

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF HEARINGS AND APPEALS

The Secretary, United States)	
Department of Housing and Urban)	
Development, on behalf of Complainant)	
Commonwealth Development, Inc.)	
)	HUD OHA No.
Charging Party,)	FHEO No. 06-17-8202-8
)	
v.)	
)	
City of Arlington, Texas)	
)	
Respondents)	
)	

CHARGE OF DISCRIMINATION

I. JURISDICTION

On May 2, 2017, Complainant Commonwealth Development, Inc. filed a timely complaint with the Department of Housing and Urban Development (“HUD” or the “Department”) alleging that Respondent the City of Arlington, Texas violated subsection 804(a) of the Fair Housing Act, 42 U.S.C. §§ 3601-19 (“Act”), by discriminating because of familial status. On January 5, 2018, the Complaint was amended to clarify the violation alleged.

The Act authorizes the Secretary of HUD to issue a Charge of Discrimination (“Charge”) on behalf of aggrieved persons following an investigation and a determination that reasonable cause exists to believe that a discriminatory housing practice has occurred. *See* 42 U.S.C. § 3610(g)(1), (2). The Secretary has delegated that authority to the General Counsel, 24 C.F.R. §§ 103.400, 103.405, who has re-delegated that authority to the Associate General Counsel for Fair Housing and the Assistant General Counsel for Fair Housing Enforcement. 76 Fed. Reg. 42,463, 42,465 (July 18, 2011).

By a Determination of Reasonable Cause issued contemporaneously with this Charge of Discrimination, the Acting Director of the Office of Systemic Investigations, on behalf of the Assistant Secretary for Fair Housing and Equal Opportunity, has determined that reasonable cause exists to believe that a discriminatory housing practice has occurred and has authorized and directed the issuance of this Charge. 42 U.S.C. § 3610(g)(2); 76 Fed. Reg. 73,990 (Nov. 29, 2011).

II. SUMMARY OF FINDINGS IN SUPPORT OF THIS CHARGE

Based on HUD's investigation of the allegations contained in the aforementioned complaint and the Determination of Reasonable Cause, Respondents are hereby charged with violating the Act as follows:

A. Legal Authority

1. It is unlawful to make a dwelling unavailable because of familial status. 42 U.S.C. § 3604(a). Such prohibited conduct includes "[e]ngag[ing] in any conduct relating to the provision of housing which otherwise makes unavailable or denies dwellings to persons because of . . . familial status." 24 C.F.R. § 100.50(b)(3). Familial status is defined as having a child in the household under the age of eighteen or being pregnant or in the process of securing legal custody of a minor child. 42 U.S.C. § 3602(k).

B. Parties

2. Complainant Commonwealth Development, Inc. is a housing development company located in Bryan, Texas.

3. Respondent, the City of Arlington, Texas, was incorporated in 1884 and is governed by a City Council that includes the Mayor and eight district representatives.

C. Factual Allegations

a. LIHTC and Respondent's Policy

4. The Low Income Housing Tax Credit ("LIHTC") is a federal tax credit under the United States Tax Code designed to incentivize the construction and rehabilitation of affordable housing for low-income residents. The program is the largest federal program for low-income housing development in the United States. LIHTC credits are allocated to developers in two ways: 9% and 4% credits. 9% credits are generally reserved for new construction and are highly competitive, while 4% credits are non-competitive and typically used for rehabilitation projects and new construction that is financed with tax-exempt bonds.

5. In Texas, the State's Department of Housing and Community Affairs allocates LIHTC credits pursuant to Texas's Qualified Allocation Plan ("QAP"). Under the Texas QAP, proposed projects can earn seventeen points for a resolution from the local government that it supports the project and fourteen points for a resolution from the local government that it does not object to the project. There is no limit to the number of projects a local government can support. Because the selection process for 9% credits is so competitive, it is practically impossible for a project to score high enough to be selected without these points. In Respondent's region, the state allocated about seven and a half million dollars (39% of total funds) exclusively for projects that would not be restricted to elderly residents (referred to by Respondent as "workforce" housing).

6. On November 29, 2016, the City of Arlington, Texas, adopted a Housing Tax Credit Review Policy (the “Policy”) setting forth criteria for the City Council to use to decide which proposed LIHTC projects would receive resolutions of support or no objection and which would not. One of the five criteria was “The City has a preference for new development of senior housing or redevelopment of senior and/or workforce housing.”

7. Although written as a preference, City officials made statements demonstrating they intended this criterion to be a requirement. For example, one councilmember stated, “we specifically [tried] to get away from . . . allow[ing] workforce housing We were trying to differentiate between senior living and workforce living.” In practice, only projects that conformed to the preference were approved under the Policy.

8. In crafting and applying the Policy, City officials made statements indicating that they preferred senior projects to workforce projects because residents with children would be problematic. For example, a councilmember expressed her view that local residents do not like having families with children as neighbors: “the community said ‘I don’t want to live next to a three-year old; the only thing worse than living next to a three-year old is living next to an eight-year old,’ so they wanted senior housing.” The Deputy City Manager also raised objections to attracting new residents with children when he stated that LIHTC projects would “be problematic if they are developed [not for seniors] whether it’s from a school standpoint or they’re just in the wrong location.”

9. The Council was aware that a need for non-age-restricted affordable housing existed in the City. Based on the City’s own Analysis of Impediments to Fair Housing Choice, “There are relatively fewer elderly persons and persons living alone, thus a smaller demand for small housing units from these segments of the population.” Additionally, the City’s Consolidated Plan reported that 15,895 non-elderly households, in addition to 2,920 elderly households, have untenably high housing cost burdens. Complainant reminded the City Council of this dual need on numerous occasions, as well as of the fact that the Council could simultaneously support both senior and workforce projects, but the Council persisted in ignoring the affordable housing needs of non-senior households. Census data shows that among LIHTC-eligible households in the Arlington area, a non-senior-headed household is much more likely to have children than a senior-headed household.

b. The 2017 Application Cycle and Complainant’s Proposal

10. For the 2017 application cycle, the City received ten applications for projects using 9% credits, but two of the applications were withdrawn. Complainant’s proposal was the only one for the new construction of workforce housing. Among the others considered, six were for the new construction of senior housing and one was for the rehabilitation of workforce housing.

11. Complainant sought a resolution of support for a development called Cooper Street Apartments. The development would have had 104 units, eighty-eight of which would have been affordable. The development would have had twenty-four three-bedroom units, fifty-six two-bedroom units, and twenty-four one-bedroom units. Census data shows that most of the two- and three-bedroom units would likely have been occupied by families with children.

12. Complainant repeatedly explained to the City Council that with a resolution of support its project was highly likely to be selected by the state for LIHTC funding because it would receive a high score on the state's metrics. Complainant also explained that workforce and senior housing were not in competition with one another because the state set aside a large amount of money exclusively for workforce housing.

13. The City Council provided resolutions of support to two of the six proposals for new construction of senior housing. All other 9% projects were denied, including Cooper Street Apartments and the proposed workforce redevelopment project. In considering Complainant's proposal, councilmembers made clear that the Policy was a reason they would not provide a letter of support or no objection. For example, one councilmember stated that as a new construction workforce housing project "that's kind of in violation of our City requirements . . . that kind of doesn't work for us right away, so I think I could make a determination on that one without taking a look at it. It just doesn't fit the criteria."

14. A proposal for a senior project using 4% credits was initially awarded a resolution of no objection (even though the Policy did not technically apply to projects using 4% credits). However, the Council subsequently considered withdrawing the resolution when the project was changed from being purely senior housing, whereupon the developer withdrew the proposal. A councilmember also spoke of another workforce project that he discouraged from even applying while the Policy was in development.

15. By enacting and implementing its Policy, Respondent blocked the construction of affordable housing that would have been occupied by families with children, including the development proposed by Complainant. Respondent did so even though supporting such proposals would have in no way impeded its ability to support senior developments as well.

16. As a result of Respondents discriminatory conduct, Complainant suffered actual damages.

D. Legal Allegations

17. As described above, Respondent discriminated by making dwellings unavailable because of familial status, in violation of subsection 804(a) of the Act. 42 U.S.C. § 3604(a); 24 C.F.R. § 100.50(b)(3).

III. CONCLUSION

WHEREFORE, the Secretary of the United States Department of Housing and Urban Development, through the Office of the General Counsel, and pursuant to 42 U.S.C. § 3610(g)(2)(A), hereby charges Respondent with engaging in discriminatory housing practices in violation of 42 U.S.C. §§ 3604(a), and prays that an order be issued that:

1. Declares that the discriminatory housing practices of Respondent, as set forth above, violate the Fair Housing Act, 42 U.S.C. §§ 3601-19;

2. Enjoins Respondent and its agents, employees, successors, and all other persons in active concert or participation with it, from discriminating because of familial status in any way related to the provision of housing pursuant to 42 U.S.C. § 3612(g)(3);
3. Requires Respondent's agents and employees to attend, at Respondent's cost, training that addresses the Fair Housing Act's prohibitions against discrimination;
4. Awards such damages pursuant to 42 U.S.C. § 3612(g)(3) as will fully compensate any aggrieved persons for any harm caused by Respondent's discriminatory conduct;
5. Awards the maximum civil penalty against Respondent for each violation of the Act, pursuant to 42 U.S.C. § 3612(g)(3) and 24 C.F.R. § 180.671; and
6. Awards such additional relief as may be appropriate under 42 U.S.C. § 3612(g)(3).

Respectfully submitted on this 23rd day of September 2020.

s/ Jeanine M. Worden

Jeanine M. Worden
Associate General Counsel for Fair Housing

s/ Kathleen M. Pennington

Kathleen M. Pennington
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing “Important Notice,” “Charge of Discrimination,” and “Determination of Reasonable Cause” were served on the following via email on this 23rd day of September 2020:

COMPLAINANT:

Commonwealth Development, Inc.
emanuel@edgproperties.net

COMPLAINANT’S REPRESENTATIVE:

J. Davis Watson
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RESPONDENT:

City of Arlington, Texas
Galen Gatten
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