



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT  
WASHINGTON, DC 20410-2000

OFFICE OF FAIR HOUSING  
AND EQUAL OPPORTUNITY

April 23, 2009

G. Michael Payton  
Executive Director  
Ohio Civil Rights Commission  
30 East Broad Street, 5<sup>th</sup> Floor  
Columbus, OH 43215-3414

Dear Mr. Payton:

On February 19, 2009, Keith McNeil, Director of Operations/Regional Counsel, Ohio Civil Rights Commission (OCRC), submitted to me via email four legislative proposals. The proposals purport to address certain concerns that HUD identified in letters to you, dated February 18, 2009 and August 12, 2008, related to the Ohio fair housing law's continued substantial equivalence to the Fair Housing Act, as amended in 1988 (the Act). We have reviewed the proposals and provide the following comments for your consideration.

**I. Relief Available for Pattern or Practice Violations**

The proposed amendments, if enacted, adequately address HUD's concerns with regard to relief available to remedy pattern or practice violations.

We note, however, that the amounts of the proposed civil penalties are less than those available under the Act. Compare Proposed Ohio Rev. Stat. § 4112.052(c)(3) (providing for civil penalties of not more than \$50,000 for a first violation and not more than \$100,000 for a subsequent violation) with 28 C.F.R. § 85.3(b)(3) (adjusting for inflation penalties available under 42 U.S.C. § 3614(d)(1)(C) to \$55,000 for a first violation and \$110,000 for a subsequent violation).

**II. Standing for Fair Housing Organizations**

The proposed amendments, if enacted, adequately address that private fair housing groups must have standing to remedy housing discrimination.

**III. Respondent Subpoenas**

As HUD requested, the proposed amendments eliminate a respondent's ability to use OCRC's subpoena power during fair housing investigations. However, the subpoena power OCRC proposes to substitute may not provide for the same pre-hearing discovery available under the Act. OCRC's proposed language would provide subpoena power to "a party to a hearing" without specifying whether that power may be exercised prior to a hearing. Proposed Ohio Rev. Stat. § 4112.04(B)(3)(b) (emphasis added). The Act and its implementing regulations, in contrast, provide subpoena power to the parties both prior to and during an administrative hearing. See 42 U.S.C. §

3611(a); 24 C.F.R. § 180.545(b). This ambiguity could be addressed by beginning the relevant provision as follows: “After the filing of a charge under division (A)(2) of section 4112.05 of the Revised Code in any case in which none of the parties elects to proceed under (A)(2) of section 4112.051 of the Revised Code, upon written application of one of the parties, the commission shall issue subpoenas . . . .”

#### **IV. The Right to Intervene**

The proposed amendments do provide for intervention of aggrieved persons in elected cases, actions filed by the Attorney General in pattern or practice matters, and actions to enforce conciliation agreements. However, the amendments do not provide, as does the Act, an aggrieved person with the right to intervene in administrative proceedings adjudicating allegations of discrimination. As indicated in my August 12, 2008 letter, the Act provides that “[a]ny aggrieved person may intervene as a party in the [administrative] proceeding” while Ohio law allows for intervention only at “the discretion of the person . . . conducting the hearing,” and only for the purpose of “presentation of oral or written arguments.” See Ohio Rev. Code § 4112.05(D); 42 U.S.C. § 3612(c). For the purpose of substantial equivalence, the Ohio fair housing statute should be amended accordingly.

#### **V. Landlord Liability for Tenant-on-Tenant Harassment**

As you know, your proposed amendments do not address HUD’s concern with the Ohio Supreme Court holding in Ohio Civil Rights Comm’n v. Akron Metro. Housing Auth. In your email, dated April 1, 2009, you indicated your intention not to propose an amendment to remedy the Akron Metro. Housing Auth. holding because you are “not confident that federal law and HUD’s regulations mandate potential landlord liability for tenant-on-tenant harassment.”

You are correct that HUD has not published a final regulation on this matter. However, the U.S. Supreme Court has never issued a ruling akin to Akron Metro. Housing Auth. In fact, as I provided you via email on February 18 and 20, 2009, federal case law and HUD guidance recognize a housing provider’s obligation to take corrective action when it knows about hostile housing environment harassment. As a result, HUD may accept and investigate as jurisdictional a complaint against a housing provider for failing to take corrective action on alleged tenant-on-tenant harassment. In light of Akron Metro. Housing Auth., OCRC cannot do the same. Therefore, “in operation,” the Ohio fair housing law is inconsistent with the Act on this matter. See 24 C.F.R. § 115.205(a).

For the purpose of retaining substantial equivalence certification, I reiterate HUD’s recommendation that you propose an amendment to the Ohio fair housing law that effectively addresses this issue.

#### **VI. Burden of Proof for Design and Construction Cases**

As you know, the proposed amendments also do not address HUD’s concern with the changes made by HB444 (codified at Ohio Rev. Code § 3781.111(B)(2)). Under the Act, no presumption of compliance with the Act’s design and construction requirements attaches to the approval of building plans by a state body, even if state law incorporates the Act’s design and construction requirements.

In your April 1, 2009 email, you indicate OCRC's intent to amend its policy guidance to state that HB444's presumption would be rebutted by a prima facie showing of discrimination. We are not convinced this will resolve the substantial equivalence issue. Such guidance would appear to nullify HB444's "rebuttable presumption" by suggesting that it has no practical effect. The Ohio courts are unlikely to accept this interpretation because legislative enactments are presumed to have some discernable effect. Moreover, administrative guidance cannot repeal a statute.

## **VII. The Statute of Limitations for Design and Construction Complaints**

The proposed amendments do not address HUD's concern that the statute of limitations for design and construction claims filed with OCRC commences "when the construction of the complex was completed." Ohio Civil Rights Comm'n v. Fairmark Dev., Inc., No. 08AP-250, 2008 WL 5197160, at \*2 (Ohio Ct. App. Dec. 11, 2008) (relying upon Ohio Civ. Rights Comm. v. Triangle Real Estate Servs., Inc., No. 06AP-157, 2007 WL 1125842, at \*3 (Ohio Ct. App. Apr. 17, 2007)). This interpretation of Ohio's fair housing law materially deviates from the Act and HUD's interpretation of the statute of limitations for design and construction complaints. A design and construction violation does not "terminate"—and thus the limitations period does not commence—until a covered building is brought into compliance with the Act. U.S. Dep't of Hous. & Urban Dev., Fair Housing Act Design Manual: A Manual to Assist Designers and Builders in Meeting the Accessibility Requirements of the Fair Housing Act, 22 (rev. 1998) (design and construction "complaints could be filed at any time that the building continues to be in noncompliance"). HUD acknowledges that this position cannot be enforced in the Ninth Circuit, where the Court of Appeals rejected this reading of the statute of limitations for design and construction cases and reached a conclusion similar to that of the Ohio courts. For HUD-filed complaints arising in all other federal judicial circuits, however, HUD applies its interpretation of the Act.

I appreciate OCRC's commitment and diligent efforts to retain substantial equivalence. If you have any questions, comments, or concerns, please do not hesitate to contact me at (202) 402-7044.

Sincerely,



Kenneth J. Carroll, J.D., M.P.A.  
Director, Fair Housing Assistance Program Division

cc: Lynn M. Grosso, Director, Office of Enforcement, FHEO  
Kathleen M. Pennington, Assistant General Counsel for Fair Housing Enforcement  
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