HUD Adopts Formal Policy on Occupancy Standards

A new federal law may finally end the confusion that has reigned for the past few years over apartment occupancy standards. Congress recently directed the Department of Housing and Urban Development (HUD) to adopt HUD's 1991 "Keating memo" as its formal policy for deciding fair housing cases based on occupancy standards. The Keating memo says that generally a two-persons-per-bedroom limit is a reasonable occupancy standard for an owner to set.

Occupancy Standards from 1991 to Now

HUD released the Keating memo back in 1991 to guide its own investigation in determining whether a particular occupancy standard was "reasonable." Owners took the cue and began following the memo's guidelines. But in July 1995, HUD issued the "Diaz memo," which instructed its staff to look to square footage to determine reasonable occupancy standards. Then in 1996, Congress enacted a law that said it was okay to limit occupancy to two-persons-per-bedroom in most situations (what the Keating memo said)—at least until HUD implemented a formal policy.

Since 1996, HUD hasn't implemented a policy on occupancy standards. So, to put an end to any remaining confusion over occupancy standards, Congress in the new law directed HUD to adopt and follow the Keating memo as its formal policy on occupancy standards. Congress's action doesn't create a nationwide occupancy standard. It simply forces HUD to use the Keating memo to decide whether *your* occupancy standards are reasonable. In fact, the new law specifically bars HUD from adopting any new occupancy standards of its own.

Keep Exceptions in Mind

Under the Keating memo, a two-persons-per-bedroom occupancy standard may not be reasonable. The Keating memo says that two per bedroom is presumed an okay occupancy standard *unless* the size of the bedrooms or other "special circumstances" indicate that the standard is unreasonable. HUD will still decide reasonableness on a case-by-case basis.

Here are some of the factors relating to reasonableness you still need to consider when setting or evaluating your occupancy standard:

State and local laws. If your state or city has an occupancy law that's stricter than HUD's policy, you must follow it.

Sizes of bedrooms and living area. If the bedrooms are large or there's a spacious living room or den, you may need to allow more than two people per bedroom. You may also limit occupancy to only one person per bedroom if the bedrooms are extremely small. Unfortunately, HUD doesn't define terms like "large bedrooms" or "spacious living areas," so you'll need to use common sense, says Clarine Nardi Riddle of the National Multi Housing Council and the National Apartment Association. If a one-bedroom apartment looks like it could comfortably house more than two people, then allow bigger households to rent it.

Configuration and layout of apartment. What you consider to be a den or study might be a bedroom in the eyes of an apartment applicant or a HUD investigator. Unless there are other reasons to limit the number of people in the apartment, it would probably be unreasonable for you to reject a household that wanted to use a den as a bedroom.

Capacity of building systems. When setting your occupancy standards, you can consider the number of people your building's septic, sewer, and other systems can handle. But if you're going to use this as a reason to limit the number of people you let occupy a bedroom, you'll need to be able to prove that the burden on your building's systems would be severe, says fair housing attorney and former HUD counsel Theresa L. Kitay.

Age of children. It may be unreasonable to count infants as occupants. While it might be reasonable to limit a one-bedroom apartment to two adults, it might not be reasonable to prohibit two adults and an infant from occupying a one-bedroom apartment.

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