mortgage lenders and brokers).

<sup>16</sup> MASSACHUSETTS DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT, AFFIRMATIVE FAIR HOUSING MARKETING AND RESIDENT SELECTION PLAN GUIDELINES 1 (2013), available at <http://www.mass.gov/hed/docs/dhcd/hd/fair/afhmp.pdf>.

Massachusetts has created Affirmative Marketing and Resident Selection Plan Guidelines.<sup>17</sup> These guidelines were put in place to help facilitate access to affordable housing and to help comply with fair housing laws.<sup>18</sup> These guidelines require “all privately assisted housing or housing for inclusion on the Subsidized Housing Inventory [to] have an Affirmative Fair Housing Marketing and Resident Selection Plan.”<sup>19</sup>

The guidelines recognize the importance of using affordable housing resources wisely, prescribing that “household size should be appropriate for the number of bedrooms in the home”, and give preference to larger families requiring more bedrooms in their homes.<sup>20</sup> The guidelines define household as “two or more persons who will live regularly in the unit as their principal residence and who are related by blood, marriage, law or who have otherwise evidenced a stable inter-dependent relationship, or an individual.” The guidelines require a three-tiered preference system, with each applicant ranked in one of these three preferences and drawn by a lottery.<sup>21</sup> The preference system is as follows:

a. First Preference

Within an applicant pool first preference shall be given to households requiring the total number of bedrooms in the unit based on the following criteria:

- (1) There is at least one occupant per bedroom
- (2) A husband and wife, or those in a similar living arrangement, shall be required to share a bedroom. Other household members may share but shall not be required to share a bedroom.
- (3) A person described in the first sentence of (2) shall not be required to share a bedroom if a consequence of sharing would be a severe adverse impact on his or her mental or physical health and the lottery agent receives reliable medical documentation as to such impact of sharing.
- (4) A household may count an unborn child as a household member. The household must submit proof of pregnancy with application.
- (5) If the applicant is in the process of a divorce or separation, the applicant must provide proof that the divorce or separation has begun or has been finalized, as set forth in the application.

b. Second Preference

Within an applicant pool second preference shall be given to households requiring the number of bedrooms in the unit minus one, based on the above criteria.

c. Third Preference

Within an applicant pool third preference shall be given to households requiring the number of bedrooms in the unit minus two, based on the above criteria.”<sup>22</sup>

This system of preferences helps to get families into larger units instead of giving single people living alone a three-bedroom house. It recognizes the fact that affordable housing is a scarce resource and

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 9.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

larger families need larger units. The plan helps to demonstrate that prioritizing families for larger units is allowed under fair housing laws.

**III. Conclusion**

In conclusion, the federal Fair Housing Act prohibits discrimination against seven different protected characteristics, including familial status. Familial status protects families with children under the age of 18 from housing discrimination. It does not protect households without children from discrimination because they don't have children, as this is not a protected category. Texas has the same protected categories as the federal fair housing law.

The City of Austin has expanded its protections through its city ordinance, including categories such as marital status and student status that are not protected under the federal or state laws. Housing providers in Austin may not discriminate against applicants on the basis of their marital status or their student status, but that does not prevent housing providers from adopting a policy or practice that awards larger housing units to households with children.

The Massachusetts guidelines put forth by the Massachusetts Department of Housing and Community Development mandate that developers of affordable housing prioritize larger families for larger units. The promulgation of these guidelines demonstrates the ability of housing providers to prioritize families with children over households without children under the federal Fair Housing Act.

For the reasons stated above, I believe that housing providers may prioritize families with children over households without children for larger affordable housing units under federal, state, and local fair housing laws. I would be happy to discuss any of these issues further or answer any questions you may have for me.

Sincerely,



Eliza Platts-Mills, Attorney and Clinical Professor  
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