

1. 8/24/16 Agenda

Documents:

[HOUSING COMMITTEE AGENDA 8.24.2016.PDF](#)

2. Review And Accept Minutes Of Previous Meeting Held On August 10, 2016.

2.I. Housing Committee Minutes 8/10/2016

Documents:

[1. MINUTES HOUSING COMMITTEE 8.10.2016.PDF](#)

3. Brief Overview And Discussion Of A Series Of Memorandums Consisting Of A Bundle Of Items All Connected To The Theme Of Housing Insecurity.

3.I. Rent Control Memo

Documents:

[A. RENT CONTROL MEMO 8.11.2016.PDF](#)

3.II. Non-Renewal Of Leases And Notification Requirements Memo

Documents:

[B. NON-RENEWAL AND NOTIFICATION REQUIREMENTS 8.24.2016.PDF](#)

3.III. Voucher Discrimination Memo

Documents:

[C. VOUCHER DISCRIMINATION MEMO 8.11.2016.PDF](#)

3.III.i. Voucher Discrimination Attachment

Documents:

[C1. VOUCHER DISCRIMINATION ATTACHMENT- DUSSAULT VS. RRE COACH LANTERN HOLDINGS, LLC.PDF](#)

3.IV. Tenant/Landlord Mediation Program Memo

Documents:

[D. TENANT-LANDLORD MEDIATION PROGRAM 8.11.2016.PDF](#)

3.IV.i. Mediation Program Attachment

Documents:

[D1. MEDIATION PROGRAM ATTACHMENT - MHRC MEDIATION HANDBOOK \(2\).PDF](#)

4. Brief Overview And Discussion Of Several Policy Ideas Expressed To The Committee By

4. Brief Overview And Discussion Of Several Policy Ideas Expressed To The Committee By Local Electeds.

4.I. The Mayor's "Rental Housing Security Ordinance" Proposal - Memo

Documents:

[A. MAYORS RENTAL HOUSING SECURITY ORDINANCE 8.11.2016.PDF](#)

4.I.i. Mayors Rental Housing Security Ordinance Attachment

Documents:

[A1. ATTACHMENT.PDF](#)

4.I.ii. Corporation Counsel Memo - Proposed Ordinance

Documents:

[A2. CORPORATION COUNSEL MEMO RE PROPOSED ORDINANCE.PDF](#)

4.II. Tenant Relocation Assistance Program Memo

Documents:

[B. TENANT RELOCATION ASSISTANCE PROGRAM 8.11.2016.PDF](#)

4.II.i. Tenant Relocation Attachment - Seattle DCI Tip

Documents:

[B1. TENANT RELOCATION ATTACHMENT - SEATTLE.PDF](#)

4.III. Leeway Program

Documents:

[C. LEEWAY PROGRAM - 8.11.2016.PDF](#)



HOUSING COMMITTEE

DATE: August 10, 2016 (Wednesday)
TIME: 5:30 p.m. – 8:30 p.m.
LOCATION: City Hall, City Council Chambers

A G E N D A

1. Review and accept Minutes of previous meeting held on August 10, 2016.
2. Brief overview and discussion of a series of memorandums consisting of a bundle of items all connected to the theme of housing insecurity:
 - a. *Rent Control*
 - b. *Non-Renewal and Notification Requirements*
 - c. *Voucher Discrimination*
 - d. *Tenant/Landlord Mediation Program*
3. Brief overview and discussion of several policy ideas expressed to the Committee by local electeds.
 - a. *The Mayor's "Rental Housing Security Ordinance Proposal*
 - b. *Tenant Relocation Assistance Program*
 - c. *The "Leeway Program"*
4. Public comment
5. Housing Committee member discussion and next steps

Councilor Jill Duson, Chair

Next Meeting Date: Wednesday, September 14, 2016, 5:30 PM
Location – City Hall, City Council Chambers

Housing Committee

Minutes of August 10, 2016 Meeting

A meeting of the Portland City Council's Housing Committee (HC) was held on Wednesday, August 10, 2016 at 5:30 p.m. in the City Council Chamber in Portland's City Hall. Councilors present at the meeting included Mayor Ethan Strimling, Housing Committee Chair Councilor Jill Dusen, Vice Chair Councilor David Brennerman, and members Councilor Spencer Thibodeau, Councilor Belinda Ray, and Councilor Nick Mavodones. City staff present included City Manager, Jon P. Jennings; Director of Planning & Urban Development, Jeff Levine; Housing Planner, Tyler Norod; HCD Program Manager, Kristin Styles; Health & Human Service Director, Dawn Stiles; Shelter Director, Rob Parritt; and Assistant Director, Brian Marchant.

Item 1: Review and accept Minutes of previous meeting held on June 8, 2016.

Motion to accept the minutes by Councilor Brennerman, motion seconded by Councilor Ray, minutes accepted unanimously.

Item 2: Executive Session: Pursuant to 1 M.R.S.A. 405(6)(C), the Committee will go into executive session to provide City staff general policy guidelines regarding (5:30 to 6:00 PM):

- a. Information regarding potential pilot programs involving the possibility of the City acquiring land to incentivize the creation of much needed housing.*

Before heading into executive session, Councilor Dusen open the floor for public comment.

Public Commit:

Pat – Portland Press Herald- Questioned why the meeting needs to be in executive session. Will specific sites be discussed?

Councilor Dusen- There is the potential for specific areas to be discussed in relation to the zoning.

Councilor Mavodones- questioned if Corporation Council reviewed going into executive session

Councilor Duseon- yes

At 6:10 Councilor Mavodones voted to end executive session, Councilor Ray seconded the motion.

Item 3: Review Housing Committee Work Plan.

Tyler Norod described the draft work plan timeline given to the Councilors. Staff tried to organize the next steps in related bundles for the Committee. The first will be Housing Insecurity. This was an issue brought up by many of the members of the community and City staff. In addition to addressing the concerns of the public, there are some ministerial items on the work plan. Some of the HOME funds need to be allocated by a certain date, so those items have been moved up. Tyler Norod continued through the work plan addressing the timeline for the short term rentals, the ordinance bundle, and capitalizing on the Housing Trust Fund.

Mayor Strimling- It looks like Sept. 14 is the target for voting on the short term bundle issues. Are we voting on Sept. 14th or are we starting the conversation?

Councilor Duseon - I think there is a conversation before Sept. 14, by the 14th we will want to make our recommendation to the council.

Mayor Strimling- At the August 24th meeting, it will be general guidance but not just on short term rentals?

Councilor Duseon- Yes, on August 24th my hope is that we will have a chance to discuss it, then on the 14th my hope is we vote on what we recommend to the council.

Councilor Ray- How would public comment work? So that people know, if it takes us two meetings to discuss, will we take public comment on both the 24th and 14th meeting?

Councilor Duseon- I think we should hear public comments all at once. Once we narrow down our list, I would like to include public comment in our deliberations. I hope to tell staff that these are the 4 or 8

things we want and this is what we want you to draft. I personally feel like we are taking too long to respond, I would like us to make a vote and get things sent to the council

Councilor Mavodones- There are a lot of complex items on this list. I'm not trying to delay our process, but I worry that we don't want to short drift these items. The Aug. 24th meeting, it's ambitious. I hope we stop at some point and decide what is manageable and what we can do well before the end of the year.

Councilor Duson - I hope we at least we get through the first bundle of Housing Insecurity before the end of the year, even if it means holding off on other ordinances.

Councilor Duson- Note** The meeting on Oct. 12th is on a Jewish Holiday, it needs to be changed.

City Manager- Short term rentals have become a hot topic, we are finding ourselves in a bit of a quandary. Innovation has gotten ahead of our ordinances and zoning code. The zoning board has table the issue until next year. For now, we plan to enforce any health and safety issues but not enforce short term rentals until the council votes on this. We would like the committee to move this up, we hope the committee will vote on this and bring it to the council in early December. We will notify people of complaints but we will not enforce.

Councilor Thibodeau - Are we waiving our right to enforce? Or just telling them that this is the complaint but we are not waiving our right to enforce.

City Manager- exactly, we are not waiving our right to enforce, we are choosing not to enforce at this time but may still choose to enforce this at a later date. All complaints will be kept on record and notices will still go out to property owners accused of violating the zoning ordinance.

Councilor Brenerman- What about the ones we have enforced before today?

City Manager- What we are proposing to do, would be to table the issues until the council votes, we will not be enforcing, it's a tough spot.

Councilor Brenerman- The enforcement for life safety and tabling other enforcement, makes sense to me. Are we working with Corporation Council on this?

City Manager- I have been working with corporation council on all of this, and it will be incorporated into any notice.

Councilor Dusen- I would like all councilors to be on the same page and providing correct information to our constituents.

Councilor Mavodones- I would like to hear from corporation council on the universe of actions that might be addressed.

Councilor Thibodeau - in terms of retroactive applications, we have people that have taken out loans to provide Airbnb housing. Looking at the numbers we have seen on Airbnb housing, something like 5% of our housing stock is used for Airbnb, that would have a great impact on those people.

City Manager- you are absolutely right, retroactive is something we will need to look at closely.

Councilor Ray- When we get a complaint, who should we direct the complaint to?

City Manager- All complaints should come to my office, then I will work with corporation council.

Mayor Strimling- Is this a staffing issue or a zoning ordinance issue?

City Manager- It's less to do with the personnel and more to do with our policies not keeping up with the innovation.

Mayor Strimling- I think the council should give the city staff some direction on how we would like them to decide based on what we are hearing

Councilor Brenerman- I asked at a previous meeting for us to have public comment on the Airbnb issues. So is the September 14th meeting where we should have the comment?

Councilor Ray- The 24th or the 14th? (Brenerman- the 14th) I think we should move it up, I think we should give some direction tonight.

Councilor Brennerman- I suggested the 14th because the 24th meeting is already full and I don't see how we can fit this big topic in.

Councilor Ray- What about flipping the items- short term rental first, then Housing Insecurity next?

Councilor Duseon- I will let the committee decide on flipping the issues, but I think we should all agree now that we will have a longer meeting on the 24th.

Councilor Mavodones- I would be ok with flipping them. I think we should be realistic about how late the meeting is going to go.

Councilor Duseon- I would be ok with adding an additional hour to the meeting.

Councilor Thibodeau - I'm fine with flipping or keeping it the way it is now. I think we should give the public some type of proposal to look at around Airbnb because that will help us with what we are voting on. I think the conversation should be less about whether people like Airbnb or not and more on a particular proposal.

Councilor Duseon- Should we go around the room and give our opinion on what we would like?

Mayor Strimling- I would like to see it go the other way and hear from the public before staff proposes something to the committee.

Councilor Mavodones- I would like to hear from the Oxford Street Shelter and recommend we extend tonight's meeting until 8pm.

Councilor Duseon- I see sideways thumbs on doing that. I need the committee to clarify whether we want to flip short term rentals and housing insecurity.

City Manager- I like Councilor Brennerman's idea of hearing public comment on the 14th and the staff will be able to hear what the committee has to say and what the public has to say

Councilor Duseon- I worried that agenda item 2 will go long and not give enough time for Agenda item 3

Councilor Mavodones- There is a lot hear and it's very ambitious. I'm fine with moving the agenda item up, but I will leave that to you.

Councilor Thibodeau - Short term rentals can potentially take an entire meeting. I do not want to limit anyone's public comment, but I would like to set a framework around this topic so that we have a better idea than people do or don't like it.

Councilor Duson- I feel pressed to move short term rentals up, which means extending our next two meetings to 5:30-8:30. I will work with staff on managing our meeting time well. I will now turn to Dawn Stiles.

Item 4: Brief overview by City Staff on the Oxford Street Shelter Services. See enclosed memorandum by Health & Human Services Department staff Rob Parritt, Shelter Director, and Brian Marchant, Assistant Shelter Director.

Director Dawn Stiles introduced staff and lauded their work for the City and its most at-risk residents. Shelter Director Rob Parritt provided a quick overview of their memo and the services that the shelter provides. There are only three low barrier shelters in the State of Maine. There are two low barrier shelters in Portland and one in Penobscot. Our success is due to the amazing relationships we have with landlords in Portland but it is becoming increasingly difficult to find housing. The Shelter has a full time position just for following up with landlords on the placement of long time stayers in housing. Recidivism rate of only 11% which is a tremendously successful rate. Brian Marchant went through the many housing subsidy sources available for at risk populations that the shelter helps people access.

Councilor Duson commended staff and reminded the Council that much of this work is part of the 10 year plan to end homelessness. Part of this is providing data to the City. This is a huge part of what you do and is appreciated.

Rob Parritt – Part of the importance of data is that it helps us be more efficient with limited and often shrinking resources.

Councilor Mavodones – Echoes Councilor Duson's comments and praise for all the work staff does for City's most vulnerable. How does recidivism rate compare nationally and regionally?

Rob Parritt – It is competitive both nationally and regionally. Ideal target is about 90% which is right where we are.

Councilor Mavodones – Shelter Plus Care – What happened to these funds?

Rob Parritt – The program is administered by Shalom House. They are federal funds. Staff recently travelled to Washington to advocate for more funds. The reason is because we have such low recidivism rates and doing such a great job that people are staying in their homes longer which means less funds become available for others in need.

Mayor Strimling – Does staff have access to Narcan?

Rob Parritt – We do not. One of our staff had access and training outside of the City and recently was able to administer Narcan to a person in need. The next night it was needed again but we did not have it and were fortunate to be able to respond successfully with CPR.

City Manager – We have had discussions with police and fire department about staff having more access to Narcan. This would be administered at an administrative level and not require Council policy direction.

Mayor Strimling – I know we are looking at what other cities are doing and looking towards how to help improve the surrounding neighborhood.

City Manager – Staff has been remarkable and receptive along with the local community to help improve the areas surrounding the shelter. We are looking at shelters in Boston and Cambridge for ideas on how best to help clean up the surrounding areas.

Rob Parritt – We are working with the neighbors and actively working to improve the area around the shelter. It is very challenging. One of the biggest issues is drug use, particularly a drug called “spice”. But we are working with the City to improve infrastructure and clean streets. I think we can celebrate all the great work that we have done but still acknowledge that we have a lot more to do.

Councilor Brenerman – I too admire the work you do. Before Preble Street there was High Street resource center. One of my first jobs was working there. It was still difficult then to find housing. Two questions: How many people are housed in Portland using Section 8 Vouchers?

Rob Parritt – I know we have at least 40 for at risk populations per year.

Councilor Brenerman – Where does social service money come from for Housing First projects?

Rob Parritt – I am not sure of the exact source. It’s a combination of state and federal dollars and tax credits.

Councilor Brenerman – Do you refer people to Bishop street and other housing first developments?

Rob Parritt – Absolutely. We have a comprehensive plan for a number of housing projects. We are excited for that project to be completed. It will definitely be a help.

Councilor Ray – How have you managed to keep landlords involved? Are there benefits beyond altruistic motives given the state of the housing market?

Brian Marchant – I think there are certain landlords that want to help. As long as we are there they will help. We have great relationships. We try to respond as soon as possible. There are people who are not homeless that have issues and trash apartments. Our support and responsiveness can separate us and build trust.

Rob Parritt – Our income sources via vouchers represent stable income.

Councilor Ray – I want to commend you because the success seems to rely on the great work of staff. What is the process for accepting vouchers?

Rob Parritt – All vouchers have different parameters and include inspections. That is making it more difficult given the market to have landlords who want to participate in inspections.

Item 5: Public comment.

Dee Clark, Walker Street, an advocate for Homeless Voices for Justice (HVJ). I am very grateful for my apartment but concerned for others who are being evicted for no cause evictions or significant rent increases. The City has the power to end this and I am frustrated that no action has been taken. We brought this before the Committee in April. We thought back in May this was the time to rally and stop this injustice. In less than 3 months about 100 people were kicked out of their homes. If HVJ had not taken action even more casualties of gentrification would have happen. We have heard councilors have not seen this as an urgent issue. You will all go home safe and sound. Others are not so lucky. I know what it is like. What is the longest any of you have stood in line for something you needed? Have you ever stood in line to rest your head on a mat or need something to eat? People are sleeping outside with children. One last thing, the 100 plus people, the 100 plus affordable units because of gentrification. I am grateful that we will discuss the housing insecurity bundle but I need to

raise this emergency issue. Be prepared to act. Every week you do not act you affect people in need. We support the Mayor's ordinance.

Jim Devine, 606 Congress Street, an advocate for Homeless Voices for Justice. I agree with Dee's comments. Previous deliberations gave me food for thought. I respect process and I know things take time. But people out there need help now. I think there is a lot of good stuff in the Mayor's proposal. I hope the Committee will focus on eviction issues on 24th.

Steven Hirshon – President Bayside Neighborhood Association. Laud Brian Marchant and Rob Parritt for their work. Quite honestly the issues are not with the shelter, of which there are some. Issue is with the unsheltered of which there are about 100. They start the day using the other services in the area. They are then around abusing drugs and alcohol. Don't have sufficient access to bathrooms creating a public health issue. Not just trash, drunkenness, or drug use. Unfortunately, places that people don't get to clean up get nasty. Glad staff is getting down to Boston area to see how things are done there. Pine Street Inn in Boston does a lot of interaction and policing to help the local community. The City has an arm's length relationship with Preble Street. City needs to take a hard look at how and where people are housed. Right now people are released from state prison to the shelter. Maybe we should push back on state. If they keep cutting back resources for Portland then we should ask why they keep sending people here.

Chris Quint – Chamber of Commerce. Commend work to this date. I believe it has been a good open transparent process. We believe diverse housing options are important for the City moving forward. We need to create more housing that meets a diverse range of needs of all citizens.

Gwynne Williams – Danforth Street – Revisit terms of IZ policy in light of following facts.

Average 2015 Portland rent is \$1275 or half of median renter income. Renter income is substantially lower than average renter. Per capita income is even lower. Clear disconnect between terms of policy and the City's needs. People working in service sector are low income not middle income workers. They are the backbone of our local economy. We need to lower income thresholds on IZ to meet the intent of the policy. Ms. Williams read from written comments. Her written comments are attached as part of this record.

Ken Thomas – Danforth St – City manager would no longer be enforcing STR's. So far there have been 4 letters, three results of complaints. I would suggest there is not a significant problem associated with STR's in Portland. Enforcement is a problem. I appreciate City Manager's constraint. We also need retroactive protection. I was at last year's meetings. Nothing suggested that it was against policy at that time. I hope the council work in concert to give protection to me and others. I would like to be part of a focus group on the subject.

Gerry Burnell – Sec. of Portland Democrats. Last week moderated discussion on affordable housing. Would like clarification on current STR regulations. Regarding the last comment as to the proliferation of Airbnb. AirDNA website lists about 410 units in Portland. This is a significant portion of the City's housing stock. Vacancy rates are low. Airbnb seems to be increasing. The problem is only getting bigger. I agree your agenda is ambitious and I applaud that. A lot of people do not have time. A lot of friends are having to move. Cited recent article needing to find new place due to recent rent increases. I encourage the Committee to act as quickly as possible.

Katrina – Owned and managed multi units for many years. I have a lot of pride in buying and renovating units. Recently bought a severely run down and infested 5 unit building. No way to treat pests with the building occupied. No one should have to live in these conditions. Bringing units back to

suitable conditions and having rent restrictions would make it infeasible. Myself and others like me would have to stop renovating these dilapidated buildings. My heart goes out to those living in these awful conditions.

Alex Landry, Boynton Street – I have been closely following the Committee’s work. I sympathize with many of things I’ve heard but I see this largely as a supply issue. One idea is to allow for increased density along transit routes. Anne Pringle and Cheryl Leeman, former elected officials, both have mentioned putting development along corridors. Shows that this idea has support in the broader community. The survey for comp plan is coming up. Recent results show significant support for transport corridor development. This is mainstream idea. Would like to hear from Councilors Thibodeau, Mavodones, and Brenerman on whether they support transportation corridor development.

Brit Vitalus – We agree with past comments that these are complex issues and need to be done carefully and thoughtfully. Some of these issues pose legal challenges. We are open to no mass evictions of whole buildings or tying immediate evictions to sales of large buildings. Most landlords and tenants do not think about non-renewal of a lease becoming a 30 day contract. Maybe there is room for education to make this more evident. Half of landlords in Portland’s own two units. We don’t have that many large buildings. So many of these issues will impact small landlords not the big fish from out of town. There is a lot of new construction coming along not just in Portland but greater Portland. The Harvard economist who presented noted that this is a supply and demand issue. Cumberland and Westbrook are creating a lot of new units. Perhaps there should be sunset provisions for any new policies that come out of this process. These are cyclical issues. Landlords are increasingly worried about the effect of new units on the market.

Item 6: Housing Committee member discussion and next steps.

Councilor Duson – Transportation corridor issue is something we will definitely be looking at.

On a motion made and seconded the meeting was adjourned at 8:07 PM.

Respectfully,

Kristin Styles & Tyler Norod

Public comment to Portland City Council Housing Committee, 8/10/16

I'm here to suggest a fairly simple improvement to current City housing policy – and that is to revisit the terms of the recently enacted Inclusionary Zoning provision in light of the following facts:

The average 2015 Portland rent was \$1,572 a month, more than half of the median renter's income of \$2800 a month, or \$36,000 annually. You will note that the median income of renters is substantially lower than the *overall* median income used in the Inclusionary Zoning policy, which provides for housing set-asides affordable to those with income up to 120% of the overall median. The percapita income in Portland is even lower, at \$29,000. Additionally, 21% of Portland's population are "persons in poverty." That's from the US Census. Twenty-one percent.

Finally, people working in the service sector, which is the backbone of Portland's economy, and what makes it so attractive to the forces of gentrification, are low, not middle, income earners.

So if you want to address the housing affordability crisis for workforce renters, which was presumably the intention of the Inclusionary Zoning requirement, I strongly urge you to lower the targeted income threshold. Thank you.

-Gwynne Williams, District 2, Danforth St.



TO: Councilor Duson, Chair
Members of the Housing Committee

FROM: Tyler Norod, Housing Planner
Housing and Community Development Division

DATE: August 19, 2016

SUBJECT: Rent Control

Throughout the last seven months of public process the Committee received requests for Portland to consider instituting a rent control ordinance. The intent of rent control as a policy is clear and no doubt would benefit some tenants already renting in Portland who may be at risk of displacement. The framework for such a policy was never clearly articulated during the public process.

In order to complete its analysis, staff has assumed an ordinance that aligns with some of the most common forms of modern rent control found in the United States. The ordinance would limit annual rent increases at a given percentage linked to a predetermined measurement like the consumer price index. A rent control board would be formed to help establish annual rent increases. The Board would also be responsible for determining maximum allowable increases for landlords who make significant improvements, take on large maintenance projects, or make adjustments for other housing cost increases associated with taxes, fees, utilities, etc. Rent can be increased when a unit is vacated. This is often based on a set percentage or what the market rent is at the time. New buildings would likely be free from rent control restrictions as a means of incentivizing the continued creation of more housing supply.

There is a significant amount of research published on the topic of rent control. Staff examined academic journal publications and other substantive papers to help assess the potential impacts of a policy in Portland. While the literature makes it clear that rent control may help some existing Portland renter households the overall long term benefits and appropriateness of rent control were less favorable according to the majority of the published research. Listed below are a few of the potential implications associated with rent control as found in existing literature:

Vacancy Rates

Rent control may further exacerbate low vacancy rates due to a variety of factors including an increase in condo conversion, change of use to non-residential, less rental units being created, a decrease in tenant mobility, and a potential decrease in homeownership from tenants choosing to stay in relatively low cost rentals.

Market Rents

Prices of uncontrolled, market rate units and newly vacant controlled units will likely continue to increase due to a shrinking vacancy rate and an incentive for landlords of controlled units to charge as much as possible when a unit becomes available in order to hedge against future restricted increases.

Mobility

Tenants mobility is hampered as many households will be incentivized to remain in housing that is either too large or small for their needs further worsening vacancy rates. Tenants may also be disincentivized to take on new employment/school opportunities that would require a move or endure long commutes that eat into their residential savings from living in a rent controlled unit for long periods of time.

Who Benefits?

Rent control benefits are often poorly targeted and would likely benefit members of the community who do not need this level of financial support to remain in their housing. This may lead to a very inefficient policy. If rent control was only enforced for residents meeting certain income requirements a policy may inadvertently create a disincentive for landlords not to rent to certain households most in need of help. As such most rent control ordinances control a unit rather than be tied to households earning beneath certain income levels. Due to low vacancy and increased rental rates future new residents will likely be at a disadvantage finding new affordable housing. Over time, this may slowly lead to a less economically diverse community, which conflicts with one of the primary reasons for supporting a rent control policy.

Perverse Incentives

Under rent control, landlords are incentivized to target renters who likely will have short tenancies, such as younger tenants, at the cost of likely longer stayers, such as seniors and tenants with children. Landlords will also be incentivized to aggressively push out or not renew a lease to tenants who have lived in a unit for a long period of time and likely have below market rent.

Rent control best practice often pairs a separate ordinance that tightens regulations on how/when a landlord can choose not to renew a lease. Corporation Counsel has already expressed concerns related to such a policy being legally problematic in Maine. Rent control may inspire other unintended costs such as “key fees”, long wait lists, bribes, and high search costs.

Maintenance

Depending on the details of how rent increases are managed, landlords may not have the necessary financial incentive to properly maintain their units. Given the state of the existing housing stock in Maine this may lead to quality and safety issues. The consensus from existing research on the topic of maintenance is unclear. Although much of the literature has cited a decline in maintenance levels in rent controlled units, some research says maintenance declines are limited to what is allowed within existing building codes. For example, landlords may be penalized for certain safety or utility related building problems but not for cracked paint and uncared for property.

Homelessness

There is conflicting research on whether or not Rent Control hurts or helps households at risk for homelessness. Lower rental rates and reliable rent increases can help provide greater housing security for at risk households already living in a unit. However, over the long term, lower vacancy rates and potential higher housing costs for new tenants can make it increasingly difficult for at risk households to find appropriate housing that they can afford.

Taxes

Tax revenue may decrease as property owners pursue abatements or lower assessments in line with the reduced value of their rent controlled buildings. Additional tax revenue may be lost due to depreciating value of surrounding buildings if they are in close proximity of a significant number of controlled units that experience disinvestment due to limited returns.

Sunset Clause

Rent control is a long term policy. Other communities have tried to limit rent control to a certain number of years but found it difficult to rescind once it had outlived its term.

Administrative Costs

There will be significant additional costs to the City to manage and oversee the implementation of Rent Control. In 2002, Portland went through a similar process to analyze a potential rent control ordinance. Ultimately, the City decided it was not in Portland's best interest to pursue any new measure. From that exploration it was estimated that the City would need two to three additional full time staff as well as a half time attorney. In addition, the City would need to form a new Rent Control Board. In 2002, the costs for the Board and new staff were estimated to be approximately \$300,000 per year. Assuming similar costs and accounting for inflation, staff anticipates rent control to cost approximately \$400,000 annually in today's dollars. This estimate may be low and does not account for any reduction in real estate tax revenue. In the 1970's and 1980's, Cambridge, MA's annual budget for the rent control board and related activities cost the city approximately \$700,000 per year, not adjusting for inflation. Additional detailed analysis would be needed to further refine any cost estimates should the Committee wish to pursue a specific rent control policy.



Planning & Urban Development Department

TO: Councilor Duson, Chair
Members of the Housing Committee

FROM: Tyler Norod, Housing Planner
Housing and Community Development Division

DATE: August 19, 2016

SUBJECT: Non-Renewal of Leases and Notification Requirements

The Housing Committee solicited significant public comment over the last seven months asking for feedback on the most pressing housing issues facing Portland. Concerns related to low vacancy rates, increases in rent, and insufficient notification from landlords to tenants were themes. If the landlord chooses to not renew a tenant's lease, Maine currently mandates that the landlord provide tenants-at-will -- those tenants who do not have a signed lease -- with a minimum notification of 30 days. A landlord must also provide a minimum of 45 days written notice to increase a tenant's rent. Given the extremely tight rental market in Portland it can be challenging for tenants to find adequate new housing should their lease not be renewed or the rent increase be more than they are able or are willing to pay. This challenge is often more evident for low income residents who do not have as many housing options and may need additional time to organize and complete a move.

To this end, it has been suggested that the City increase the minimum notification periods for non-renewal of leases and rent increases. Suggestions were made to increase the notification period for both non-renewal and rent increases to either 90 or 60 day minimums. The general idea of increasing notification minimums appears to be helpful to tenants and reasonable for most landlords. The City's Corporation Counsel has also noted that increasing minimum notifications would likely be in line with what is allowed under state law but would need to be issued with associated fines as a civil violation and may not help a tenant avoid the state FED (eviction) process. The state's FED process only requires a 30 day notice. That said, the FED process typically can last several months due to long waits in the court system so the process may not hamper the City's ability to effectively require longer notification periods.

The key consideration is the length of any increase and implications for potential unintended consequences. Staff received concerns from landlords that combined with an already lengthy eviction process, a 90 day minimum notification requirement may cause significant financial risk to landlords. For example, if a tenant is upset that their rent is increasing or that their tenancy will not be renewed they may choose to not pay the remainder of their lease. Currently this would mean that the landlord would miss one month's rent, which, assuming no significant damage to the unit, could be accounted for using the tenant's security deposit. If the period were longer, such as 90 days, an aggrieved tenant may again choose to withhold the remaining rent. The landlord would be able to start a lengthy and expensive eviction process for prolonged overdue rent payment but this is not ideal nor would the

security deposit come close to covering the missing rent. The Committee may want to instead consider a 60 day minimum for both rent increases and non-renewal of leases. This would have the potential to be a reasonable middle ground from which to assess the impacts of any shift in notification requirements. These changes could be reviewed and increased at a later date in the near future to better determine the effects of an even greater increase.

In other states and municipalities that have similar extended notification minimums, it is often typical for similar notification periods to apply to both the tenant and the landlord. The Committee will want to consider whether or not any extension of the notification period in Portland would apply to both parties.

It should also be noted that significant public feedback was received requesting a moratorium on landlords who choose not to renew a tenant-at-will's lease. This scenario has often been referred to as a "no cause eviction". State law clearly defines causes for evictions under state law and allows landlords who provide at least 30 days written notice to not renew a lease to any tenant-at-will for any reason. Corporation Counsel already advised the Housing Committee that any effort on the part of the City to pursue such a moratorium may prove problematic and run counter to state law.



Planning & Urban Development Department

TO: Councilor Duson, Chair
Members of the Housing Committee

FROM: Tyler Norod, Housing Planner
Housing and Community Development Division

DATE: August 19, 2016

SUBJECT: Voucher Discrimination

The Housing Committee solicited significant public comment over the last six months asking for feedback on what were the most pressing housing issues facing Portland. One issue identified was the need for an ordinance clarifying the City's discrimination policy for landlords who refuse to rent to tenants utilizing vouchers or other forms of public subsidy to pay their rent. The state already has a provision in place stating that this type of housing discrimination is in violation of Maine's Human Rights Act under Section 4581-A(4):

"For any person furnishing rental premises or public accommodations to refuse to rent or impose different terms of tenancy to any individual who is a recipient of federal, state or local public assistance, including medical assistance and housing subsidies, primarily because of the individual's status as recipient."

Despite the state's rules it has been reported that cases of discrimination against potential tenants receiving public assistance still occur. In 2012, a Maine court case, *Dussault V. RRE Coach Lantern Holdings, LLC, et al.*, ruled that the Maine Human Rights Act (MHRA) does not preclude landlords from not accepting rental vouchers so long as the landlord's decision does not intentionally discriminate against or result in the disparate impact on, recipients of public assistance. If the landlord chooses not to rent to a household using a voucher or other subsidy it must have a legitimate, non-discriminatory reason – "business necessity" – for doing so. In this case the court ruled in favor of the landlord because the landlord refused to add the federal tenant addendum to their lease due to extra requirements not found in the landlord's typical lease.

Many of the stories heard about income discrimination are related to Section 8 vouchers which are a federal program. It should be noted that federal law explicitly states that landlord participation in the section 8 voucher program is voluntary as explained under code 24 C.F.R. § 982.302(b) stating, "If the family finds a unit, *and the owner is willing to lease the unit under the program*, the family may request [Housing Authority] approval of the tenancy" (italics added).

To further clarify the City's support for a diverse citizenry along with support for the use of our public tenant based housing subsidies the Committee may want to consider clarifying income discrimination parameters through a City ordinance of its own. A potential framework is available below and would apply to a wide range of financial resources targeting rental housing for certain households:

Any of the following shall be considered unlawful housing discrimination under a new ordinance.

- a) For a person to refuse to rent or negotiate for the rental of, or otherwise make unavailable or deny a dwelling to any person because of the person's source of income;*
- b) For a person to make, print, or publish or cause to be made, printed or published, any notice, statement, or advertisement, with respect to the rental of a dwelling that indicates any preference, limitation, or discrimination based on a person's source of income;*
- c) For a person to exclude any person from admission to a dwelling because of the person's source of income;*

These items would mimic the MHRA and demonstrate the City's support for a diverse and inclusive population. However, this would be redundant and may not provide significant impact.

Corporation Counsel touched upon this issue in a July 13th memo to the Housing Council noting that Massachusetts has a law in place that prohibits landlords from refusing to accept vouchers and the associated rental terms, contracts, and inspections required by HUD. However, the Massachusetts law does not dictate rental amounts or require landlords to set rents at the limited amounts for which vouchers would cover. To do this, the City would need to require landlords to accept all associated inspections, mandated repairs, terms, contracts, paperwork, addendums, etc. that may be part of vouchers or other forms of housing subsidies. According to Corporation Counsel this would need to be done outside the FED process and the MHRA, and may prove difficult to enforce, but could possibly be somewhat similar to protections described under Chapter 13.5 of the City Code that relate to discrimination on the basis of sexual orientation.

MAINE SUPREME JUDICIAL COURT

Reporter of Decisions

Decision: 2014 ME 8
Docket: Cum-11-591
Argued: May 8, 2012
Decided: January 23, 2014

Panel: SAUFLEY, C.J., and ALEXANDER, LEVY, SILVER, MEAD, GORMAN, and JABAR, JJ.
Majority: SAUFLEY, C.J., and ALEXANDER, SILVER, and MEAD, JJ.
Concurrence: ALEXANDER, J.
Dissent: LEVY, GORMAN, and JABAR, JJ.

NICOLE DUSSAULT

v.

RRE COACH LANTERN HOLDINGS, LLC, et al.

SILVER, J.

[¶1] Nicole Dussault appeals from a summary judgment entered in the Superior Court (Cumberland County, *Cole, J.*) in favor of RRE Coach Lantern Holdings, LLC, and Resource Real Estate Management, Inc. (collectively, Coach Lantern). Dussault claims that Coach Lantern’s policy of not including in its standard lease a tenancy addendum that binds the landlord to the requirements of the federal government’s Section 8 Housing Choice Voucher Program constitutes unlawful discrimination on the basis of her status as a public assistance recipient in violation of 5 M.R.S. § 4582 (2007)¹ of the Maine Human Rights Act (MHRA), 5 M.R.S. §§ 4551-4634 (2007). She also argues that the court erred by granting

¹ Title 5 M.R.S. § 4582 has been repealed and replaced by P.L. 2011, ch. 613, §§ 11-12 (effective Sept. 1, 2012) (codified at 5 M.R.S. § 4581-A (2013)), but the change does not affect this appeal. The relevant language of the new section 4581-A is substantially identical to that of prior section 4582.

Coach Lantern’s motion for summary judgment and denying her cross-motion for summary judgment based on three theories of discrimination: direct evidence, disparate treatment, and disparate impact. We disagree and affirm the judgment.

I. FACTUAL AND LEGAL BACKGROUND

[¶2] The following facts are drawn from the summary judgment record and are not disputed by the parties. Nicole Dussault and her three children became homeless in June 2008 following a foreclosure on Dussault’s home. On July 14, 2008, Dussault was issued a voucher pursuant to the Section 8 Housing Choice Voucher Program by Avesta Housing, a nonprofit organization that administers the federal voucher program as a contract agent for the Maine State Housing Authority.² Through the voucher program, the Housing Authority provides assistance to people with low incomes by subsidizing rent. The Housing Authority pays a portion of the voucher recipient’s rent each month directly to the landlord for a unit of the recipient’s choosing. *See* 24 C.F.R. § 982.1 (2013). The Housing Authority calculates an amount of rent for which the recipient is responsible, which is usually equal to thirty percent of the recipient’s adjusted

² The federal program originated with section 8 of the United States Housing Act of 1937, P.L. 75-412, 50 Stat. 888, as amended by the Housing and Community Development Act of 1974, P.L. 93-383, § 201(a), 88 Stat. 633, 662-666, and is now codified at 42 U.S.C.A. § 1437f (West, Westlaw through P.L. 113-65 (excluding P.L. 113-54) approved 12-20-13), with associated regulations at 24 C.F.R. §§ 982.1-.643 (2013). It is administered by the United States Department of Housing and Urban Development (HUD) in conjunction with state and local housing agencies. *See* 24 C.F.R. §§ 982.1, 982.3.

income as defined by statute. *See* 42 U.S.C.A. §§ 1437a(b)(5), 1437f(o)(2)(A)-(B) (West, Westlaw through P.L. 113-65 (excluding P.L. 113-54) approved 12-20-13). Federal law explicitly makes landlords' participation in the voucher program voluntary. *See* 24 C.F.R § 982.302(b) (2013) ("If the family finds a unit, *and the owner is willing to lease the unit under the program*, the family may request [Housing Authority] approval of the tenancy." (emphasis added)).

[¶3] Dussault sought housing in Scarborough in order to maintain her son's placement in the school system there. Through Craigslist, Dussault found a listing for a three-bedroom apartment in the Coach Lantern Apartments in Scarborough with an advertised rent that was within the voucher program limits. The apartment is owned by RRE Coach Lantern Holdings, LLC, of which Resource Real Estate Management, Inc., is an affiliate.

[¶4] On August 5, 2008, Dussault called Coach Lantern to inquire about renting the apartment. Dussault alleges that after she disclosed that she would be using a voucher to pay the rent, she was told that Coach Lantern does not accept vouchers. She alleges that her caseworker at Avesta Housing was told the same thing by Coach Lantern when the caseworker inquired on Dussault's behalf. Approximately two weeks later Dussault again called Coach Lantern to inquire about the apartment, but she did not mention that she would be using a voucher. After arranging an appointment and being shown the apartment, Dussault was

given a rental application. A Coach Lantern employee encouraged her to fill it out. Two days later a Coach Lantern representative called Dussault to ask if she planned to submit the application. Dussault did submit an application, and on it she disclosed that she would be using a voucher. Dussault qualified for an apartment and “was accepted.”

[¶5] Dussault’s Avesta caseworker sent Coach Lantern a “landlord packet” indicating that in order for Dussault to be able to use her voucher, Coach Lantern would have to include a HUD tenancy addendum in her lease. Federal regulations require any landlord that accepts a housing voucher to include the tenancy addendum in its lease. 24 C.F.R. § 982.308(f) (2013). The addendum sets forth the program requirements for participating landlords and tenants. *Id.*; *see also* 24 C.F.R. §§ 982.308-.310 (2013). The caseworker informed Coach Lantern that paperwork would need to be filled out before a HUD-mandated property inspection could take place, and that the paperwork and inspection process “could take a couple of weeks.”

[¶6] Coach Lantern, through its attorney, contacted Avesta Housing by letter dated September 3, 2008, to state its “problem with the inclusion of a Tenancy Addendum with [the standard] lease” and to see whether it could rent to Dussault without including the addendum in her lease. The letter stated, “I wish to make it absolutely clear that my client is not refusing to rent to [Dussault]

primarily because she is a recipient of public assistance,” but because “[t]he addendum includes more restrictive rights and obligations on the landlord th[a]n the standard lease that they use, and my client does not wish to be bound by these more restrictive obligations.” Avesta Housing replied by email dated September 12, 2008, that Coach Lantern could not rent to Dussault without including the addendum.

[¶7] Coach Lantern is unwilling to include the addendum in any of its leases. Specifically, Coach Lantern finds it unacceptable that pursuant to the addendum the landlord agrees (1) to maintain the unit and premises in accordance with the housing quality standards set by the Housing Authority; (2) not to raise the rent during the initial term of the lease; (3) to charge a “reasonable” rent, as determined by the Housing Authority in accordance with HUD requirements, during the lease term; (4) not to evict the tenant or terminate the lease solely because the Housing Authority has failed to pay the subsidized portion of the rent; (5) not to evict a tenant who is a victim of domestic violence based on acts of domestic violence committed against her, unless the landlord can demonstrate an actual and imminent threat to other tenants or employees; (6) to open the premises to inspection by a Housing Authority inspector at the beginning of the lease, upon any complaint by the tenant, or after the landlord has remedied a problem identified by an inspector in a prior inspection; and (7) to notify the Housing

Authority at least sixty days prior to any rent increase.

[¶8] Dussault was unable to afford the apartment without using the voucher. Because she could not use the voucher unless Coach Lantern included the addendum in her lease, she did not rent the apartment. She could not find housing in Scarborough and ultimately moved to South Portland. Dussault does not intend to seek housing at any Coach Lantern property in the future.

II. PROCEDURAL BACKGROUND

[¶9] In November 2008, Dussault filed a complaint with the Maine Human Rights Commission (Commission), alleging that Coach Lantern's policy of refusing to include the HUD tenancy addendum in her lease, and therefore its refusal to participate in the voucher program, constitutes discrimination against Dussault on the basis of her status as a public assistance recipient in violation of the MHRA. After an investigation, the Commission voted unanimously at a hearing on April 13, 2009, that there were reasonable grounds to believe that Coach Lantern discriminated against Dussault because of her status as a recipient of public assistance.

[¶10] Dussault then filed a complaint in the Superior Court seeking declaratory and injunctive relief and damages. Coach Lantern filed a motion for

summary judgment and Dussault filed a cross-motion.³ The court granted Coach Lantern's motion and denied Dussault's motion, ruling in favor of Coach Lantern on each of three theories of discrimination. First, the court determined that there was no direct evidence of discrimination, and thus declined to perform a mixed-motive analysis. Next, the court concluded that Dussault failed to meet her burden, as part of the three-step, burden-shifting test that applies when there is no direct evidence of discrimination, to produce sufficient evidence that Coach Lantern's proffered reasons for refusing to participate in the voucher program were pretextual. Finally, in performing a discriminatory impact analysis, the court concluded that Coach Lantern's policy affects recipients of public assistance more harshly than housing applicants who do not intend to use vouchers, but that the policy is justified by a business necessity.

[¶11] Dussault timely appealed.

III. DISCUSSION

A. Standard of Review

[¶12] We review the court's interpretation and application of the MHRA de novo. *See Russell v. ExpressJet Airlines, Inc.*, 2011 ME 123, ¶ 16, 32 A.3d 1030. "We review the court's ruling on cross-motions for summary

³ Dussault withdrew her request for injunctive relief in her motion for summary judgment, as she does not plan to seek housing at Coach Lantern properties in the future.

judgment de novo” *F.R. Carroll, Inc. v. TD Bank, N.A.*, 2010 ME 115, ¶ 8, 8 A.3d 646. “Summary judgment is appropriate if the record reflects that there is no genuine issue of material fact and the movant is entitled to a judgment as a matter of law.” *Id.* (quotation marks omitted).

B. The Maine Human Rights Act

[¶13] The MHRA declares that individuals have a civil right to “[t]he opportunity . . . to secure decent housing in accordance with [their] ability to pay, and without discrimination because of race, color, sex, sexual orientation, physical or mental disability, religion, ancestry, national origin or familial status.” 5 M.R.S. § 4581.⁴ Although the MHRA does not reference status as a recipient of public assistance in this declaration, *see id.*, the MHRA does provide certain protections to public assistance recipients. Section 4582 provides in relevant part:

It is unlawful housing discrimination, in violation of this Act
 . . .

[f]or any person furnishing rental premises or public accommodations to refuse to rent or impose different terms of tenancy to any individual who is a recipient of federal, state or local public assistance, including medical assistance and housing subsidies primarily because of the individual’s status as recipient

5 M.R.S. § 4582. Section 4583, however, provides in relevant part:

⁴ Title 5 M.R.S. § 4581 has since been amended by P.L. 2011, ch. 613, § 10 (effective Sept. 1, 2012) (codified at 5 M.R.S. § 4581 (2013)), but the change does not affect this appeal.

Nothing in this Act may be construed to prohibit or limit the exercise of the privilege of every person and the agent of any person having the right to sell, rent, lease or manage a housing accommodation to set up and enforce specifications in the selling, renting, leasing or letting or in the furnishings of facilities or services in connection with the facilities that are consistent with business necessity and are not based on the race, color, sex, sexual orientation, physical or mental disability, religion, country of ancestral origin or familial status of or the receipt of public assistance payments by any prospective or actual purchaser, lessee, tenant or occupant.

5 M.R.S. § 4583. Together these sections establish that a landlord may not refuse to rent to, or impose different terms of tenancy on, a recipient of public assistance who is an otherwise-eligible tenant primarily on the basis of that person's status as a recipient unless the landlord can demonstrate a business necessity that justifies the refusal.

[¶14] In construing a statute, we seek to give effect to the Legislature's intent. *See Eagle Rental, Inc. v. State Tax Assessor*, 2013 ME 48, ¶ 11, 65 A.3d 1278. We look beyond the plain language of the statute to other indicia of legislative intent only if the statute is ambiguous. *See id.*; *Fuhrmann v. Staples the Office Superstore E., Inc.*, 2012 ME 135, ¶ 23, 58 A.3d 1083. The only discrimination that the MHRA prohibits with respect to public assistance recipients is "refus[al] to rent or impos[ition of] different terms of tenancy" based primarily on a person's status as a recipient. 5 M.R.S. § 4582. This language stands in contrast to the broader prohibition against housing discrimination on other bases,

which makes it a violation of the MHRA to “refuse to show or refuse to sell, rent, lease, let *or otherwise deny to or withhold from* any individual housing accommodation because of the race or color, sex, sexual orientation, physical or mental disability, religion, ancestry, national origin or familial status of the individual.” *Id.* (emphasis added).

[¶15] We previously construed the MHRA’s prohibition of “unlawful housing discrimination” based on receipt of public assistance in *Catir v. Commissioner of the Department of Human Services*, 543 A.2d 356, 357-58 (Me. 1988). In *Catir*, a nursing home that had accepted state and federal Medicaid reimbursement stopped participating in the program and informed residents that it would no longer keep residents who were unable to pay the higher, private rate. *Id.* at 357. Residents receiving Medicaid sued, seeking a declaration that the nursing home was obligated to accept Medicaid reimbursement. *Id.* We upheld summary judgment for the nursing home, reasoning that it was not unlawful discrimination for the nursing home to stop participating in the Medicaid program and to require the residents receiving Medicaid to pay the same rate as residents not receiving Medicaid. *Id.* at 357-58. We concluded that the nursing home had not “refuse[d] to rent or impose[d] different terms of tenancy” on the Medicaid recipients because the record showed that, by refusing to accept the lower Medicaid payment, the nursing home merely “subjected the [Medicaid] recipients

to the same terms of tenancy offered to any other individual.” *Id.* at 357-58 (first and second alterations in original) (quotation marks omitted).

[¶16] Here, as in *Catir*, the undisputed facts demonstrate that Coach Lantern did not “refuse to rent [to] or impose different terms of tenancy” on Dussault. Rather, Coach Lantern was willing to, and in fact did, offer Dussault the apartment, and was willing to rent to her after learning of her status so long as it could do so without including the tenancy addendum. In essence, Coach Lantern offered to rent the apartment to Dussault on “the same terms of tenancy offered to any other individual.” *Id.* at 358. A landlord does not violate the MHRA by offering apartments to recipients of public assistance on the same terms as it offers apartments to other potential tenants. *See id.*

[¶17] Even if we were convinced that Coach Lantern’s policy of declining to include the tenancy addendum in Dussault’s lease constituted a refusal to rent or imposition of different terms of tenancy within the meaning of section 4582, the undisputed facts show that Coach Lantern’s refusal to include the addendum was not “primarily because of [Dussault’s] status as recipient,” but rather because Coach Lantern did not wish to bind itself to the terms of the tenancy addendum. The term “status,” although not defined in the MHRA, is commonly defined as “[a] person’s legal condition, whether personal or proprietary; the sum total of a person’s legal rights, duties, liabilities, and other legal relations, or any particular

group of them separately considered.” *Black’s Law Dictionary* 1542 (9th ed. 2009). To the extent that there is any ambiguity in the meaning of “status,” the legislative history of the MHRA makes clear that the statute was meant to proscribe refusals to rent “made not with reference to the tenant’s personal responsibility and integrity . . . but only on the general misapprehension that a family on public assistance is automatically an undesirable tenant.” L.D. 327, Statement of Fact (107th Legis. 1975).

[¶18] We recognize the MHRA’s purpose to protect public assistance recipients’ rights to secure decent housing. We will not, however, read into the MHRA a mandate that landlords accept terms of tenancy that are otherwise required only if the landlord chooses to participate in a voluntary federal program. *See* 24 C.F.R § 982.302(b) (noting that the voucher program is voluntary); *see also Edwards v. Hopkins Plaza Ltd. P’ship*, 783 N.W.2d 171, 176-77 (Minn. Ct. App. 2010) (concluding that the voucher program is voluntary pursuant to state and federal law).

[¶19] We are limited by the language that the Legislature has enacted, and may not substitute our policy judgment for that of the Legislature. *See Edwards*, 783 N.W.2d at 179 (“[T]he issue of ensuring affordable housing availability is an issue for the . . . Legislature or the United States Congress, which have the power to establish policy and enact laws in this area.”). The Legislature has not required

landlords to accept Section 8 vouchers. Although the Legislature has considered a bill that would have effectively required landlords to participate in the voucher program, it has not, to date, made this voluntary program mandatory in Maine. *See* L.D. 685, § 2 (123rd Legis. 2007) (proposing an amendment to the MHRA forbidding discrimination against recipients of public assistance “because of any requirement of such a public assistance program”); Comm. Amend. A to L.D. 685, No. S-162 (123rd Legis. 2007) (removing the language regarding discrimination based on the requirements of public assistance programs from the bill).

C. Summary Judgment

[¶20] In deciding the parties’ cross-motions for summary judgment, the Superior Court ruled in favor of Coach Lantern on each of three different theories of discrimination: direct evidence, disparate treatment, and disparate impact. We address each theory in light of the interpretation of the MHRA that we have now articulated.

1. Direct Evidence

[¶21] Courts have historically addressed claims of direct evidence of discrimination through a “mixed-motive” analysis. *See Patten v. Wal-Mart Stores E., Inc.*, 300 F.3d 21, 25 (1st Cir. 2002). Pursuant to that analysis, a plaintiff must first offer evidence that her status as a public assistance recipient was a “motivating factor” in the landlord’s refusal to rent to her. *See id.* (emphasis

omitted). The defendant landlord then bears the burden of producing evidence that it would have refused to rent to the potential tenant even if she were not a recipient of public assistance. *See id.* Because the undisputed facts demonstrate that, in declining to include the tenancy addendum in its lease, Coach Lantern did not “refuse to rent or impose different terms of tenancy” on Dussault based primarily upon her status as a recipient of public assistance, Dussault has failed to present a prima facie case of discrimination on a direct evidence theory.⁵

2. Disparate Treatment

[¶22] When a plaintiff makes a disparate treatment claim at the summary judgment stage, a three-step, burden-shifting test applies. *See Daniels v. Narraguagus Bay Health Care Facility*, 2012 ME 80, ¶ 14, 45 A.3d 722. First, the plaintiff must establish a prima facie case of discrimination. *See id.* Second, if the plaintiff has met her burden in the first step, the landlord must present evidence of a legitimate, non-discriminatory reason for the adverse action. *See id.* ¶ 15. Third, if the landlord meets its burden in the second step, the plaintiff must present evidence that the landlord’s proffered reason is pretextual or untrue. *See id.* This analysis addresses the parties’ burdens of production, not persuasion. *See St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 507-08, 521 (1993).

⁵ Given this conclusion, we need not address the continuing vitality of the “mixed-motive” analysis in light of *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 173-80 (2009) (interpreting the Age Discrimination in Employment Act’s bar on discrimination “because of” age as requiring a showing of but-for causation, rather than a showing that age was simply a motivating factor).

[¶23] Here again, Dussault has failed to establish a prima facie case, because the undisputed facts show that Coach Lantern did not “refuse to rent or impose different terms of tenancy” on Dussault based primarily upon her status as a recipient of public assistance. *See Lindsay v. Yates*, 578 F.3d 407, 415 (6th Cir. 2009) (requiring the plaintiff in a housing discrimination case to provide prima facie evidence that he or she applied for and was denied a housing accommodation); *McDonald v. Coldwell Banker*, 543 F.3d 498, 503, 505 (9th Cir. 2008) (same); *Mitchell v. Shane*, 350 F.3d 39, 47 (2d Cir. 2003) (same); *see also Cookson v. Brewer Sch. Dep’t*, 2009 ME 57, ¶ 14, 974 A.2d 276 (discussing the requirement of a prima facie showing of discrimination in the employment context).

3. Disparate Impact

[¶24] We evaluate claims of disparate impact in the employment context using a similar three-step, burden-shifting analysis. *See Me. Human Rights Comm’n v. City of Auburn*, 408 A.2d 1253, 1264-65, 1268 (Me. 1979). First, the plaintiff must establish a prima facie case of disparate impact by identifying a facially neutral practice that affects one group more harshly than another. *Id.* at 1264. Second, if the plaintiff meets her burden in the first step, the defendant must present prima facie evidence that its practice is justified by a business necessity. *Id.* at 1265. Finally, if the defendant meets its burden in the second step, the

plaintiff must present prima facie evidence that the defendant's proffered justification is pretextual or that other practices would have a less discriminatory impact. *Id.* at 1268.

[¶25] Nothing in the language of the MHRA suggests, however, that it imposes disparate impact liability on a landlord for discrimination against an individual because of the individual's status as a recipient of public assistance. *See Smith v. City of Jackson*, 544 U.S. 228, 233-40 (2005) (concluding that the Age Discrimination in Employment Act created disparate impact liability because its text "focuses on the *effects* of the action on the employee rather than the motivation for the action of the employer").⁶ As we have noted, the only discrimination that the MHRA prohibits with respect to public assistance recipients is "refus[al] to rent or impos[ition of] different terms of tenancy" based primarily on a person's status as a recipient. 5 M.R.S. § 4582.

[¶26] Dussault argues that section 4583 incorporates disparate impact liability into the housing discrimination provisions of the MHRA, and that the legislative history of the statute supports this contention. This argument, however, finds no support in the language of section 4583. *See Eagle Rental*, 2013 ME 48, ¶ 11, 65 A.3d 1278 (noting that we do not consider legislative history if a statute is

⁶ Although none of the parties or amici have directly argued that the MHRA does not impose disparate impact liability on a landlord for discrimination against an individual because of the individual's status as a recipient of public assistance, a necessary first step in our analysis is to determine whether such liability exists.

unambiguous). Nothing in the language of section 4583 broadens the MHRA's protections of recipients of public assistance; rather, section 4583 *limits* those protections by providing landlords with a defense of business necessity for conduct that might otherwise violate section 4582. *See Smith*, 544 U.S. at 251-52 (O'Connor, J., concurring) (opining that, contrary to the plurality opinion, a provision in the Age Discrimination in Employment Act permitting discrimination based on "reasonable factors other than age" did not create disparate impact liability, but rather created a "safe harbor" for defendants (emphasis omitted) (quotation marks omitted)). We therefore conclude, as a matter of law, that the MHRA, as currently established by the Maine Legislature, does not create disparate impact liability in the context of claims of housing discrimination based on a landlord's decision not to participate in the voluntary voucher program established by Section 8.

[¶27] In reaching the opposite conclusion, the dissent relies heavily on the federal courts' interpretation of the Fair Housing Act (FHA), 42 U.S.C.A. §§ 3601-3631 (West, Westlaw through P.L. 113-65 (excluding P.L. 113-54) approved 12-20-13). Unlike the MHRA, however, the FHA does not prohibit housing discrimination on the basis of an individual's status as a recipient of public assistance. *Id.* § 3604(a)-(e) (prohibiting housing discrimination "because of race, color, religion, sex, familial status, or national origin"). Moreover, the FHA more

broadly defines the discrimination it prohibits, making it a violation of the Act “[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, *or otherwise make unavailable or deny, a dwelling to any person*” because of their protected status. *Id.* § 3604(a) (emphasis added). This language stands in contrast to the MHRA’s relatively narrow prohibition of “refus[al] to rent or impos[ition of] different terms of tenancy” based primarily on a person’s status as a recipient of public assistance. 5 M.R.S. § 4582; *see also Smith*, 544 U.S. at 233-40. Although we look to federal law for guidance in interpreting the MHRA, we “must not abdicate [our] function of conclusively resolving matters of purely state law.” *Fuhrmann*, 2012 ME 135, ¶ 27, 58 A.3d 1083 (alteration in original) (quotation marks omitted). This is particularly true where Congress has taken pains to identify the voucher program as entirely voluntary.

[¶28] The dissent’s interpretation of section 4583 would effectively compel Maine’s landlords to participate in a voluntary federal housing subsidy program or risk having to litigate whether their decision not to participate is based on a “business necessity.” For many of Maine’s small or mid-sized landlords, the expense and uncertainty of litigation simply may not be an option. Had the Legislature intended to impose this requirement on landlords, it would have done so clearly, particularly in light of the fact that it would have effectively overruled

our holding in *Catir*. See 543 A.2d at 357-58 (holding that a nursing home did not violate the MHRA by offering housing to Medicaid recipients on “the same terms of tenancy offered to any other individual”). “In the absence of *clear and explicit* statutory language showing that the legislature intended a statute to modify case law, we will not interpret a statute to effect such a modification.” *Caron v. Me. Sch. Admin. Dist. No. 27*, 594 A.2d 560, 563 (Me. 1991) (emphasis added).

[¶29] The dissent suggests that our interpretation of the MHRA allows landlords to avoid liability by simply alleging business necessity rather than proving it. Dissenting Opinion ¶ 58. We do not so hold. Rather, because we conclude that sections 4582 and 4583 do not create disparate impact liability in the context of claims of housing discrimination based on a landlord’s decision not to accept the tenancy addendum in order to participate in the voucher program, and because Dussault has not otherwise made out a *prima facie* case of housing discrimination, we do not reach the issue of business necessity.

D. Conclusion

[¶30] Because the undisputed facts show that Coach Lantern did not discriminate against Dussault in violation of the MHRA, we affirm the summary judgment in favor of Coach Lantern and the denial of Dussault’s cross-motion for summary judgment.

The entry is:

Judgment affirmed.

ALEXANDER, J., concurring.

[¶31] I am pleased to join the Court’s opinion. I write separately to note that the Maine Legislature has explicitly rejected the change in the law urged by the Dissent that would interpret current Maine law to mandate acceptance of onerous contract conditions that come with the Section 8 program by all landlords except those capable of assuming the heavy cost of litigation to demonstrate “business necessity” to avoid the contractual mandates.

[¶32] Since its inception, the Section 8 Housing Choice Voucher Program, established pursuant to 42 U.S.C.A. § 1437f(o) (West, Westlaw through P.L. 113-65 (excluding P.L. 113-54) approved 12-20-13) and 24 C.F.R. pt. 982 (2013),⁷ has been a voluntary program with property owners free to choose to enter into lease contracts with tenants supported by vouchers only if “the owner is willing to lease the unit under the program.” 24 C.F.R. § 982.302(b); *see also Park Village Apartment Tenants Ass’n v. Mortimer Howard Trust*, 636 F.3d 1150,

⁷ The Department of Housing and Urban Development regulations covering the voucher program, including the requirements imposed on property owners at 24 C.F.R. pt. 982, extend to eighty-two pages of double column, small print text in the Code of Federal Regulations. Access to and comprehension of those regulations may present a considerable challenge to many individual property owners covered by this law.

1161-62 (9th Cir. 2011), *cert. denied* 132 S.Ct. 756 (2011); *Edwards v. Hopkins Plaza Ltd. P'ship*, 783 N.W.2d 171, 176 (Minn. Ct. App. 2010).

[¶33] As the Court's Opinion notes, the Section 8 program in Maine has been administered as a voluntary program. This litigation represents an attempt, promoted by the Maine Human Rights Commission, to convert the Section 8 program in Maine into a compulsory program and to secure by judicial action an amendment to the housing discrimination laws that the Maine Legislature explicitly refused to adopt.

[¶34] The record reflects that in 2007, the Maine Human Rights Commission supported an effort to amend former 5 M.R.S. § 4582 (2007), now 5 M.R.S. § 4581-A(4) (2013), to make it unlawful to decline to rent properties because of the additional contractual burdens imposed on owners as a condition for rental to individuals whose rent would be supported by Section 8 housing vouchers. L.D. 685, § 2 (123rd Legis. 2007). This effort to change the discrimination laws from prohibiting different, special treatment of subsidized tenancies to requiring different, special treatment of subsidized tenancies failed. The provision mandating acceptance of the additional contractual burdens was stricken from the legislation that made other amendments to the Maine Human Rights Act. Comm. Amend. A to L.D. 685, No. S-162 (123rd Legis. 2007). The other revisions of law were then enacted as P.L. 2007, ch. 243.

[¶35] The Legislature’s specific refusal to change the housing discrimination law from the interpretation we gave it in *Catir v. Commissioner of the Department of Human Services*, 543 A.2d 356 (Me. 1988), is an indicator of legislative intent that must be respected.

[¶36] Our rules of statutory construction establish that when a law has been interpreted by a judicial opinion, we do not later change that interpretation absent “clear and explicit” statutory language demonstrating legislative intent to change prior case law. *Caron v. Me. Sch. Admin. Dist. No. 27*, 594 A.2d 560, 563 (Me. 1991) (stating that, absent clear and explicit statutory language showing legislative intent to modify case law interpreting a statute, this Court will not interpret a statute to effect such a modification); *see also Tripp v. Philips Elmet Corp.*, 676 A.2d 927, 930-31 (Me. 1996) (same); *Rubin v. Josephson*, 478 A.2d 665, 671 (Me. 1984) (same).

[¶37] Here there has been no “clear and explicit” statutory language demonstrating legislative intent to change the interpretation we adopted in *Catir*. To the contrary, there is an explicit refusal by the Maine Legislature to enact the change in the law supported by the Maine Human Rights Commission and apparently adopted by the dissent today. Such a major change of policy is a matter best left to resolution by the Maine Legislature after it considers all the implications of such a change. It is not a change that should be adopted by judicial

action after the Legislature refused to make the change supported by the Maine Human Rights Commission.

LEVY, J., with whom GORMAN and JABAR, JJ., join, dissenting.

[¶38] I agree with the Court’s conclusion that the Maine Human Rights Act (MHRA), 5 M.R.S. §§ 4551-4634 (2007), does not make participation in the Section 8 housing assistance program mandatory, and that the MHRA prohibits landlords from intentionally discriminating against recipients of public assistance. However, I conclude that the MHRA prohibits housing practices that have a disparate impact on recipients of public assistance when such decisions are not justified by a business necessity. I also disagree with the Court’s conclusion that Coach Lantern did not “refuse to rent” to Dussault for purposes of section 4582. For these reasons, I respectfully dissent.

A. Whether Coach Lantern “Refused to Rent” to Dussault

[¶39] Before discussing why disparate impact liability applies in this case, it is necessary to address the threshold question of whether Coach Lantern’s actions exposed it to liability pursuant to the MHRA. The MHRA deems it unlawful “to refuse to rent or impose different terms of tenancy” primarily because of an individual’s status as a recipient of public assistance. 5 M.R.S. § 4582. The Court

concludes that Coach Lantern did not “refuse to rent” to Dussault because Coach Lantern expressed its willingness to rent to her so long as it could do so without including the HUD tenancy addendum in its lease. Court’s Opinion ¶ 16. The Court relies heavily on our holding in *Catir v. Commissioner of the Department of Human Services*, 543 A.2d 356, 357-58 (Me. 1988), which was decided before the “business necessity” defense was added to section 4583 in 2007. *See* P.L. 2007, ch. 243, § 4 (effective Sept. 20, 2007). In *Catir*, we upheld a summary judgment for a nursing home that terminated its participation in the Medicaid program because “there [was] no allegation or suggestion that the nursing home ‘refuse[d] to rent or impose[d] different terms of tenancy’ on Medicaid recipients” by making them pay the same higher rate as non-Medicaid patients. 543 A.2d at 357-58 (first alteration added) (quoting 5 M.R.S.A. § 4582 (Pamph. 1987)).

[¶40] *Catir* is inapposite to the present case for several reasons. First, our opinion stated that the material facts were “undisputed,” *id.* at 357, and that the “*plaintiffs’ affidavits* clearly establish that the nursing home refused to accept the lower Medicaid payment and subjected the recipients to the same terms of tenancy offered to any other individual,” *id.* at 358 (emphasis added). Thus, the summary judgment record demonstrated that the nursing home’s refusal to serve the plaintiffs as Medicaid patients was not based on the plaintiffs’ status as recipients of public assistance, but was instead based on its decision to no longer accept the

Medicaid reimbursement rate. Because *Catir* was decided before the business necessity exception was added to section 4583, we had no reason to consider whether the nursing home's refusal to accept the Medicaid reimbursement rate was based on business necessity.

[¶41] Second, the more fundamental issue in *Catir* was not whether the nursing home “refuse[d] to rent” to its Medicaid recipients, but whether it “impose[d] different terms of tenancy” on them by making them pay the higher private rate that non-Medicaid patients paid. In holding that the nursing home had not imposed different terms of tenancy, we noted that “[t]he equality of housing access secured by the Maine Human Rights Act is premised upon the assumption that the persons seeking the housing have the ability to pay.” 543 A.2d at 358. In contrast with the plaintiffs’ presumed inability to pay the higher private rate at issue in *Catir*, there is no dispute here that Dussault, with the assistance of the Section 8 housing subsidy, had the ability to pay the rent asked by Coach Lantern.

[¶42] In extending *Catir* so that it controls the outcome of this case, the Court adopts too narrow a view of what it means for a landlord to “refuse to rent” to a prospective tenant. Here, Coach Lantern would not rent an apartment to Dussault so long as the HUD tenancy addendum was included in the lease. Therefore, regardless of the reason for its refusal, Coach Lantern “refused to rent” to Dussault pursuant to the plain language of section 4582. The Court’s

characterization of Coach Lantern as being “willing” to rent to Dussault is misplaced, for Coach Lantern was “willing” to rent to Dussault only if she relinquished her status as a recipient of public assistance. Court’s Opinion ¶ 16. The Court’s interpretation of section 4582 would effectively sanction a landlord’s refusal to rent to a tenant based on the tenant’s protected status so long as the landlord simply asserted that it was “willing” to accept the tenant should she change her status.

[¶43] On the facts before us, I conclude that Coach Lantern “refused to rent” to Dussault pursuant to section 4582. I now turn to whether Coach Lantern’s refusal to rent was “primarily because of” Dussault’s status as the recipient of public assistance.

B. Disparate Impact Liability Pursuant to the MHRA

[¶44] The MHRA makes it unlawful “to refuse to rent . . . to any individual . . . primarily because of the individual’s status as [a] recipient” of public assistance. 5 M.R.S. § 4582. The Court construes the phrase “primarily because of” to proscribe only intentional discrimination against recipients of public assistance, and not housing decisions that have a disparate impact on such recipients. This construction, which was not argued by Coach Lantern before the Superior Court or this Court, is contrary to sections 4582 and 4583.

1. The Plain Meaning of Sections 4582 and 4583 Recognizes Disparate Impact Liability

[¶45] “When construing the language of a statute, we look first to the plain meaning of the language to give effect to the legislative intent.” *Stromberg-Carlson Corp. v. State Tax Assessor*, 2001 ME 11, ¶ 9, 765 A.2d 566. A statute’s plain meaning must be considered through the lens of “the whole statutory scheme for which the section at issue forms a part so that a harmonious result, presumably the intent of the Legislature, may be achieved.” *Id.* (quotation marks omitted). To give effect to the intent of the Legislature, “[w]ords must be given meaning and not treated as meaningless and superfluous.” *Id.*

[¶46] The question before us is what it means for a landlord to refuse to rent to a tenant “primarily because of” the tenant’s status as a recipient of public assistance pursuant to section 4582. The Court’s holding—that “primarily because of,” on its face, only prohibits housing decisions that are intentionally discriminatory—misreads the statute. Whether a housing decision is “primarily because of” a tenant’s protected status can mean either (1) that the decision had a discriminatory purpose, or (2) that the decision resulted in a disparate impact on members of a protected group that was *functionally equivalent* to intentional discrimination. “[T]he necessary premise of the disparate impact approach is that some [housing] practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination.”

Mountain Side Mobile Estates P'ship v. Sec'y of Hous. & Urban Dev., 56 F.3d 1243, 1250-51 (10th Cir. 1995) (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988)) (second alteration in original). This construction accords with the Supreme Court's adoption of disparate impact liability in the face of statutory language that, as is true here, does not explicitly mention disparate impact liability. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-36 (1971) (holding that disparate impact liability is contemplated by Title VII's prohibition on employment tests that are ““designed, intended or used to discriminate because of race””) (quoting the Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(h), 78 Stat. 241, 257 (codified as amended at 42 U.S.C.A. § 2000e-2 (West, Westlaw through P.L. 113-65 (excluding P.L. 113-54) approved 12-20-13))).

[¶47] This construction of section 4582 is confirmed by viewing it in conjunction with the business necessity defense established in section 4583. Section 4583 dictates that the MHRA must be construed to permit housing practices that are both (1) “consistent with business necessity” and (2) “not based on” an individual's status as a member of a protected class, including recipients of public assistance:

Nothing in this Act may be construed to prohibit or limit the exercise of the privilege of every person and the agent of any person having the right to sell, rent, lease or manage a housing accommodation to set up and enforce specifications in the selling, renting, leasing or letting . . . of facilities . . . that are consistent with business necessity and are not based on the race, color, sex, sexual

orientation, physical or mental disability, religion, country of ancestral origin or familial status of or the receipt of public assistance payments by any prospective or actual purchaser, lessee, tenant or occupant.

5 M.R.S. § 4583. Section 4583 creates a defense to liability pursuant to the MHRA that is relevant only if a housing decision is “not based on” a protected status, i.e., if the decision is not purposefully discriminatory but nonetheless has a disparate impact on a protected class. The business necessity defense is specifically tailored to defending against claims of disparate impact liability. *See Me. Human Rights Comm’n v. Can. Pac. Ltd.*, 458 A.2d 1225, 1233 n.16 (Me. 1983) (“[The business necessity defense] is thus available only to validate uniform employment criteria having a discriminatorily disparate impact.”); *Me. Human Rights Comm’n v. City of Auburn*, 408 A.2d 1253, 1264-66 (Me. 1979) (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425-34 (1975), and *Griggs*, 401 U.S. at 431, for the proposition that a plaintiff’s prima facie case of disparate impact may be countered by a showing of business necessity). Thus, a facially neutral housing practice that has a disparate impact on a protected group is not discriminatory if it is “consistent with business necessity.” 5 M.R.S. § 4583.

[¶48] Any doubt as to the proper construction of sections 4582 and 4583 is erased by the statute’s legislative history.⁸ The 2007 amendment to the MHRA

⁸ The majority concludes that 5 M.R.S. § 4582 (2007) unambiguously precludes disparate impact liability, and accordingly excludes 5 M.R.S. § 4583 (2007)’s legislative history from its analysis. This construction of section 4582 conflicts with the business necessity defense—a defense specifically tailored to defend against claims of disparate impact liability—established by section 4583. At the very least,

that, among other things, added the “business necessity” language to section 4583 expressly states that it “amends the Maine Human Rights Act to . . . prohibit unreasonable housing practices that have a disparate impact on the basis of . . . the receipt of public assistance payments.” L.D. 685, Summary (123rd Legis. 2007); P.L. 2007, ch. 243, § 4 (effective Sept. 20, 2007) (codified at 5 M.R.S. § 4583 (2012)). The Legislature’s intent to subject claims of housing discrimination based on the receipt of public assistance payments to disparate impact analysis, and to permit landlords to justify their practices based on a showing of business necessity, could not be clearer.⁹

2. The MHRA’s Recognition of Disparate Impact Liability Does Not Make Participation in Section 8 Mandatory

[¶49] I agree with the Court that the MHRA does not make landlords’ participation in the Section 8 housing voucher program mandatory. Nothing in the construction of the MHRA set out above requires landlords to participate in the Section 8 program. Rather, the statute simply prohibits landlords from

there exists ambiguity in the statute that requires consultation of the relevant legislative history. Because the “primary purpose in statutory interpretation is to give effect to the intent of the Legislature,” *Arsenault v. Sec’y of State*, 2006 ME 111, ¶ 11, 905 A.2d 285, the proper construction of the statute must recognize that the Legislature expressly provided that the business necessity defense is available to defend against disparate impact claims based on “the receipt of public assistance payments by any prospective or actual purchaser, lessee, tenant or occupant.” 5 M.R.S. § 4583.

⁹ The Court’s assertion that the Legislature “would have effectively overruled our holding in *Catir*” by creating disparate impact liability pursuant to section 4582 is incorrect. See Court’s Opinion ¶ 28. As discussed above, our holding in *Catir* was sufficiently distinguishable—and cursory—that the Legislature’s contemplation of disparate impact liability in section 4582 did not infringe upon our holding in that case. See *Catir v. Comm’r of Dep’t of Human Servs.*, 543 A.2d 356, 357-58 (Me. 1988).

discriminating, either in word or in effect, against recipients of public assistance. The Legislature's provision for these two forms of liability cannot be properly understood as making participation in Section 8 mandatory.

[¶50] The concurrence, in arguing that the MHRA does not compel participation in Section 8, places significant weight on the fact that in 2007 the Judiciary Committee struck a proposed amendment to 5 M.R.S. § 4582 that would have made it unlawful for landlords to refuse to rent or impose different terms of tenancy to any recipient of public assistance “primarily because of the individual’s status as recipient or because of any requirement of such a public assistance program.” *See* L.D. 685 (123rd Legis. 2007); Comm. Amend. A to L.D. 685, No. S-162 (123rd Legis. 2007). The legislative history is silent as to why the Judiciary Committee decided to remove the proposed language from the enacted law, and any number of inferences can be drawn from the Committee’s decision.¹⁰ Further,

¹⁰ It is important to note that Section 8 housing assistance is one of many “federal, state or local assistance” programs to which former section 4582 applied. Therefore, one interpretation of the Judiciary Committee’s decision not to adopt the proposed change to section 4582 is that it was concerned about the consequences the change might have with respect to public assistance programs other than Section 8. The Judiciary Committee might also have concluded that the separate provision for disparate impact liability in L.D. 685, pursuant to section 4583, was sufficient to ameliorate concerns regarding landlords refusing to rent to tenants because of the requirements of participating in the Section 8 program. *See* Letter from Maine Human Rights Commission to Members of Joint Standing Committee on Judiciary 2 (April 5, 2007) (proposing amending section 4582 in order to “ensure that a housing provider cannot refuse to rent or impose different terms of tenancy because of the requirements of a public assistance program”). Finally, the Judiciary Committee might have concluded that the proposed amendment to section 4582 to add “any requirement of such a public assistance program” was not needed because a refusal to rent or imposition of different tenancy terms on that basis was already encompassed by the existing statutory language, “primarily because of the individual’s status as recipient.” The letter of the Executive Director of the Maine Human Rights Commission addressed to the Judiciary Committee that accompanied L.D. 685 suggested this very possibility. *See* Letter from Maine Human Rights Commission to Members of

this 2007 amendment to the MHRA is the very same one cited above that demonstrates the Judiciary Committee’s desire, in no uncertain terms, to subject unreasonable housing practices to disparate impact liability. *See* L.D. 685, Summary (123rd Legis. 2007).

3. Federal Law Supports an Interpretation of Section 4582 that Creates Disparate Impact Liability

[¶51] A construction of sections 4582 and 4583 that recognizes disparate impact liability is also supported by federal law. “In enacting the Human Rights Act, Maine was legislating against the background of prior federal antidiscrimination statutes and a developing body of case law construing and applying those statutes.” *City of Auburn*, 408 A.2d at 1261 (footnote omitted). Accordingly, we look to federal case law to “provide significant guidance in the construction of our statute.” *Id.* (quoting *Me. Human Rights Comm’n v. Local 1361*, 383 A.2d 369, 375 (Me. 1978)).

[¶52] The federal counterpart to the MHRA’s fair housing provisions is the Fair Housing Act (FHA), 42 U.S.C.A. §§ 3601-3631 (West, Westlaw through P.L. 113-65 (excluding P.L. 113-54) approved 12-20-13). The FHA provides that “it shall be unlawful . . . [t]o refuse to sell or rent . . . or otherwise make unavailable or deny, a dwelling to any person *because of* race, color, religion, sex,

Joint Standing Committee on Judiciary 2 (April 5, 2007) (noting that the “recurring problem [of] landlords arguing that they do not want to do paperwork or comply with other requirements of public assistance programs such as Section 8 . . . arguably would violate the existing language” of section 4582).

familial status, or national origin.” *Id.* § 3604(a) (emphasis added). Even though the words “because of” can be read to suggest solely intentional discrimination, every federal court of appeals but one has concluded that this FHA provision creates liability for intent-neutral disparate impact. *See, e.g., Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mt. Holly*, 658 F.3d 375, 381-82 (3d Cir. 2011); *Gallagher v. Magner*, 619 F.3d 823, 833-38 (8th Cir. 2010); *Reinhart v. Lincoln Cnty.*, 482 F.3d 1225, 1229 (10th Cir. 2007); *Tsombanidis v. W. Haven Fire Dep’t*, 352 F.3d 565, 573 (2d Cir. 2003); *Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 49 (1st Cir. 2000); *Gamble v. City of Escondido*, 104 F.3d 300, 304-05 (9th Cir. 1997); *Simms v. First Gibraltar Bank*, 83 F.3d 1546, 1555 (5th Cir. 1996); *Smith & Lee Assocs., Inc. v. City of Taylor*, 102 F.3d 781, 790 (6th Cir. 1996); *Knapp v. Eagle Prop. Mgmt. Corp.*, 54 F.3d 1272, 1280 (7th Cir. 1995); *Jackson v. Okaloosa Cnty.*, 21 F.3d 1531, 1543 (11th Cir. 1994); *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 986 (4th Cir. 1984). *But see Greater New Orleans Fair Hous. Action Ctr. v. U.S. Dep’t of Hous. and Urban Dev.*, 639 F.3d 1078, 1085 (D.C. Cir. 2011) (declining to decide whether the FHA permits disparate impact claims as to grant administration, but assuming that it does). The nearly unified view of the federal courts further supports the construction of sections 4582 and 4583 that recognizes disparate impact liability in housing discrimination. *See City of Auburn*, 408 A.2d at 1261.

C. Summary Judgment

[¶53] Because sections 4582 and 4583 recognize disparate impact liability, it is necessary to review the grant of summary judgment in favor of Coach Lantern on Dussault’s claim of disparate impact.

[¶54] In analyzing a claim of disparate impact, courts employ a burden-shifting analysis similar to that employed when analyzing a claim of disparate treatment. *See City of Auburn*, 408 A.2d at 1264-65 (adopting this analysis in the employment discrimination context); *see also Mountain Side Mobile Estates P’ship*, 56 F.3d at 1250-54; *Huntington Branch, N.A.A.C.P. v. Town of Huntington*, 844 F.2d 926, 935-39 (2d Cir. 1988), *aff’d per curiam on other grounds*, 488 U.S. 15, 18 (1988). The first step of the analysis requires the party alleging discrimination to provide prima facie evidence that a facially neutral practice affects one group more harshly than another. *City of Auburn*, 408 A.2d at 1264. If the plaintiff produces a prima facie case, the burden of production shifts to the defendant to produce “credible evidence” of a genuine business necessity for the challenged practice. *Id.* at 1264-66. If the defendant meets that burden, the burden shifts back to the plaintiff to “show that the defendant was using his selection device as a pretext for discrimination.” *Id.* at 1268 (quotation marks omitted). At all times, the ultimate burden of persuasion rests with the plaintiff. *Id.* at 1265.

[¶55] Here, Dussault satisfies the first step of the analysis: Coach Lantern’s refusal to include the HUD tenancy addendum in its leases effectively excludes one hundred percent of Section 8 recipients from renting from Coach Lantern. *See* 24 C.F.R. § 982.308(b)(2) (2013) (requiring inclusion of HUD-prescribed addenda on all leases). As we have said in the employment setting, where the “inexorable zero” exists, “the prima facie inference of discrimination becomes strong.” *City of Auburn*, 408 A.2d at 1264 (quoting *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 342 n.23 (1977)). Because Dussault presented prima facie proof of discrimination, the burden shifted to Coach Lantern to produce evidence that its decision to not include the HUD tenancy addendum in its leases was justified by “credible evidence” of business necessity. *Id.* at 1265. This presents the question of what constitutes a “business necessity” pursuant to section 4583.

[¶56] The idea that a business necessity can justify a practice having a disparate impact on a protected class originated in the context of federal employment discrimination law. *See Griggs*, 401 U.S. at 431. Federal courts have developed definitions of “business necessity” that inform the meaning of the term within the context of housing discrimination law. *See, e.g., Mountain Side Mobile Estates P’ship*, 56 F.3d at 1254. Similarly, our employment discrimination case law provides guidance as to what should constitute a “business necessity” for

purposes of section 4583.¹¹ In the employment discrimination context, we have interpreted “business necessity” to require, among other things, that an employment practice be “necessary to safe and efficient job performance,” and not be done out of “mere business convenience.” *City of Auburn*, 408 A.2d at 1265 (quoting *Dothard v. Rawlinson*, 433 U.S. 321, 331 n.14 (1977)). In other words, the challenged practice must be shown by “credible evidence,” *id.*, to be necessary to achieve a lawful and substantial nondiscriminatory interest of the defendant. This approach is consistent with that taken in the federal rule recently adopted to implement the FHA’s discriminatory effects standard. *See* Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,482 (Feb. 15, 2013) (to be codified at 24 C.F.R. pt. 100). Applying this approach to section 4583, a business necessity is established when the challenged housing practice is not based on a protected status, and credible evidence demonstrates that the practice is necessary to achieve a “substantial, legitimate, nondiscriminatory interest” of the defendant. *Id.* at 11,460.

¹¹ At least one commentator has argued that although the definitions of “business necessity” created in employment law tend to inform the definitions adopted in housing law, housing law should apply a stricter standard. *See* Lindsey E. Sacher, Note, *Through the Looking Glass and Beyond: The Future of Disparate Impact Doctrine Under Title VIII*, 61 Case W. Res. L. Rev. 603, 636 (2010) (“[T]he differences between housing and employment suggest that given the limited number of legitimate justifications for denying housing to a qualified applicant, [housing discrimination] defendants should bear a higher burden than [employment discrimination defendants] when seeking to rebut a prima facie case of disparate impact.”).

[¶57] Here, Coach Lantern’s statement of material facts listed nine requirements of the HUD tenancy addendum that it finds objectionable. It then asserted, in paragraph 25, that “Coach Lantern is unwilling to attach the [Section 8] Addendum to any of its leases because of the number of burdensome conditions contained therein and the fact that the Addendum alters a landlord’s rights under state law.” Although Coach Lantern summarized the conditions of the addendum that it objects to, it failed to assert facts from which a fact-finder could determine that the conditions would interfere with any substantial, legitimate, and nondiscriminatory interest associated with its business. Coach Lantern did not identify which addendum provisions differed from its own lease provisions, and it further failed to include a copy of its standard lease in the summary judgment record. Because of this, it is impossible to identify the actual differences between Coach Lantern’s lease agreement and the Section 8 addendum. Similarly, Coach Lantern failed to identify which of its rights pursuant to state law would be altered if it were bound by a Section 8 addendum and the extent to which the alteration of those rights would interfere with the safe and efficient operation of its business.

[¶58] Contrary to the Court’s approach, whether a housing practice qualifies as a business necessity is a fact-intensive issue that the law requires the landlord to prove by credible evidence, not simply allege. Where the proffered justification for a landlord’s housing practice (here, Coach Lantern’s assertion that provisions

of the HUD tenancy addendum are unduly onerous) applies exclusively and completely to a class of individuals who share a status protected by the MHRA (here, Dussault and all other recipients of Section 8 housing subsidies), only a fact-finder can determine whether the housing practice in fact qualifies as a business necessity and is not based on the individuals' protected status. Coach Lantern's statement of material facts does no more than assert that it objects to certain requirements of the addendum without offering any information from which a fact-finder could determine whether Coach Lantern's objection is based on "mere business convenience" or an actual business necessity. One can only speculate, for example, whether Coach Lantern will incur increased operating expenses if it adopts the addendum, and, if so, whether the increased expenses will be sufficiently substantial as to jeopardize the "safe and efficient" operation of its rental business. *City of Auburn*, 408 A.2d at 1265 (quotation marks omitted).

[¶59] Accordingly, Coach Lantern did not meet its burden of showing that an actual business necessity justified its decision to refuse to include Section 8 addenda in its lease agreements. Because Dussault made an un rebutted prima facie case of disparate impact discrimination, her motion for summary judgment should have been granted and Coach Lantern's motion for summary judgment should have been denied. *See Mountain Side Mobile Estates P'ship*, 56 F.3d at 1254.

C. Conclusion

[¶60] With certain exceptions not applicable here, Maine landlords are required to comply with the Maine Human Rights Act. The Act does not compel landlords to participate in the Section 8 housing voucher program so long as the landlord's decision does not intentionally discriminate against, or result in a disparate impact on, recipients of public assistance. If a landlord's refusal to rent to recipients of public assistance has a disparate impact on such individuals, the landlord must have a legitimate, non-discriminatory reason—"business necessity"—for doing so. 5 M.R.S. § 4583. Because Dussault made an un rebutted prima facie case of discrimination based on Coach Lantern's refusal to rent to her, I would vacate the judgment and remand for entry of a judgment in favor of Dussault and for a determination of her remedies.

On the briefs:

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Margaret Coughlin LePage, Esq., and Katharine I. Rand, Esq., Pierce Atwood, LLP, Portland, for appellees RRE Coach Lantern Holdings, LLC, and Resource Real Estate Management, Inc.

John P. Gause, Esq., Maine Human Rights Commission, Augusta, for amicus curiae Maine Human Rights Commission

Justin W. Andrus, Esq., and Neil S. Shankman, Esq., Shankman & Associates, Topsham, for amicus curiae Maine Apartment Owners and Managers Association

Mark C. Joyce, Esq., Disability Rights Center of Maine, Augusta, for amicus curiae Disability Rights Center of Maine

John J. McDermott, Esq., National Apartment Association, Arlington, Virginia, and David J. Van Baars, Esq., Windham, for amici curiae National Apartment Association and Maine Apartment Association

J. Danian Ortiz, Esq., Patrick Bushell, Law Student, and Ian Friel, Law Student, The John Marshall Law School Fair Housing Center & Clinic, Chicago, Illinois, and David A. Lourie, Esq., Portland, for amicus curiae The John Marshall Law School Fair Housing Center & Clinic

Robert Edmond Mittel, Esq., MittelAsen LLC, and Danielle Pelfrey Duryea, Esq., James P. Dowden, Esq., and Thomas R. Sutcliffe, Esq., Ropes & Gray LLP, Boston, Massachusetts, for amici curiae National Center for Medical Legal Partnership and Lawyers' Committee for Civil Rights and Economic Justice

At oral argument:

Patricia M. Ender, Esq., for appellant Nicole Dussault

Katharine I. Rand, Esq., for appellees RRE Coach Lantern Holdings, LLC, and Resource Real Estate Management, Inc



TO: Councilor Duson, Chair
Members of the Housing Committee

FROM: Tyler Norod, Housing Planner

DATED: August 19, 2016

RE: Tenant/Landlord Mediation Program

As part of the Housing Committee's public process, Councilor Jill Duson suggested that the Committee consider a tenant/landlord mediation program similar to the Maine Human Rights Commission's (MHRC) mediation program. Throughout the recent public process the general idea of a mediation program appeared to have support from both tenant advocates and the landlord community. The State's program establishes a framework for third party mediators to work towards resolutions between two willing parties. State staff administer the program and connect interested parties to trained mediators. All mediation services are voluntary and cannot be initiated without both sides agreeing to participate. Willing parties are required to pay for the mediation services which often are less expensive and offer faster resolutions than going to court. It is not required that both parties pay an equal amount. The mediator fee is set annually by the Commission and is paid as a set stipend to participating mediators. A portion of the fee will be designated by the Commission to help defray the costs of mediation for indigent parties. A small percentage of the funds are also collected to help defray administrative costs to the State.

To find out more about potential costs and needs of a mediation program, staff reached out to numerous individual mediators, the Maine Association of Mediators, the State's Court Alternative Dispute Resolution (CADRES) Program Manager, and Opportunity Alliance Mediation Service Manager. Mediation costs varied widely from pro bono services to several hundred dollars per hour for very complex business mediations. One overlapping theme was an acknowledgement of significant administrative work involved in administering a successful program. Without knowing how high the potential demand might be for a program like this, it is difficult to know precisely how costly a program may be. Several potential program frameworks are listed below:

- 1) The City could hire one full time administrator to oversee the program and help coordinate all mediation services. An Administrative Assistant under the CEBA contract would cost between \$31,000 - \$39,000 annually depending on experience. After factoring in benefits the total employee cost to the City would be between \$43,000 - \$54,000 annually. The City could also create a new position under the Health & Human Services Department that would cost the City between \$34,000 - \$43,000 annually in salary and between \$47,000 - \$59,000 total. The benefit would be that under Health & Human Services the new position may have better connection to oversight and existing City services that could aid eligible at risk households. The City would set a modest stipend rate for mediators similar to what is done through the State's CADRES

program that would be paid for by participants. Should the City decide to pay for the tenant's costs who meet certain income eligibility thresholds that would be an additional annual cost to the City. The City could establish an initial annual cap for expenditures that would help the City better understand potential demand and manage anticipated costs to the City.

- 2) Throughout the community process there was talk of the City hiring a tenant/landlord "ombudsman" to oversee disputes. It does not appear that hiring a single "ombudsman" would be the best approach for several reasons. First, the City should not be perceived as or be pressured to take sides in any mediation. This would likely prove disruptive to the chances of having a successful outcome through mediation. Second, the cost of employing a trained ombudsman would likely be higher than the administrator positions identified in option #1. Third, after a while landlords or tenants might come before a single ombudsman for more than one dispute. Right or wrong, this may lead to questions of fairness based on how parties perceived past mediation resolutions.
- 3) The City could partner with an existing organization who already provides the administrative capacity for managing mediation programs. This would require an RFP process to ensure fair opportunity to receive any City funding. Currently there are at least two local organizations that staff are aware of:
 - a. Opportunity Alliance already provides mediation services to individuals in need. The non-profit offers mediation services for a variety of issues, including housing issues, on a sliding pay scale. The program is run largely through private donations and has the capacity to facilitate more mediations. In order to accommodate more cases through a Portland specific program, Opportunity Alliance would likely need funding for additional administrative support staff. Opportunity Alliance operates regionally, so prior to any potential funding there would need to be consideration for how best to reach Portland residents.
 - b. The Maine Association of Mediators already administers a Residential Real Estate Program. This program is designed to address conflicts arising from the sale of private residential real estate between two parties. The program has a flat fee of \$800 to be split between the two parties, with \$150 per hour fee after the first three hours. Approximately \$300 of the initial \$800 goes towards administration costs. Given that tenant/landlord mediations targeted by the City may represent less financial exposure than the buying and selling of real estate it may be possible to design a real estate rental program at a reduced cost. It should be noted that administrative costs are consistently a significant portion of the costs associated with any mediation program.



MAINE HUMAN RIGHTS COMMISSION THIRD-PARTY NEUTRAL MEDIATION PROGRAM HANDBOOK

MAINE HUMAN RIGHTS COMMISSION

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1. Introduction

The Maine Human Rights Commission (“the Commission”) is the state agency that administers the Maine Human Rights Act, 5 M.R.S. §§ 4551 et seq. (the “MHRA”), the state antidiscrimination law. As a part of that responsibility, the Commission conducts preliminary investigations of discrimination complaints to determine whether there are reasonable grounds to believe that unlawful discrimination occurred. Prior to making such a finding, the Commission provides the parties to a complaint an opportunity to resolve the matter by settlement agreement. Participation in the Third-Party Neutral Mediation Program (“Program”) is one such opportunity to resolve a complaint.

Mediation is an informal, voluntary process in which those involved in a dispute jointly explore and reconcile their differences. The mediators in the Commission’s Program are neutral third parties who are contracted by the Commission and are not Commission employees. An assigned mediator assists the opposing parties to reach a voluntary negotiated resolution. The mediator has no authority to impose a settlement. Rather, the mediator helps the participants address the issues in dispute in order to reach a voluntary settlement.

The purpose of this handbook is to provide guidance and direction for the parties and mediators who participate in the Program. It establishes procedures that ordinarily should be followed but does not create rights or establish causes of action.

2. Number and characteristics of mediators

The Executive Director shall maintain a roster of between 4 and 7 mediators who she or he determines are qualified to conduct mediations on complaints filed with the Commission. The Executive Director may remove any mediator from the roster at any time for any reason. A mediator may not be a current employee of the Commission. The cost of mediation shall be paid by the Commission on terms set by the Commission and agreed to by the mediators.

3. Assignment of complaints for mediation

The Executive Director shall determine the number of complaints that may be referred to mediation depending on available resources. The Compliance Manager shall select which complaints are eligible for referral to mediation and shall invite the parties to participate.

A mediation shall not occur unless all parties agree and sign the Commission’s “Agreement to Mediate” (attachment A). Factors considered by the Compliance Manager in deciding whether to make a referral shall include the parties’ interest in participating in mediation and the likelihood that the complaint will be resolved with or without mediation. The Executive Director or the Compliance Manager may terminate a referral to mediation at any time and for any reason.

4. Assignment of mediators

The Compliance Manager shall assign mediators from the roster on a rotating basis. The selected mediator will be provided a referral form that includes contact information for the parties and their attorneys. If a mediator does not accept an assignment within three business days of the initial referral, the Compliance Manager shall select the next mediator on the roster. Once a mediator has accepted an assignment, the mediator will be provided with a copy of the complaint as well as relevant case documents.

5. Mediator conflict of interest

A mediator shall decline or discontinue an assignment if the mediator has a conflict of interest. A conflict of interest exists when the mediator has a professional, financial, familial, or personal interest that conflicts with the mediator's objectivity. In addition, a party may raise a question of whether a mediator has a conflict of interest with the Compliance Manager, who will make a determination after contacting the mediator for additional information. If a mediator has a conflict of interest, the Compliance Manager will assign the case to the next mediator on the roster. Mediators should also endeavor to avoid the appearance of a conflict of interest by disclosure or by abstention.

6. Payment for mediations

When the parties agree to mediate, the Maine Human Rights Act permits one or more parties to the complaint to agree to pay the costs of mediation. Because the Commission does not have sufficient funding to provide mediations free of charge, parties to a program mediation will be assessed a mediation fee. The per-case fee for mediation shall be reviewed and confirmed by vote of the Commission; the Commission may change the fee by majority vote at a public meeting.

Assessing a fee for Program mediations allows the Commission to provide a stipend to the assigned mediator to offset costs incurred in the course of providing volunteer service to the Commission and the parties in dispute. The mediation stipend is funded from the pool of fees paid by the parties who accept the invitation to use the Commission mediation program.

The fee collected by the Commission pursuant to this section shall be maintained in the MHRC "Mediation Program Account" (MPA) designated to support and cover the costs of the Program. Use of the funds in the MPA shall be restricted to the following:

1. Members of the MHRC 3rd Party Neutral Mediation Panel shall receive a stipend for each case referred for mediation. The amount of the stipend for mediators shall be reviewed and confirmed annually by vote of the Commission.
2. A portion of the fee for mediation will be designated by the Commission to help defray the costs of mediation for indigent unrepresented parties, and

3. A percentage of the funds in the MPA may be designated by the Commission to offset administrative expenses directly attributed to the Mediation Program. Admin expenses will be limited to no more than 2% of the mediation fees collected.

The Commission will include in its annual report a financial report on the Mediation Program Account.

A party may request that the Commission waive the mediation fee in the event the party is unable to pay the fee, utilizing the Commission's "Application to Waive Fees" (Attachment E). Whether to grant the waiver application, or to make further inquiries to the party making the request about its contents, is entirely within the discretion of the Commission's Executive Director. Also, the Commission's ability to provide pro-bono mediation for an indigent party is subject to availability of funds in the MPA.

If the Commission does grant a waiver of the mediation fee for a party, and the party ultimately recovers funds sufficient to pay the mediation fee as part of a settlement reached from the mediation, the party will be required to repay the Commission for the previously-waived fee.

The Compliance Manager will not inform the assigned mediator, or opposing party, as to whether a party in a given mediation has requested, been granted, or been denied a waiver of the mediation fee.

Cases referred to the Program's panel will be assessed the Mediation Program Fee when referral to a mediator is confirmed. Fees for mediation must be paid in advance of the scheduled conference. If mediation is cancelled by either of the parties, each party will receive a refund of his/her/its fee, unless the party's conduct caused the mediator to expend substantial resources in anticipation of or preparation for mediation.

7. Conduct during mediations

- A. Once a referral has been accepted by a mediator, she or he will contact the parties to set up a mutually agreed time for a mediation session to take place as soon as possible after the referral. The mediator will mail, e-mail, or fax written confirmation of the mediation session date and location to the parties and their representatives.
- B. Mediators ordinarily should schedule only one mediation session per day.
- C. Once scheduled, a mediation session shall not be rescheduled other than for good cause as determined by the mediator.
- D. Mediation sessions shall be conducted at the offices of the Maine Human Rights Commission or, for good cause shown in the discretion of the mediator, at another accessible location.

- E. The mediation session shall take place no later than 45 days after the referral unless the Compliance Manager extends this deadline for good cause shown.
- F. The mediator may, at her or his discretion, ask the parties to submit information to further the mediation process.
- G. In calculating any deadline imposed by the Commission relating to its investigation of a complaint, the prescribed period shall not include time that elapses while a complaint has been referred to the Mediation Program.
- H. In addition to the assigned mediator, mediation session attendees shall include:
 - i. Individual parties;
 - ii. A management employee or officer of a corporate party, with appropriate settlement authority, whose interests are not entirely represented by an insurance company;
 - iii. A designated representative of a government agency party whose interests are not entirely represented by an insurance company;
 - iv. An adjuster for any insurance company providing coverage potentially applicable to the case, provided that the adjuster participate in the conference with appropriate settlement authority;
 - v. Counsel for all parties; and
 - vi. Nonparties whose participation the mediator determines is essential to settlement discussions (e.g., lienholders).
- I. Attendance at a mediation session shall be in person unless the mediator allows attendance by telephone or video conference for good cause shown.
- J. The mediator shall only facilitate the settlement of claims raised in the Commission complaint and other claims that are essential to the settlement of that complaint. The mediator shall not assist the parties in drafting an agreement, however, that resolves claims other than those raised in the Commission complaint.
- K. The mediation session shall not be transcribed or recorded.
- L. At the conclusion of the mediation, the mediator will provide the Compliance Manager with any documents created or collected by the mediator relating to the mediation. The Compliance Manager shall maintain these materials in a separate file from the investigative file relating to each complaint.

M. An assigned mediator shall:

- i. Assist the parties in resolving the complaint by agreement;
- ii. If settlement is reached, either:
 - (a) Prepare a settlement agreement on the Commission's form, which shall be signed by the parties and forwarded to the Commission for approval pursuant to Procedural Rule § 2.04(C); or
 - (b) Prepare and have Complainant sign a Commission withdrawal form pursuant to Procedural Rule § 2.02(G), which shall be forwarded to the Compliance Manager together with the final terms of settlement; and
- iii. At the conclusion of the mediation session, provide each party with a Mediation Survey (attachment B) and stamped envelope addressed to the Commission.

N. Reasonable accommodation. Anyone planning to attend a mediation session who would like to request a reasonable accommodation (e.g. interpreter services, accessible location) should submit the request to the Compliance Manager in advance of the mediation session, and the Compliance Manager will facilitate providing the accommodation. If the assigned mediator becomes aware of a request for accommodation, she or he shall inform the Compliance Manager as soon as possible so that an accommodation may be provided in a timely manner.

O. Complaints. Anyone who participates in the Mediation Program may file a complaint relating to any aspect of the Program by submitting a Complaint Form (attachment C).

8. Confidentiality

A. Pursuant to the MHRA, 5 M.R.S. § 4612(1)(A), evidence of conduct or statements made in compromise settlement negotiations, offers of settlement, and any final agreement are confidential and may not be disclosed without the written consent of the parties to the proceeding nor used as evidence in any subsequent proceeding, civil or criminal, except in a civil action alleging a breach of agreement filed by the commission or a party. All conduct or statements made while a complaint has been referred to mediation are subject to this confidentiality requirement.

B. Mediators must sign an Agreement of Nondisclosure (attachment D).

C. Maine Rules of Evidence 408 (Compromise and Offers to Compromise) and 514 (Mediator's Privilege) apply to mediations conducted pursuant to this Program.



TO: Councilor Jill Duson, Chair
Members of the Housing Committee

FROM: Tyler Norod, Housing Planner

DATED: August 19, 2016

RE: Portland Rental Housing Security Ordinance

On July 13, 2016, Mayor Ethan Strimling submitted a proposal for a new Rental Housing Security Ordinance to the Housing Committee. The Mayor's ordinance combined policy ideas discussed in the previous memo's submitted for your review. The Housing Committee's positions on these aforementioned policy ideas will likely address the majority of the content within the Mayor's proposal. Attached to this memo is a copy of the Mayor's ordinance covering voucher discrimination, rent increase limitations, non-renewal of leases, and enforcement measures.

Division 2: Fair Housing

This Division is focused on mitigating the potential for landlords to discriminate based on the source of potential tenants income, i.e. vouchers. Corporation Counsel has expressed a belief that sections (a) through (d) of the Mayor's proposal are already covered by State law which expressly prohibits discrimination based on source of income. Corporation Counsel also expressed concern that since the State already legislated in this area that they intended to occupy this field making additional regulation potentially problematic. Some states, such as Massachusetts, do require landlords not to discriminate against tenants' sources of incomes because of any associated requirements the income sources may have. However, the Massachusetts law does not dictate rental amounts or require landlords to set rents at the limited amounts for which vouchers would cover. To do this, the City would need to require landlords to accept all associated inspections, mandated repairs, terms, contracts, paperwork, addendums, etc. that may be part of vouchers or other forms of housing subsidies. According to Corporation Counsel this would need to be done outside the FED process and the MHRA, and may prove difficult to enforce, but could possibly be somewhat similar to protections described under Chapter 13.5 of the City Code that relate to discrimination on the basis of sexual orientation. It should be noted that under the proposed ordinance in Section (g)(2) that landlords could be required to make improvements to their units applicable for new construction. Building codes for existing buildings are intentionally different from building codes for new buildings. Enforcement of this specific part of the proposed ordinance could prove extremely problematic.

Sections (h) and (j) may represent another problematic area for the City to legislate given the results of the recent court case *Dussault v. Ren Coach Lantern Holdings, LLC. Et. Al.* which determined that landlords do not have to rent to tenants despite their source of income if their decision is consistent

with a business necessity. Section (h) would prohibit landlords from using a metric to determine an income to rent ratio. Section (j) prohibits landlords from using credit checks when screening tenants.

Section (i), although well intentioned, appears ambiguous and difficult to enforce. More information may be needed to understand the proposed parameters that would govern this subsection.

Division 3: Rent Increase Limitations

The Mayor's ordinance proposes increased notification minimums similar to what has been discussed in other memos before the Committee. It also proposes that rents not be increased during the term of a lease, the first year of tenancy, and no more than once per year. This language appears redundant. If the City pursued legislation that only allowed rents to be increased once per year than the ordinance could be drafted to read that the one year period would begin from the first month's rent paid. If this legislation is pursued, staff would also recommend clarifying that once per year means 12 months or 365 days rather than calendar year.

Division 3 also contains a provision that would restrict landlords owning multiple units from increasing rents on the units if any units owned by the landlord are not in compliance with existing building or safety codes. Unfortunately, this may have unintended consequences and be challenging to enforce. Earlier in the year, the Committee heard testimony from members of the Fire Department and the City's Housing Safety Office. They expressed to the Committee that there were often small code violations that landlords are cited for but allowed to continue renting their buildings. These include issues with missing smoke detectors that are sometimes removed by tenants. Staff noted that most landlords, once informed of their violations correct any issues in a reasonable amount of time and there are already policies in place for dealing with landlords who do not comply.

Division 4: Termination of Tenancy

Corporation Counsel has expressed concerns about this section of the Mayor's proposal as it appears to conflict with State law which expressly recognizes and defines tenants at will.

Division 5: Enforcement

Corporation Counsel expressed concerns related to the Enforcement language proposed in the Mayor's ordinance. Based on their review parts of this proposal may run contrary to State Law and be outside the boundaries of home rule.



Office of the Mayor, Ethan K. Strimling

MEMORANDUM

To: Councilor Jill Duson, Housing Committee Chair

From: Ethan K. Strimling, Mayor

Date: July 13, 2016

Re: Portland Rental Housing Security Ordinance

As a result of the Housing Committee's comprehensive exploration of the city's housing stresses and possible solutions to ease the burden felt by those who currently occupy rental housing in Portland, there has been a robust and fruitful discussion that has informed both myself and the community greatly. The attached legislative proposal is the product of those many discussions as well as my meetings with individuals and groups representing various points of view on the issue.

The goals of the "Portland Rental Housing Security Ordinance" are to protect our most vulnerable citizens from being left without a safe place to live by:

- Preventing discrimination against people using rental assistance mechanisms;
- Preventing people from losing their home through no fault of their own by establishing guidelines and clarity around no cause evictions;
- Establishing the baseline for lease agreements in order to create a mutually beneficial relationship between renter and landlord;
- Helping people have a safe affordable place to live by preventing landlords from raising rents if the landlord is in violation of existing state and local ordinances, and;
- Putting in place disincentives for "bad actor" landlords and establishing a redress process for tenants who have been negatively impacted by their unjust actions.

To be sure, this legislative proposal is by no means the single answer to our housing crisis in Portland. Conversations surrounding tools such as rent control are certainly likely to continue – and I urge the constructive dialogue that you've shepherded to continue as well. I do feel, however, that the attached proposal can be a step forward as the committee moves towards recommending timely and achievable solutions to the full Council for discussion and action.

Thank you to you and the entire committee for their work and consideration of this proposal.

PORTLAND RENTAL HOUSING SECURITY ORDINANCE

DIVISION 1. GENERALLY

Sec. 13.7-21. Legislative findings and statement of policy.

The council finds that:

- (a) The population of the city consists of people of every socioeconomic group, some of whom are discriminated against in housing based upon their source of income;
- (b) There are currently inadequate protections to protect against discrimination in housing based upon source of income;
- (c) The lack of legal protection for individuals unfairly limits their housing choices and discourages them from publicizing acts of discrimination out of fear of reprisal;
- (e) It is the policy of the City to bring about through fair, orderly and lawful procedures, the opportunity of each person to obtain housing without regard to source of income;

Therefore, in order to protect the public health, safety and welfare, it is declared to be the policy of this city to prevent discrimination in housing on account of source of income.

Sec. 13.7-22. Definitions.

As used in this chapter, unless the context otherwise indicates, the following words shall have the following meanings:

Discriminate. "Discriminate" includes, without limitation, segregate or separate.

Dwelling Unit and Multiple Dwelling Unit. is as defined in Section 6 of the City Ordinances in effect as of the date of the passage of this Ordinance.

Housing accommodation. "Housing accommodation" includes any building or structure or portion thereof, or any parcel of land, developed or undeveloped, which is occupied, or is intended to be occupied or to be developed for occupancy, for residential purposes excepting:

- (a) The rental of a one-family unit of a two-family dwelling, one (1) unit of which is occupied by the owner;
- (b) The rental of not more than four (4) rooms of a one-family dwelling which is occupied by the owner;

Person. "Person" includes one (1) or more individuals, partnerships, associations, organizations, corporations, municipal corporations, legal representatives, trustees, trustees in bankruptcy, receivers and other legal representatives, and includes the city and all agencies thereof.

Source of Income. "Source of Income" means any lawful source of money that is paid to or for the benefit of a person seeking to rent a dwelling and includes grants.

Tenant-Based Rental Assistance. "Tenant-Based Rental Assistance" means any and all forms of tenant-based rental assistance and vouchers, including but not limited to:

- (a) Tenant-based rental assistance through the Section 8 Housing Choice Voucher Program, 42 U.S.C § 1437f (o)
- (b) Tenant-based rental assistance through the HOME Investment Partnerships Act at title II of the Cranston-Gonzalez National Affordable Housing Act, as amended, 42 U.S.C § 12701 et seq.;
- (c) Tenant-based rental assistance under the HUD-Veterans Affairs Supportive Housing (HUD-VASH), authorized by § 8 (o) (19) of the United States Housing Act of 1937, 42 U.S.C. § 1437f (o) (19);
- (d) Tenant-based rental assistance through the Shelter Plus Care Program authorized by title IV, subtitle F, of the Stewart B McKinney Homeless Assistance Act, 42 U.S.C. §§ 11403-11407b, as amended;
- (e) Tenant-based rental assistance through the Supportive Housing Program authorized by title IV, subtitle F, of the Stewart B McKinney Homeless Assistance Act, 42 U.S.C. §§ 11381-11389, as amended;
- (f) Tenant-based rental assistance through the Section 8 Disaster Voucher Program (DVP);
- (g) Tenant-based rental assistance through the Housing Opportunities for Persons with AIDS (HOPWA) Program, 42 U.S.C. § 12901 – 12912 as amended;
- (h) Tenant-based rental assistance through the Community Block Grant Program, 42 U.S.C. § 5301 et seq. as amended;
- (i) Tenant-based rental assistance through the Continuum of Care Program authorized by subtitle C of title IV of the McKinney-Vento Homeless Assistance Act, 42 U.S.C. §§ 11381-11389; and
- (j) Tenant-based rental assistance through the Rural Development Voucher Program authorized through § 542 of the Housing Act of 1949, as amended. See 78 Fed. Reg. 49374 (Aug. 14, 2013) (proposed rule); and
- (k) Tenant-based rental assistance through the Maine Bridging Rental Assistance Program, authorized by M.R.S. Title 34-B § 3011; and

- (l) Tenant-based rental assistance through the Maine State Housing Authority Home To Stay Program, M.R.S. Title 30-A § 4771; and
- (m) Tenant-based rental assistance through the Maine State Housing Authority Stability Through Engagement Program, M.R.S. Title 30-A § 4771; and
- (n) Tenant-based rental assistance through the City of Portland's Tennant Based Rental Assistance Program, M.R.S. Title 30-A § 4771;
- (o) Tenant-based rental assistance through the City of Portland's General Assistance Program, authorized by M.R.S. Title 22 § 4301 et seq.; and
- (p) Such other Tenant-based rental assistance or rental vouchers or rental coupons as may be authorized under any federal, state, or local program.

DIVISION 2. FAIR HOUSING

Sec. 13.7-23. Unlawful housing discrimination.

It shall be unlawful housing discrimination, in violation of this article:

- (a) For a person to refuse to rent or negotiate for the rental of, or otherwise make unavailable or deny a dwelling to any person because of the person's source of income;
- (b) For a person to discriminate in the terms, conditions, or privileges of rental of a dwelling or in the provision of services or facilities in connection therewith because of the person's source of income;
- (c) For a person to make, print, or publish or cause to be made, printed or published, any notice, statement, or advertisement, with respect to the rental of a dwelling that indicates any preference, limitation, or discrimination based on a person's source of income;
- (d) For a person to represent to any person that any dwelling is not available because of the person's source of income or because of the requirements of the program providing the source of income;
- (e) For a person to exclude any person from admission to a dwelling because of the person's source of income;
- (f) For a person to refuse to rent or negotiate for the rental of, or otherwise make unavailable or deny a dwelling to any person because of the person's source of income or because of the requirements of the program providing the source of income;
- (g) For a person to refuse to participate in or comply with any federal, state, or local requirements of a tenant-based rental assistance program, including, but not limited to the following:

- 1) Refusing to allow inspections of a dwelling by the public housing authority or other entity administering a tenant-based rental assistance program;
 - 2) Refusing to make reasonable repairs necessary for the dwelling to meet the housing quality standards of the tenant-based rental assistance program; such repairs will be considered reasonable if they do not substantially alter or change the housing unit or do not require repairs substantially different from those that would be required to bring the rental unit into compliance with the Maine Warranty of Habitability Act or local building or housing codes applicable for new construction
 - 3) Refusing to complete any necessary paperwork, including but not limited to such documents as the *Request for Tenancy Approval* form, the *Housing Assistance Payments Contract*, and the *Tenancy Addendum* or applicable General Assistance forms; and
 - 4) Refusing to provide information required by the public housing authority or other entity administering the source of income or tenant-based rental assistance program;
- (h) For a person to use a financial or minimum income standard for any person participating in any tenant-based rental assistance program that requires the person to have a monthly income of more than two- and one-half times the person's share of the total monthly rent payable to the owner of the dwelling unit.
- (i) For a person to use any tenant screening policy that actually or predictably results in a disparate impact on any person with tenant-based rental assistance unless (i) necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the dwelling owner and (ii) those interests could not be served by another practice that has a less discriminatory effect of persons receiving tenant-based rental assistance.
- (j) For a person to use any tenant screening policy that denies housing to any tenant who receives tenant based rental assistance because of any negative credit history that was incurred prior to the tenant's receipt of tenant based rental assistance.

Sec. 13.7-24. Application.

Nothing in this article shall be construed in any manner to prohibit or limit the exercise of the privilege of every person and the agent of any person having the right to sell, rent, lease or manage a housing accommodation to set up and enforce specifications in the selling, renting, leasing or letting thereof or in the furnishings of facilities or services in connection therewith which are not based on the source of income of any prospective or actual purchaser, lessee, tenant or occupant thereof.

DIVISION 3. RENT INCREASE LIMITATIONS

Sec. 13.7-29 Declaration of Emergency

Whereas a serious shortage of affordable rental housing units in the city has resulted in abnormally high rents and has produced serious threats to the public health, safety, and general welfare of the citizens of the community, the City Council hereby establishes this rent increase limitation ordinance.

Sec. 13.7-30 Rental Increases

Rent charged for a dwelling unit or multiple dwelling unit may only be increased as follows:

1. Rent charged for a dwelling unit or multiple dwelling unit may be increased by the landlord only after providing at least 90 days written notice to the tenant.
2. Rent charged for a dwelling unit or multiple dwelling unit may not be increased prior to the expiration of a lease term, during the initial year of any tenancy and no more than one time during any calendar year.
3. Rent charged for a dwelling unit or multiple dwelling unit may be increased only if all dwelling units owned by that entity are in compliance with the state's warranty of habitability law at 14 M.R.S. § 6021 and the city's Housing Code at Sec. 6-106 et seq.

DIVISION 4 TERMINATION OF TENANCY

Sec. 13.7.24

1. A constructive lease shall be imposed upon all residential tenancies for a period of one year after the creation of the tenancy that shall prohibit the termination of the tenancy except for good cause.
2. For purposes of this ordinance a tenancy shall be deemed to be created as follows:
 - A. Upon the date this ordinance becomes effective except that this ordinance shall not modify the provisions of any existing written lease agreement.
 - B. When a tenant initially moves into a residential rental unit.
 - C. When a new owner purchases the building in which a residential rental unit is located.
 - D. Thirty (30) days after the expiration of the initial one year term where the landlord has not caused to be served upon the tenant a summons and complaint for forcible entry and detainer.
 - E. Thirty (30) days after the expiration of a lease agreement in effect at the time this ordinance goes into effect where the landlord has not caused to be served upon the tenant a summons and complaint for forcible entry and detainer.

3. For the purposes of this ordinance good cause is as defined at 14 M.R.S. § 6002(1) and (2).
4. Good cause shall not include the tenant's non-payment of a rent increase may in violation of this ordinance.
5. In any action of forcible entry and detainer there is a rebuttable presumption that the action is commenced in retaliation against the tenant if within one year prior to the commencement of the action the landlord has
 - A. Attempted to institute a rent increase made in violation of this ordinance;
 - B. Attempted to terminate a tenancy in violation of this Ordinance;
 - C. Illegally discriminated against a tenant in violation of this Ordinance.
 1. No writ of possession may issue in the absence of rebuttal of the presumption of retaliation

DIVISION 5. ENFORCEMENT

Sec. 13.7-25. Enforcement by civil action.

A violation of this article shall be a civil infraction and shall be enforceable in the Maine Superior Court in a civil action. Within the time limited, a person who has been subject to unlawful discrimination may file a civil action in the superior court against the person or persons who committed the unlawful discrimination.

Sec. 13.7-26. Burden of proof.

In any civil action under this article, there shall be a rebuttable presumption that the person seeking to enforce this ordinance shall have met the burden of proof upon a showing that the person was denied housing while being a recipient of tenant based rental assistance or that the Landlord attempted to terminate a residential tenancy within one year of the creation of said tenancy.

In all other civil actions to enforce this article the burden shall be on the person seeking relief to prove by a preponderance of the evidence that a violation of this Article has occurred.

Sec. 13.7-27. Remedies

Fair Housing

In any action filed under this article by any person:

If the court finds that unlawful discrimination occurred, its judgment shall specify an appropriate remedy or remedies therefor. Such remedies may include, but are not limited to:

1. An order to cease and desist from the unlawful practices specified in the order;

2. An order to rent a specified housing accommodation, or one substantially identical thereto if controlled by the respondent, to a victim of unlawful housing discrimination or eviction in violation of this ordinance;
3. An order requiring the disclosure of the locations and descriptions of all housing accommodations which the violator has the right to sell, rent, lease or manage;
4. An order to pay the Plaintiff's actual damages, including emotional damages, pain and suffering incurred by the Plaintiff as a result of the unlawful discrimination or eviction carried out in violation of this chapter; and
5. An order to pay to the complainant civil penal damages not in excess of one thousand dollars (\$1000.00) in the case of the first order under this article against the respondent, not in excess of two thousand dollars (\$2000.00) in the case of a second such order against the respondent, and not in excess of three thousand dollars (\$3000.00) in the case of a third or subsequent such order against the respondent; and

(c) The action shall be commenced not more than one (1) years after the act of unlawful discrimination complained of.

Unlawful Rent Increases

Upon a finding by a court that a landlord has charged a tenant an unlawful rent increase in violation of this article, the court shall award to the tenant actual damages; liquidated damages of \$500 or the equivalent of one month's rent, whichever is greatest; together with the aggregate amount of costs and expenses reasonably incurred in connection with the action. The court may also award to the tenant reasonable attorney's fees.

Illegal Eviction

Upon a finding by a court that a landlord has attempted to terminate a tenancy in violation of this article, the court shall award to the tenant actual damages; liquidated damages of \$500 or the equivalent of one month's rent, whichever is greatest; together with the aggregate amount of costs and expenses reasonably incurred in connection with the action. The court may also award to the tenant reasonable attorney's fees.

Sec. 13.7-28. Attorneys' fees and costs.

In any civil action under this article, the court, in its discretion, may allow the prevailing party reasonable attorneys' fees and costs.

DIVISION 6. SEVERABILITY

Sec. 13.7-30. Severability.

If any section, phrase, sentence or portion of this Article is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision, and such holding shall not affect the validity of the remaining portions thereof.

MEMORANDUM

TO: Chair Duson and Members of the City of Portland Housing Committee
FROM: Danielle P. West-Chuhta, Corporation Counsel *DWC*
DATE: August 18, 2016
RE: **Proposed Rental Housing Security Ordinance**

I have reviewed the draft “Rental Housing Security Ordinance” that has been submitted to the Housing Committee for its consideration. The following are some thoughts, questions, and concerns that I have regarding the proposed ordinance:

A. Current State Law

According to the proposed Findings and Statement of Policy, the proposed ordinance is aimed at addressing a belief that some members of Portland’s population are discriminated against based on their source of income and that there are “inadequate” mechanisms for dealing with that discrimination.

Although the proposed ordinance does address some issues that are not covered by State law, because the Maine Legislature has adopted some protections around housing discrimination, it seems important to start a discussion of potential City Council action in this area by noting existing State law.

As the Committee knows from my prior memo on this topic, the Maine Human Rights Act (“MHRA”) currently prohibits discrimination in the renting of housing based on receipt of public housing assistance or other public benefit. Title 5 M.R.S. § 4581-A specifically provides:

It is unlawful housing discrimination, in violation of this Act . . . [f]or any person furnishing rental premises or public accommodations to refuse to rent or impose different terms of tenancy to any individual who is a recipient of federal, state or local public assistance, including medical assistance and housing subsidies, primarily because of the individual's status as recipient.

In *Dussault v. RRE Coach Lantern Holdings, LLC*, 2014 ME 8, 86 A.3d 52, the Law Court confirmed that the discrimination “the MHRA prohibits with respect to public assistance recipients is ‘refus[al] to rent or impos[ition of] different terms of tenancy’ based primarily on a person's status as a recipient.” It also explained, however, the limits of that protection. According to the Court, there is no violation of the MHRA where a landlord does not “refuse to rent [to] or impose

different terms of tenancy” on a recipient of public benefits. Rather, where a landlord is “willing to, and in fact [does], offer [a tenant] the apartment, and [is] willing to rent to her after learning of her status [as a recipient of public benefits] so long as it could do so without including the tenancy addendum,” there has been no violation. By refusing to participate in the voucher program for the rental of any of its units, the Court explained, the landlord simply “offered to rent the apartment . . . on “the same terms of tenancy offered to any other individual.” A landlord does not violate the MHRA by offering apartments to recipients of public assistance on the same terms as it offers apartments to other potential tenants.

The Court then went on to note that “[t]he Legislature has not required landlords to accept Section 8 vouchers. Although the Legislature has previously considered a bill that would have effectively required landlords to participate in the voucher program, it has not, to date, made this voluntary program mandatory in Maine. *See* L.D. 685, § 2 (123rd Legis. 2007) (proposing an amendment to the MHRA forbidding discrimination against recipients of public assistance “because of any requirement of such a public assistance program”); Comm. Amend. A to L.D. 685, No. S-162 (123rd Legis. 2007) (removing the language regarding discrimination based on the requirements of public assistance programs from the bill).”

So, under current Maine State law, although it is unlawful for landlords to refuse to rent to recipients of benefits or to offer rental housing on different terms, there is no requirement that landlords accept public benefits or participate in housing choice voucher programs.

B. Proposed Ordinance

I. “Division 2: Fair Housing”

- Section (a) seems to me to be somewhat redundant of the State statute and so I simply raise questions about its necessity. As noted above, rental on different terms because of receipt of public benefit is already expressly prohibited. I think (a) through (d) are therefore already covered by the State law. Given too that the State has already legislated in this specific area, I do have a concern that the State may have intended to occupy the field with respect to these protections and the requirement that violations go to the Maine Human Rights Commission such that local regulation in this area may be problematic and subject to challenge.
- I also have some concern with the use of the word “person” throughout this section of the proposed ordinance rather than owner or landlord – particularly with respect to section (e). That section purports to prohibit “a person from excluding any

person from admission to a dwelling because of the person's source of income." This has the potential to be read in a manner that goes beyond regulating rentals – under a literal reading and using the proposed definition of "person", it purports to regulate what private home owners/occupants can do in their own homes and who they must allow into them. That likely was not the intent of the language, but it could be read that way. At the very least, if this proposal is going to continue to use "person," I would recommend that the definition of that term make clear that it relates to housing determinations, etc. and not to who can make a social visit, etc.

II. A helpful sample and summary of issues regarding Division 2:

For the Committee's information, I note that in 2014, the City of Austin, Texas enacted an ordinance very similar in purpose (and, language) to the one being proposed here. A review of that ordinance and what occurred after it was enacted may be instructive:

The ordinance was enacted on December 11, 2014 and challenged in court the next day. Importantly, the ordinance was ultimately upheld (though in the context of a motion for preliminary injunction, not after a trial on the merits) by the federal courts. Although it is very similar to the proposal that has been submitted to the committee, it differs in some important ways (for example, it uses "person" but also limits the prohibitions to specific behaviors relating to housing). I attach it for your consideration and suggest that to the extent the Committee and the City Council wish to adopt an ordinance prohibiting discrimination based on source of income, it model that ordinance after this one – because it has been upheld by the District Court.

The District Court's discussion of the ordinance and of the legal issues raised by the Austin Apartment Association is really helpful in terms of understanding the potential issues and their resolution. I also attach it for your review and reference.

It should be noted that following the decision by the U.S. Court of Appeals, the Texas State legislature enacted a State law that invalidated the local ordinance so it is no longer in effect. Here is a link to an article outlining the history: <http://www.austinchronicle.com/news/2015-09-04/not-for-rent/>.

III. "Division 3: Rent Increase Limitations":

This section requires, among other things, that all rent increases be preceded by at least ninety (90) days' written notice. Title 14 M.R.S. § 6015 provides:

Rent charged for residential estates may be increased by the lessor only after providing at least 45 days' written notice to the tenant. A written or oral waiver of this requirement is against public policy and is void. Any person in violation of this section is liable for the return of any sums unlawfully obtained from the lessee, with interest, and reasonable attorney's fees and costs.

Given that State law sets a minimum, as I stated in my prior memo to the Committee, an argument could be made that the City can increase the notice requirement without conflicting with State law (that is, a landlord can meet both the State and the City requirements so there is no inconsistent obligation in that respect) such that it does not exceed the City's home rule authority.

IV. Division 4: Termination of Tenancy:

This section proposes to impose a "constructive lease" on tenancies that would otherwise be tenancies at will under State law and to limit the grounds for eviction to "good cause" only. This appears to me to conflict with State law which expressly recognizes and defines tenancies at will and permits eviction for any reason in those situations upon thirty (30) days' written notice. See 14 M.R.S. §§ 6001 & 6002. Therefore, I have a concern that this provision may exceed the City's home rule authority.

V. Enforcement and Remedies

I have some concern that the enforcement and penalty provisions of the proposed ordinance may also be contrary to State law. First, to the extent that this ordinance contains the same protections as those provided by the MHRA, I don't think the City has the authority to create a private right of action on behalf of a tenant that would circumvent or run contrary to the administrative process contemplated by the Act. Under the Act, a person aggrieved by discrimination may not recover compensatory or other damages unless they first file a complaint with the Maine Human Rights Commission. 5 M.R.S. § 4622. This proposal purports to create a private right of action for some of the same wrongs, but does not require the same administrative process. This appears to potentially exceed the City's home rule authority.

Also, 30-A M.R.S. § 3001, the State statute that authorizes municipalities to enact local ordinances, explains that "[a]ll penalties established by ordinance shall be recovered on complaint *to the use of the municipality.*" (emphasis added). The proposals contained in the draft would

impose penalties that are payable to an aggrieved tenant, not the City, in apparent violation of the limits of the City's home rule authority.

In other sections of the City's code, violations of City ordinances are subject to fines that are payable to the City in accordance with 30-A M.R.S. § 3001. Those violations are ultimately enforced in Court and penalties imposed on a complaint filed by the City, in its name. My recommendation is that if the Committee and the City Council wish to regulate in this area, violations be enforced in the usual course.

C. Conclusion

I hope this discussion of some of the threshold questions and concerns raised by this proposed ordinance are helpful to the Committee. I am happy to talk further with you about these issues and any others that you might identify at your meeting on August 24 and to assist the Committee in whatever way I can in the development of any and all proposals it may wish to craft to address these issues.

Austin Apt. Ass'n v. City of Austin

United States District Court for the Western District of Texas, **Austin** Division

February 27, 2015, Decided; February 27, 2015, Filed

Case No. A-14-CA-1146-SS

Reporter

89 F. Supp. 3d 886; 2015 U.S. Dist. LEXIS 28352

AUSTIN APARTMENT ASSOCIATION, Plaintiff, -vs-
CITY OF **AUSTIN**, Defendant.

Core Terms

Ordinance, landlord, voucher, rent, housing, holders, lease, federal law, preempted, federal fair housing, fair housing, preemption, substantial equivalent, merits, inspection, Tenancy, substantial likelihood, impairing, courts, contractual obligation, preliminary injunction, terminates, requires, City's, regulations, families, fail to demonstrate, property owner, low-income, Apartment

Case Summary

Overview

HOLDINGS: [1]-A landlords' association failed to show that a city **ordinance** prohibiting discrimination against tenants participating in the federal housing voucher program was preempted by state and federal fair housing laws, since the city's housing laws remained substantially equivalent to the state and federal laws despite the creation of a new protected class of tenants which would advance rather than denigrate fair housing; [2]-The association also failed to show that the **ordinance** violated landlords' substantive due process right to contract or not to contract with tenants since the city did not act arbitrarily or irrationally in furthering the legitimate government interest in insuring affordable housing to low-income tenants; [3]-The **ordinance** did not constitute a taking since landlords remained free to rent their properties and receive compensation from the vouchers.

Outcome

Motion for preliminary injunction denied.

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Public Health & Welfare Law > Housing & Public Buildings > Fair Housing

Governments > Local Governments > **Ordinances** & Regulations

HN1 **Austin**, Tex., Ord. No. 20141211-050 amends the city's fair housing code to prohibit landlords from refusing to rent to prospective tenants on the basis of **source of income**, which is defined to include housing vouchers and other subsidies provided by government or non-governmental entities. Consequently, under the **ordinance**, where a person is otherwise qualified to rent a property, the landlord may not reject that person's application solely because he or she wishes to pay a portion of the rent with a voucher obtained through the federal Housing Choice Voucher Program.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

HN2 A party seeking a preliminary injunction must satisfy each of four criteria: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury if the injunction is not granted; (3) the substantial injury outweighs the threatened harm to the party against whom the injunction is sought; and (4) granting the injunction will not disserve the public interest. A preliminary injunction is an extraordinary remedy which should not be granted unless the party seeking it has clearly carried the burden of persuasion on all four requirements.

Governments > Local Governments > Police Power

Business & Corporate Compliance > ... > Public Health & Welfare Law > Housing & Public Buildings > Fair Housing

HN3 See **Tex. Loc. Gov't Code Ann. § 214.903**.

Governments > Local Governments > Home Rule

Governments > Local Governments > Ordinances & Regulations

HN4 Home-rule cities have broad discretionary powers to enact their own ordinances, provided that no ordinance shall contain any provision inconsistent with the Constitution of the State of Texas, or with the general laws enacted by the Legislature of the State. Home-rule cities possess the full power of self-government and look to the Legislature not for grants of power, but only for limitations on their power. A home-rule city ordinance is unenforceable to the extent it conflicts with a state statute. However, a state statute and a home-rule city ordinance will not be held repugnant to each other if any other reasonable construction leaving both in effect can be reached. Consequently, if the Texas Legislature decides to preempt a subject normally within a home-rule city's broad powers, it must do so with unmistakable clarity.

Governments > Legislation > Interpretation

HN5 Courts are generally not free to read into statutes language that is not there.

Business & Corporate Compliance > ... > Public Health & Welfare Law > Housing & Public Buildings > Fair Housing

HN6 Under federal law, the United States Department of Housing and Urban Development may certify a particular local agency only if the rights the agency protects, the procedures the agency follows, the remedies available to the agency, and the availability of judicial review of the agency's actions under the state or municipal fair housing law are all substantially equivalent to those created by and under the federal Fair Housing Act. 42 U.S.C.S. § 3610(f)(3)(A).

Business & Corporate Compliance > ... > Public Health & Welfare Law > Housing & Public Buildings > Fair Housing

HN7 See Tex. Loc. Gov't Code Ann. § 214.903(a).

Constitutional Law > Supremacy Clause > Federal Preemption

HN8 In determining whether federal law preempts state law, congressional intent is the paramount consideration. Preemption may manifest in several different ways. First, Congress may expressly state a federal law preempts state law (express preemption). Second, Congress's preemptive intent may be inferred where the federal scheme is so comprehensive it

occupies the field, leaving no room for supplementary state law (implied preemption). Finally, federal law may preempt state law to the extent the two actually conflict (conflict preemption), either because compliance with both federal and state regulations is a physical impossibility, or because the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Constitutional Law > Supremacy Clause > Federal Preemption

Business & Corporate Compliance > ... > Public Health & Welfare Law > Housing & Public Buildings > Fair Housing

HN9 The United States Department of Housing and Urban Development regulations implementing the Housing Choice Voucher Program specifically provide that the federal statutes creating it are not intended to preempt operation of state and local laws that prohibit discrimination against a Section 8 voucher-holder because of status as a Section 8 voucher-holder. 24 C.F.R. § 982.53(d).

Constitutional Law > Congressional Duties & Powers > Contracts Clause > General Overview

HN10 Tex. Const. art. I, § 16 prohibits any law impairing the obligation of contracts.

Constitutional Law > Congressional Duties & Powers > Contracts Clause > Application & Interpretation

HN11 Tex. Const. art. I, § 16 applies only where parties have entered into a contract and thereafter a statute is passed that unlawfully impairs their contractual obligations.

Constitutional Law > Substantive Due Process > General Overview

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings

HN12 Where a plaintiff alleges a takings claim and a substantive due process claim together, courts must determine the extent to which the due process claim rests on protections that are also afforded by the Takings Clause and analyze the claim accordingly.

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings

HN13 The Takings Clause of the Fifth Amendment, made applicable to the states through the Fourteenth Amendment, directs that private property shall not be

taken for public use, without just compensation. U.S. Const. amend. V.

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings

HN14 See Tex. Const. art. I, § 17.

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings

Constitutional Law > The Judiciary > Case or Controversy > Ripeness

HN15 Before addressing the merits of a takings claim, the court must be convinced the claim is ripe, even if neither party has raised the issue.

Counsel: **[**1]** For Austin Apartment Association, Plaintiff: Craig T. Enoch, Melissa Anne Lorber, Shelby O'Brien, LEAD ATTORNEYS, Enoch Kever PLLC, Austin, TX.

For City of Austin, Defendant: Meitra Farhadi, LEAD ATTORNEY, Assistant City Attorney, Austin, TX; Patricia L. Link, LEAD ATTORNEY, City of Austin Law Department, Austin, TX.

For Doris Landrum, Dimple Smith, Gloria Middleton, Latorie Duncan, Intervenor Defendants: Fred Fuchs, Kelli Dunn Howard, Nelson H. Mock, LEAD ATTORNEYS, Texas RioGrande Legal Aid, Inc., Austin, TX.

Judges: SAM SPARKS, UNITED STATES DISTRICT JUDGE.

Opinion by: SAM SPARKS

Opinion

[*889] ORDER

BE IT REMEMBERED on the 26th day of January 2015, the Court held a hearing in the above-styled cause, and the parties appeared by and through counsel. Before the Court are Plaintiff Austin Apartment Association's Motion for Preliminary Injunction [#4], Defendant City of Austin's Response [#8] thereto, Intervenor Doris Landrum, Dimple Smith, Gloria Middleton, and Latorie Duncan's Response [#7] thereto, Plaintiffs Trial Brief on Legal Authorities and Comparing Ordinance-Mandated and Free-Market Lease Terms [#11], Defendant's Response [#15] thereto, and Intervenor's Response

[#14] thereto. Having reviewed the documents, the arguments **[**2]** of the parties at hearing, the governing law, and the file as a whole, the Court now enters the following opinion and orders.

Background

On December 11, 2014, the City Council of the City of Austin, Texas, enacted Ordinance Number 20141211-050 (the Ordinance). **HN1** The Ordinance amends the City's fair housing code to prohibit landlords from refusing to rent to prospective tenants on the basis of "source of income," which is defined to include "housing vouchers and other subsidies provided by government or non-governmental entities." Prelim. Inj. Hrg. Ex. P-8 (the Ordinance) at 2. Consequently, under the Ordinance, where a person is otherwise qualified to rent a property, the landlord may not reject that person's application solely because he or she wishes to pay a portion of the rent with a voucher obtained through the federal Housing Choice Voucher Program (HCVP or the Program), formerly known as Section 8.

Plaintiff Austin Apartment Association (the Association), a trade association whose members control rental properties serving over 192,000 households, claims the Ordinance is invalid and seeks a preliminary injunction against its enforcement pending resolution of this action. Specifically, the Association argues **[**3]** the Ordinance is preempted by Texas and federal law, impairs the obligation of contracts in violation of the Texas Constitution, and constitutes a regulatory taking and due process violation under the Texas and United States Constitutions. As set forth below, the Court finds the Association has failed to demonstrate a substantial likelihood of success on the merits of its claims, and therefore DENIES the motion for preliminary injunction.

A. The Housing Choice Voucher Program

Congress created the Housing Choice Voucher Program to "aid[] low-income families in obtaining a decent place to live" and to "promot[e] economically mixed housing." 42 U.S.C. § 1437f(a). The Program is funded by the United States Department of Housing and Urban Development (HUD) and administered by state and local public housing authorities (PHAs) in accord with the regulations promulgated **[*890]** by HUD. Families (or individuals) who wish to receive housing vouchers must apply with their local PHA, which is responsible for screening prospective participants for federal eligibility, issuing vouchers, and contracting with landlords who lease to HCVP participants. See Prelim.

Inj. Hrg. Ex. P-12 (HCVP Guidebook) at 1-12.

Once a family is approved by and receives a voucher from [**4] the PHA—a process that may take years, as demand for vouchers far outstrips supply and waiting lists are very long—the family is responsible for finding a landlord in the private rental market willing to lease to them. See 24 C.F.R. § 982.302(a). Federal law does not require landlords to accept housing vouchers, and landlords who do accept vouchers are not required to approve tenants merely because they are voucher holders. Rather, landlords who participate in the Program may screen prospective tenants and reject them if screening reveals red flags in terms of paying rent and utility bills, caring for rental housing, respecting neighbors, criminal activity, and the like. See 24 C.F.R. § 982.307(a) (discussing landlord's obligation to screen prospective tenants and factors properly considered in so doing).

Once the family has located a willing landlord and the family and landlord have negotiated the terms of the lease, the PHA must also approve the prospective tenancy. The landlord and family fill out and submit to the PHA a two-page Request for Tenancy Approval, which provides the PHA with basic information such as the address and size of the unit to be rented and the utilities and appliances provided by the landlord versus [**5] paid for by the tenant. See Prelim. Inj. Hrg. Ex. P-2 (Request for Tenancy Approval) at 1. The Request for Tenancy Approval also requires landlords who rent more than four units to disclose the rent charged for comparable units, so the PHA can ensure the rent charged to the voucher holder is comparable to that charged to unassisted tenants. *Id.* at 2.

The portion of the rent paid by the government is pegged to the PHA's schedule of "payment standards," dollar amounts based on the local fair market rent for apartments or houses of a certain size. HCVP Guidebook at 7-1. The PHA will never pay more than its fixed share, equal to the applicable payment standard less the dollar amount for which the voucher holder is responsible. *Id.* at 6-2. Typically, a family must pay thirty percent of its monthly adjusted income toward rent. *Id.* at 6-1; see 42 U.S.C. § 1437f(o)(2)(A). If a family wants to rent a unit which costs more than thirty percent of its monthly adjusted income plus the PHA's fixed share, the family may do so and pay the additional cost—but the amount paid by the family may never exceed forty percent of its monthly adjusted income. 42 U.S.C. § 1437f(o)(3); see HCVP Guidebook at 6-2. If the family's responsibility would exceed forty percent of its monthly

adjusted income, the family may not rent that [**6] unit. HCVP Guidebook at 6-2.

If the PHA approves the tenancy, an inspection of the house or apartment to be leased to the family is scheduled. The inspection ensures the unit passes basic federal housing quality standards (HQS) geared toward ensuring tenant health and safety; for example, the property must have "a shower or bathtub with hot and cold running water," lockable exterior doors, "a safe heating system," permanently installed electrical outlets, and the like. See Prelim. Inj. Hrg. Ex. P-3 (HQS Checklist) at 5-7. All utilities must be turned on prior to the inspection. *Id.* at 9. According to the HQS Checklist, some of the most common reasons a unit fails inspection include broken smoke detectors, [**891] missing or cracked electrical outlet covers, peeling paint, trip hazards from carpet or other permanent floor coverings, cracked windowpanes, and inoperable stove burners. *Id.* at 4. If a property fails inspection, the landlord is required to make any needed repairs and notify the PHA when the property is ready for re-inspection.

Once the unit has passed inspection, the landlord and the PHA must execute the HUD-prepared Housing Assistance Payments Contract. See Prelim. Inj. Hrg. Ex. P-4 (HAP Contract). Execution of the HAP Contract is required [**7] by HUD, and without an executed HAP Contract covering a particular family's tenancy, the PHA will not pay any rent to the landlord. See *id.* at 4 ("During the HAP contract term, the PHA will pay housing assistance payments to the owner[.]"). The landlord cannot modify or negotiate the HAP Contract; it "must be word-for-word in the form prescribed by HUD." *Id.* at 1. Further, the landlord must append a Tenancy Addendum to the landlord-tenant lease agreement, which controls in the event the two conflict. Prelim. Inj. Hrg. Ex. P-5 (Tenancy Addendum) at 1 § 1(b).

Under the HAP Contract, the PHA's responsibility to pay rent terminates automatically under a number of circumstances, including if the tenant terminates the lease, moves out of the unit, or is dropped from HCVP, or if the PHA determines there is not enough funding to continue the Program. See HAP Contract at 4 § 4(b)(1)—(6) (detailing situations in which the HAP Contract automatically terminates). The PHA has discretion to terminate payments if the family leasing the property breaks up, "if the PHA determines that the [property] does not provide adequate space . . . because of an increase in family size or a change in family composition," or if the landlord violates the HAP

Contract. *Id.* at 5 § 4(b)(7)–(9). Additionally, [*8] the HAP Contract governs the timing of payment of rent. Although the PHA "must pay housing assistance payments promptly when due," it will only be obligated to pay late fees for tardy payments if (1) charging late fees is general practice in the community, (2) charging late fees is the landlord's general practice, and (3) the landlord also charges the leasing family late fees. *Id.* at 5 § 7(a). Additionally, the PHA is not required to pay late fees, even where those three conditions are met, "if HUD determines that late payment by the PHA is due to factors beyond the PHA's control." *Id.* at 5 § 7(a)(3). Late payment of rent by the PHA is not a violation of the lease, and the landlord cannot terminate a tenancy because the PHA fails to pay its share. *Id.* at 9 § 5(d).

B. Procedural History

On December 12, 2014, the Association filed suit in the 345th Judicial District Court of Travis County, Texas, seeking a declaration the Ordinance is invalid, a temporary restraining order, and preliminary and permanent injunctive relief. See Notice Removal [#1-3] at 2 (Orig. Pet.). The City removed to this Court on December 31, 2014, invoking federal question jurisdiction. *Id.* [#1] ¶ 1. Intervenors Latorie Duncan, Doris Landrum, Gloria Middleton, [*9] and Dimple Smith, all current HCVP voucher holders, filed a Plea in Intervention prior to removal and then a Motion to Intervene in this Court, seeking to intervene in support of the City. See Mot. Intervene [#12]. The Court granted the motion on January 23, 2015. See Order of Jan. 23, 2015 [#18].

The Association filed the instant "Emergency Motion for Temporary Restraining Order [TRO] and, Thereafter, Motion for Preliminary Injunction" [#4] on January 5, 2015. Following hearing on the motion, the Court granted the TRO and held the [*892] motion for preliminary injunction in abeyance pending further development of the record and a second hearing. See Order of Jan. 6, 2015 [#10]. During the second hearing, which took place on January 26, 2015, the Court heard testimony from witnesses, received exhibits, and entertained argument on the motion.

Analysis

I. Legal Standard

HN2 A party seeking a preliminary injunction must satisfy each of four criteria: (1) a substantial likelihood of success on the merits, (2) a substantial threat of

irreparable injury if the injunction is not granted, (3) the substantial injury outweighs the threatened harm to the party against whom the injunction is sought, and (4) [*10] granting the injunction will not disserve the public interest. Planned Parenthood Ass'n of Hidalgo Cnty., Tex., Inc. v. Suehs, 692 F.3d 343, 348 (5th Cir. 2012). "[A] preliminary injunction is an extraordinary remedy which should not be granted unless the party seeking it has clearly carried the burden of persuasion on all four requirements." *Id.* (quoting Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570, 574 (5th Cir. 2012)).

II. Application

The Association argues the Ordinance is invalid for four reasons: first, it is preempted by state law; second, it is preempted by the federal Fair Housing Act; third, it unconstitutionally burdens the freedom to contract guaranteed by Article 1, § 16 of the Texas Constitution, which prohibits laws impairing the obligation of contracts; and fourth, it constitutes a regulatory taking and due process violation under both the Texas and United States Constitutions. The Association fails to demonstrate a substantial likelihood of success on the merits under any of its theories.

A. State Preemption

The Association first argues the Ordinance is preempted by Texas law because it is not "substantially equivalent" to federal law, as required by § 214.903 of the Texas Local Government Code. Section 214.903 provides:

HN3 (a) The governing body of a municipality may adopt fair housing ordinances that provide fair housing rights, compliance duties, and remedies that are substantially equivalent to those granted under federal law. [*11] Enforcement procedures and remedies in fair housing ordinances may vary from state or federal fair housing law.

(b) Fair housing ordinances that were in existence on January 1, 1991, and are more restrictive than federal fair housing law shall remain in effect.

Tex. Local Gov't Code § 214.903. In the Association's view, § 214.903 preempts the Ordinance because the Ordinance "attempts to add a new protected class" that is different from those protected under the federal Fair Housing Act. Mot. Prelim. Inj. [#4] at 6–7. The Court is unpersuaded.

HN4 Home-rule cities, like the City of Austin, "have broad discretionary powers" to enact their own ordinances, "provided that no ordinance 'shall contain any provision inconsistent with the Constitution of the State, or [with] the general laws enacted by the Legislature of this State.'" Dall. Merch.'s & Concessionaire's Ass'n v. City of Dall., 852 S.W.2d 489, 490 (Tex. 1993) (quoting Tex. Const. art. XI, § 5). Home-rule cities "possess the full power of self-government and look to the Legislature not for grants of power, but only for limitations on their power." *Id.* at 490—91 (citing MJR's Fare v. City of Dall., 792 S.W.2d 569, 573 (Tex. App.—Dallas 1990, writ denied)). A home-rule city ordinance [*893] is unenforceable to the extent it conflicts with a state statute. *Id.* at 491 (citing City of Brookside Vill. v. Comeau, 633 S.W.2d 790, 796 (Tex. 1982)). However, a state statute and a home-rule city ordinance "will not be held repugnant to each [*12] other if any other reasonable construction leaving both in effect can be reached." *Id.* (quoting City of Beaumont v. Fall, 116 Tex. 314, 291 S.W. 202, 206 (Tex. 1927)). Consequently, if the Texas legislature decides to preempt a subject normally within a home-rule city's broad powers, "it must do so with unmistakable clarity." S. Crushed Concrete, LLC v. City of Hous., 398 S.W.3d 676, 678 (Tex. 2013) (quoting In re Sanchez, 81 S.W.3d 794, 796 (Tex. 2002)).

The Court finds the Association has failed to demonstrate a likelihood of success on the merits of its state preemption claim, as nothing in the record suggests § 214.903 preempts the Ordinance with "unmistakable clarity." The Association, without attempting to define "substantially equivalent," asserts the Ordinance is not substantially equivalent to the federal Fair Housing Act simply because the federal Fair Housing Act does not include source of income as a protected class. The Association cites no authority in support of that bold proposition, however, and the Court declines to embrace it. Construing § 214.903 as the Association urges would mean the City has long been violating the statute, as the City's fair housing code protects a number of classes of persons not protected by the federal Fair Housing Act. "Substantially," moreover, is defined by the Oxford English Dictionary as "[i]n all essential characters or features[.]"¹ It seems [*13] to the Court the salient "essential features" of the federal Fair Housing Act are the classes of

persons it protects. The Ordinance, in protecting from discrimination all of the classes protected under federal law and then some, exhibits the essential features of federal fair housing law. *Cf.* 24 C.F.R. § 115.204(h) (stating, in context of making substantial equivalency determination under federal law, if a local law "is different from the [Fair Housing] Act in a way that does not diminish coverage of the Act, including . . . the protection of additional prohibited bases, then the . . . local law may still be found substantially equivalent.").

That being said, the Court notes it is unsure what to make of the City's argument on this point. The City claims "substantially equivalent" is a term of art in fair housing law, referring to HUD's federal statutory authority to "certify" a local (or state) PHA, which requires HUD to determine whether the local (or state) law the PHA administers is "substantially equivalent" to the federal Fair Housing Act. See 42 U.S.C. § 3610(f)(3) (explaining HUD may certify an agency if the fair housing law it administers is substantially equivalent to federal law). Austin's [*14] PHA is certified by HUD; the City therefore concludes "unless and until HUD revokes the City's substantial equivalency certification, there is no violation of [§ 214.903]." Def.'s Resp. Mot. Prelim. Inj. [#8] at 6.

To the extent the City is claiming "substantially equivalent" as used in § 214.903(a) should be read coextensively with federal law, two unaddressed problems arise. First, that argument inserts the phrase "as determined by HUD" into § 214.903(a): "The governing body of a municipality may adopt fair housing ordinances... that are substantially equivalent[, as determined by HUD,] to those under federal law." **HN5** Courts are [*894] generally not free to read into statutes language that is not there. See, e.g., Lamie v. U.S. Trustee, 540 U.S. 526, 538, 124 S. Ct. 1023, 157 L. Ed. 2d 1024 (2004). Second, there appears to be a material difference between the federal and Texas statutes in employing the concept of substantial equivalency. **HN6** Under federal law, HUD may certify a particular local agency only if (1) the rights the agency protects, (2) the procedures the agency follows, (3) the remedies available to the agency, and (4) the availability of judicial review of the agency's actions under the state or municipal fair housing law are all substantially equivalent to those created by and under the federal [*15] Fair Housing Act. 42 U.S.C. § 3610(f)(3)(A). Under § 214.903, however, **HN7** "[e]nforcement procedures and remedies . . . may vary from . . . federal fair housing law." Tex. Local Gov't Code § 214.903(a). It is not entirely clear to the Court

¹ Substantially, adv., OED ONLINE, <http://www.oed.com/view/Entry/193055?redirectedFrom=substantially&>.

whether or how the variance permitted by § 214.903 squares with the federal concept of substantial equivalency since, in order to certify a local agency, the federal statute requires the procedures followed by and remedies available to the local agency be substantially equivalent to federal fair housing law. Further, even if the Court accepted the City's argument § 214.903 could not be violated unless HUD revoked the City's substantially-equivalent status, the City conceded at hearing there was no evidence HUD had reviewed the Ordinance and made that determination.

The burden of demonstrating a substantial likelihood of success on the merits, however, belongs to the Association, not to the City. On the present record, the Court concludes the Association has not carried that burden on the question whether the Ordinance is preempted by § 214.903.

B. Federal Preemption

The Association next argues the Ordinance is preempted by the federal Fair Housing Act. Specifically, the Association claims because the Ordinance makes participation [*16] in HCVP mandatory under certain circumstances, it is preempted by the Act, which makes participation in HCVP voluntary. See 42 U.S.C. § 1437f(d)(1)(A) ("[T]he selection of tenants shall be the function of the owner."). The Court disagrees with the Association.

HN8 In determining whether federal law preempts state law, Congressional intent is the paramount consideration. *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 280, 107 S. Ct. 683, 93 L. Ed. 2d 613 (1987). Preemption may manifest in several different ways. First, Congress may expressly state a federal law preempts state law (express preemption). *Id.* Second, Congress's preemptive intent may be inferred where the federal scheme is so comprehensive it "occupies the field," leaving no room for supplementary state law (implied preemption). *Id.* at 280–81. Finally, and most relevant for present purposes, federal law may preempt state law to the extent the two actually conflict (conflict preemption), either because "compliance with both federal and state regulations is a physical impossibility," or because the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 281 (internal quotes omitted).

The Association argues conflict preemption applies, and specifically that the Ordinance "stands as an obstacle

to the [*17] accomplishment and execution of the full purposes and objectives of Congress." See Pl.'s Trial Brief [#11] at 3. According to the Association, "[t]he voluntary nature of the [Program] lies at the heart of the federal law," as evidenced by Congress's two previous experiments with "mandating [*895] property owner participation": the "take one, take all" provision, which prohibited a landlord from declining to rent to a voucher holder if the landlord had done so in the past, and the "endless lease" provision, which prohibited landlords from refusing to renew voucher holders' leases at the expiration of the initial lease term. See *id.*; see also Pub. L. No. 105-276, §§ 549, 554, 112 Stat. 2461 (1996) (repealing "take one, take all" and "endless lease" provisions). The Association notes both provisions were repealed "because of their chilling effect" on landlords' willingness to participate in the program, given its "burdensome requirements." *Id.* (citing S. REP. No. 104-195, at 31-32 (1995)).

To date, the Association's argument has been rejected by every court which has confronted it. See *Bourbeau v. Jonathan Woodner Co.*, 549 F. Supp. 2d 78, 88–89 (D.D.C. 2008) (finding prohibiting discrimination against voucher holders will "advance rather than denigrate" Congress's objectives); *Montgomery Cnty. v. Glenmont Hills Assocs. Privacy World*, 402 Md. 250, 936 A.2d 325, 336 (Md. 2007) ("There is nothing in any of the relevant [*18] Federal statutes even to indicate, much less establish, that voluntary participation by landlords was an important Congressional objective. The only declared objective is to assist State and local governments in expanding affordable housing for low-income families"); *Franklin Tower One, L.L.C. v. N.M.*, 157 N.J. 602, 725 A.2d 1104, 1113 (N.J. 1999) ("[T]he voluntary nature of the Section 8 program is not at the heart of the federal scheme."); *Comm'n on Human Rights & Opportunities v. Sullivan Assocs.*, 250 Conn. 763, 739 A.2d 238, 246 (Conn. 1999) ("Requiring landlords to extend rental opportunities to otherwise eligible section 8 recipients . . . is not an obstacle to the congressional agenda but serves instead to advance its remedial purpose."); *Attorney General v. Brown*, 400 Mass. 826, 511 N.E.2d 1103, 1106 (Mass. 1987) (reasoning helping low-income families obtain decent housing, not voluntary landlord participation, is at the heart of the federal scheme).

The Court can see no reason to swim against the current. The undersigned is of the opinion Congress's decision to repeal the "take one, take all" and "endless lease" provisions provides no support for a conflict preemption argument. The provisions in question were

repealed in order to encourage landlords to participate in the voucher program such that more housing would be available to voucher holders, not to protect landlords from being required to rent to voucher holders.² See *Franklin Tower One*, 725 A.2d at 1113 (concluding repeal of [**19] "take one, take all" supports conclusion Congress's goal "has always been to assist in providing housing to low-income families"). Further, the Court agrees with the City and the decisions cited above that the purposes and objectives of HCVP are "to remedy the unsafe housing conditions and the acute shortage of decent and safe dwellings for low-income families," not to protect landlords' rights. 42 U.S.C. § 1437(a)(1)(A) (declaring Congressional policy). The **Ordinance** clearly serves those purposes and objectives by increasing the number of houses and apartments available to voucher holders, [**896] and in doing so, "advance[s] rather than denigrate[s]" the Program's objectives. *Bourbeau*, 549 F. Supp. 2d at 88 (citing *Glenmont Hills*, 936 A.2d at 336).

In support of its contrary position, the Association cites *Salute v. Stratford Greens Garden Apartments*, 136 F.3d 293 (2d Cir. 1998), and *Knapp v. Eagle Property Management Corp.*, 54 F.3d 1272 (2d Cir. 1995). Neither case directly addresses federal [**20] preemption. The question before the *Salute* court was whether the provision of the Fair Housing Act that requires landlords to make "reasonable accommodations" for disabled tenants required landlords to accept disabled tenants' housing vouchers. *Salute*, 136 F.3d at 301. In holding it did not, the *Salute* court did discuss the "burdensome requirements" of the voucher program, but the underpinning of its decision was that the disabled plaintiffs, in asking the landlords to accommodate them by accepting their vouchers, sought "to remedy economic discrimination of a kind that is practiced without regard to handicap." *Id.* at 302. Consequently, the *Salute* panel reasoned, it was not necessary to require landlords to accept disabled persons' housing vouchers "to afford handicapped

persons equal opportunity to use and enjoy a dwelling." *Id.* (internal quotes omitted).

Similarly, the *Knapp* court did not confront a preemption question. The issue before the panel was whether a Wisconsin statute that prevented discrimination in housing based upon "lawful **source of income**" encompassed housing vouchers. *Knapp*, 54 F.3d at 1282. In holding housing vouchers were outside the statute's purview, the court noted the contrary result would mean any landlord who [**21] did not accept vouchers could be liable for discrimination, and observed: "It seems questionable . . . to allow a state to make a voluntary federal program mandatory." *Id.* Even in so observing, however, the *Knapp* court included a qualifying citation to *Attorney General v. Brown*, which found the Fair Housing Act did not preempt a state **source-of-income** statute—the only reported decision discussing the question as of 1995, the year *Knapp* was decided. *Id.* (citing 511 N.E.2d at 1106). The Court finds the decisions from those courts directly presented with the federal preemption question far more persuasive than dicta from those which were not.

HN9 Finally, the Court notes the HUD regulations implementing HCVP specifically provide the federal statutes creating it are not intended "to pre-empt operation of State and local laws that prohibit discrimination against a Section 8 voucher-holder because of status as a Section 8 voucher-holder." 24 C.F.R. § 982.53(d). The Court owes deference to HUD's interpretation of the laws it administers. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer[.]").

Given all of the above, the Court concludes [**22] the Association has failed to show a substantial likelihood of success on the merits of its federal preemption claim.

C. Texas Constitution

The Association next argues the **Ordinance** violates **HN10** *Article I, § 16 of the Texas Constitution*, which prohibits any law impairing the obligation of contracts. The Association contends an individual may not be forced to contract against his will under *Article I, § 16*; thus, in the Association's view, by prohibiting landlords from rejecting applicants because they wish to pay with housing vouchers, the **Ordinance** unconstitutionally forces unwilling [**897] landlords to sign the HAP

²The Court further notes the inference HCVP is voluntary comes from solely from the previously quoted subsection of the statute which states "[c]ontracts to make assistance payments entered into by a [PHA] with a [landlord] shall provide that...the selection of tenants shall be the function of the owner[.]" 42 U.S.C. § 1437f(d)(1)(A). Nothing in that provision implies a landlord should have the right to discriminate against a voucher holder simply because he or she is a voucher holder. *Franklin Tower One*, 725 A.2d at 1113.

Contract. See Mot. Prelim. Inj. [#4] at 8; Pl.'s Trial Brief [#11] at 4—5.

The Association misapprehends the nature of the constitutional protection. HN11 Article I, § 16 applies "only where parties have entered into a contract and thereafter a statute is passed that unlawfully impairs their contractual obligations." Cessna Fin. Corp. v. Morrison, 667 S.W.2d 580, 584 (Tex. App.—Houston [1st Dist.] 1984, no writ); see also Travelers' Ins. Co. v. Marshall, 124 Tex. 45, 76 S.W.2d 1007, 1011 (Tex. 1934) ("[S]ection 16 of article 1 of the constitution of Texas protects all obligations of contracts from destruction or impairment by subsequent legislation.") (emphasis added); Henderson v. Love, 181 S.W.3d 810, 814 (Tex. App.—Texarkana 2005, no pet.) ("The 'obligation of a contract,' for purposes of the constitutional prohibition of impairment of contractual obligations, is defined as the law which binds the parties to perform their [*23] agreement. The laws in effect at the time a contract is executed are considered part of that contract.") (emphasis added) (internal citations omitted); City of Brownsville v. Pub. Util. Comm'n of Tex., 616 S.W.2d 402, 410 (Tex. App.—Texarkana 1981, writ ref'd n.r.e.) ("The obligations of a contract are not impaired . . . by a statute in effect when the contract was made."); Barton v. Wichita River Oil Co., 187 S.W. 1043, 1044—45 (Tex. App.—Fort Worth 1916, writ ref'd) ("The provision of the Constitution which declares that no state shall pass any law impairing the obligation of contracts does not apply to a law enacted prior to the making of the contract... but only to a statute of a state enacted after the making of the contract."). Because the Association has not alleged the obligations of any existing contract are impaired by the Ordinance, Article I, § 16 does not apply.

Urging a different conclusion, the Association cites to St. Louis Southwestern Railway Co. of Texas v. Griffin, 106 Tex. 477, 171 S.W. 703 (Tex. 1914). Griffin provides no support for the Association's argument. In Griffin, a railway worker (Griffin) sued his employer under what was then known as the "Blacklisting Law." Id. at 703. The Blacklisting Law required an employer, after firing an employee, give the employee a "true statement" explaining the reasons for his termination. Id. Considering the constitutionality of the Blacklisting Law, the court noted when Griffin entered the railway's employ, Griffin had the right to leave his job without [*24] cause or notice, and the railway had the right to fire Griffin without cause or notice. Id. at 704. The court then observed the Blacklisting Law, by requiring the railway give Griffin a statement of the "true

cause" of his termination, denied the railway its right to fire Griffin without cause, because a requirement the employer give a "true cause" for firing an employee necessarily implies a "true cause" exists. Id. The court concluded:

The value of the contract to each party consisted largely in the mutual right to dissolve the relation of master and servant at will. The destruction of that right in the corporation was a violation of its liberty of contract and a denial of the equal protection of the law[] in violation of . . . the fourteenth amendment.

Id. The court was concerned with the effect of the law on the railway's contractual right to terminate Griffin without cause. The question before the Griffin court thus had nothing to do with whether a law should be held unconstitutional because it "compelled the entering of contracts," as the Association claims. Pl.'s Trial Brief [#11] at 5.

Article I, § 16 of the Texas Constitution does not apply on these facts. The Association [*898] has therefore failed to demonstrate a substantial likelihood of success [*25] on the merits of its obligation-of-contracts claim.

D. "Liberty of Contract"

In making its obligation-of-contracts argument, the Association heavily relies on dicta from the Griffin court: "The liberty to make contracts includes the corresponding right to refuse to accept a contract[.]" Griffin, 171 S.W. at 704. An argument the Ordinance is unconstitutional because it will require property owners to sign a contract, however, sounds in substantive due process, not in impairment of the obligation of contracts. See, e.g., Andrada v. City of San Antonio, 555 S.W.2d 488, 491 (Tex. App.—San Antonio 1977, writ dismissed) ("[L]iberty of contract is generally said to be a part of that 'liberty' which is protected by due process clauses"). The Court thus considers the argument under a due process rubric.

The Association's reluctance to locate its claim in due process is unsurprising, since in the federal context "[t]he traditional view . . . is that the [Supreme] Court exceeded its legitimate judicial role by reading the right of 'liberty of contract' into the Fourteenth Amendment's Due Process Clause, despite the absence of textual support for this right." David E. Bernstein, Lochner's Legacy's Legacy, 82 Tex. L. Rev. 1, 3—4 (2003). Since

the era of *Lochner v. New York*³ drew to a close in the late 1930s, the Supreme Court has reviewed economic legislation affecting liberty of contract with great deference [**26] to the legislature. See, e.g., *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 96 S. Ct. 2882, 49 L. Ed. 2d 752 (1976) ("It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way."); *Ferguson v. Skrupa*, 372 U.S. 726, 730, 83 S. Ct. 1028, 10 L. Ed. 2d 93 (1963) ("We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws."); see also *Chi. B. & Q. R. Co. v. McGuire*, 219 U.S. 549, 567, 31 S. Ct. 259, 55 L. Ed. 328 (1911) ("The Constitution does not speak of freedom of contract. . . . There is no absolute freedom to do as one wills or to contract as one chooses.").

A federal "liberty of contract" substantive due process claim is thus a veritable non-starter, and in any event, the Association has made no allegation the City acted in an arbitrary or irrational way by passing the Ordinance. Moreover, the Ordinance advances an obviously legitimate government interest: ensuring low-income persons—many of whom are racial minorities, children, disabled, or elderly—have access to affordable housing (and thus to better schools and safer neighborhoods) throughout [**27] the City of Austin. See Prelim. Inj. Mot. Hrg. Ex. D-1 (City Council Resolution) at 2—3 (noting 91% of rental units in Travis County do not accept vouchers and high occupancy rates exacerbate the difficulties voucher holders face in finding housing); *id.* Ex. D-4 (Demographics Rep.) (indicating among heads-of-household who hold vouchers in Austin, 43% are disabled, 84% are female, and 16% are elderly, and stating 50.8% of HCVP beneficiaries are children); see also *Blue Cross & Blue Shield Mut. v. Blue Cross & Blue Shield Ass'n*, 110 F.3d 318, 333 (6th Cir. 1997) ("[F]reedom of contract entails the freedom not to contract, . . . except as [**899] restricted by antitrust, antidiscrimination, and other statutes." (emphasis added)).

A Texas liberty-of-contract due process claim might present a slightly different question. Texas courts have been inconsistent in describing the scope of substantive

due process under the Texas Constitution as compared to the federal Constitution, sometimes stating the Texas Constitution provides "an identical guarantee" and sometimes "attempt[ing] to articulate [Texas'] own independent due [process] standard, which some courts have characterized as more rigorous than the federal standard." *Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 525 (Tex. 1995). The "more rigorous" standard cited is a 1957 formulation:

The line where the police power of the state encounters the barrier [**28] of substantive due process is not susceptible of exact definition. As a general rule the power is commensurate with, but does not exceed, the duty to provide for the real needs of the people in their health, safety, comfort and convenience as consistently as may be with private property rights. . . . A large discretion is necessarily vested in the Legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests. If there is room for a fair difference of opinion as to the necessity and reasonableness of a legislative enactment on a subject which lies within the domain of the police power, the courts will not hold it void.

State v. Richards, 157 Tex. 166, 301 S.W.2d 597, 602 (1957) (emphasis added). One Texas court, in dicta, agreed "in general" with the proposition that Article I, § 19 "guarantees broader due process protection for substantive economic rights than does the United States Constitution." *Yorko v. State*, 681 S.W.2d 633, 636 (Tex. App.—Houston [14th Dist.] 1984), *aff'd*, 690 S.W.2d 260 (Tex. Crim. App. 1985). "More frequently, however," Texas courts have "relied on both state and federal authorities in discussing" Article I, § 19, and a "substantial number of Texas cases" have held or implied that the federal and Texas clauses are "identical," in contrast with only a "handful" [**29] of opinions suggesting the Texas clause has independent meaning. *Lucas v. United States*, 757 S.W.2d 687, 712—13 (Tex. 1988) (collecting cases).

Whichever standard is applied, however, the Court finds the Association has failed to demonstrate a substantial likelihood of success on the merits. There is, at the very least, "room for a fair difference of opinion" as to the necessity and reasonableness of the Ordinance in providing for "the real needs of the people . . . as consistently as may be with private property rights." The record shows HCVP participants suffer serious discrimination in the Austin private housing market and,

³ 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905).

to the extent they are able to find housing, are concentrated in the poorest areas of the city. See City Council Resolution at 3 (stating 91% of Austin landlords do not accept vouchers); Prelim. Inj. Hrg. Ex. D-3 (indicating concentration of voucher holders by zip code); *id.* Ex. D-5 (explaining the units in Austin available to voucher holders "are located in low-opportunity areas and lack high-performing schools, sustainable employment, and low-crime neighborhoods"). The City determined the public interest required discrimination against voucher holders be prohibited, as have dozens of states and municipalities around the nation. See POVERTY & [**30] RACE RESEARCH ACTION COUNCIL, APPENDIX B: STATE, LOCAL, & FEDERAL LAWS BARRING SOURCE-OF-INCOME DISCRIMINATION 1—2 (2014) (listing state and local source-of-income [**900] laws)⁴; see also, e.g., Godinez v. Sullivan-Lackey, 352 Ill. App. 3d 87, 815 N.E.2d 822, 824, 287 Ill. Dec. 178 (Ill. App. Ct. 2004) (finding refusal to rent to voucher holder a violation of source-of-income anti-discrimination provision in Chicago's Fair Housing Ordinance); Glenmont Hills, 936 A.2d at 327 (same, as to Montgomery County, Maryland housing ordinance); Timkovsky v. 56 Bennett, LLC, 23 Misc. 3d 997, 881 N.Y.S.2d 823, 829 (N.Y. App. Div. 2009) (same, as to New York City housing ordinance).

The counterargument, of course, is that the Ordinance goes too far in attempting to accomplish its goal, since at least some landlords who do not wish to do so will be required to sign the HAP Contract and subject themselves to the regulations governing the Program. Orig. Pet. ¶ 31. While the parties dispute the precise extent of the differences between the terms of a tenancy governed solely by the Association's standard lease and one governed by the standard lease plus the HAP Contract and Tenancy Addendum, it is clear the latter requires a landlord to shoulder different burdens and accept different risks than the former. As previously explained, the PHA's responsibility for making rent payments terminates automatically under certain circumstances; [**31] the PHA has discretion to stop making payments under certain circumstances; the PHA is only obligated to pay late fees for tardy payments under certain circumstances; units rented to Program participants must be inspected, and the PHA will not begin paying rent on a unit until it passes inspection; and the landlord will not receive the entirety of the first

month's rent until thirty to forty-five days after the unit passes inspection.⁵

The Court agrees these regulations place some burden on the landlords subject to them, and acknowledges the potential for lost revenue while a PHA inspection is scheduled and a unit sits vacant. It is likely there are different, less burdensome ways the City could entice property owners to participate in the Program. It is also conceivable an individual landlord could experience an unusually significant financial burden flowing from participation in the Program so great it could support an as-applied constitutional claim warranting an exception from participation.⁶ In the context of a facial due process challenge, however, this Court cannot say there is no room for a "fair difference of opinion" regarding the need for the Ordinance [**32] and the weight of the burdens it imposes, and will not substitute its judgment for the City Council's.

Further, courts that have considered versions of the so-called administrative-burdens defense have rejected it. See Bourbeau, 549 F. Supp. 2d at 87; Glenmont Hills, 936 A.2d at 339-40. Landlords remain free to reject voucher holders provided they do so on other legitimate, nondiscriminatory grounds, and are not required to reduce the rent they charge even if that means their units are too expensive for voucher holders to rent. Further, testimony at hearing indicated the housing quality standards a unit must satisfy to pass the PHA inspection are no more onerous than those already imposed by the Austin City Code. These burdens are not [**901] so severe as to constitute a violation of due process.

The Court concludes, to the extent the Association raised a "liberty of contract" due process claim, it has failed to demonstrate a substantial likelihood of success on the merits.

E. Regulatory Taking

Finally, [**33] the Association rather weakly asserts the Ordinance is so burdensome it amounts to a regulatory

⁵ See Background, subsection A, *supra*.

⁶ Cf. Krista Sterken, *A Different Type of Housing Crisis: Allocating Costs Fairly and Encouraging Landlord Participation in Section 8*, 43 *Colum. J.L. & Soc. Probs.* 215, 227—30 (2009) (advocating for a "narrow" equitable exception to landlord participation applicable under "unusual circumstances").

⁴ Available at <http://www.prrac.org/pdf/AppendixB-Feb2010.pdf>.

taking under the Texas and United States Constitutions and a violation of substantive due process. See U.S. CONST. amend. V, XIV; Tex. Const. art. I, § 17(a). **HN12** Where a plaintiff alleges a takings claim and a substantive due process claim together, courts must determine the extent to which the due process claim "rests on protections that are also afforded by the Takings Clause" and analyze the claim accordingly. John Corp. v. City of Hous., 214 F.3d 573, 583 (5th Cir. 2000). Here, the Court finds, to the extent it is unaddressed by the Court's discussion in section 11(D), *supra*, the Association's due process claim is subsumed within its takings claim. The petition contains very few allegations concerning due process, merely asserting the right to be free from a "substantial burden" that "deprives property owners of use of their property," see Orig. Pet. [#1-3] ¶¶ 30—31; further, the Association fails to develop a due process theory in its briefing, see Pl.'s Trial Brief [#11] at 6—7. The right to be free from a "burden" that "deprives property owners of use of their property" falls squarely within the ambit of the Takings Clause. See Yee v. City of Escondido, Cal., 503 U.S. 519, 522—23, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992) (explaining the Takings Clause requires compensation where "the extent to which [the regulation] deprives [**34] the owner of the economic use of the property suggest[s] that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole"). It is therefore the Takings Clause, "not the more generalized notion of 'substantive due process,' [that] must be the guide for analyzing" the Association's claim. John Corp., 214 F.3d at 582.

On to the analysis. **HN13** The Takings Clause of the Fifth Amendment, made applicable to the States through the Fourteenth Amendment, directs that private property shall not "be taken for public use, without just compensation." U.S. CONST. amend. V; Chi., B. & Q.R. Co. v. Chicago, 166 U.S. 226, 234, 17 S. Ct. 581, 41 L. Ed. 979 (1897). The Texas Constitution contains a similar mandate: **HN14** "[n]o person's property shall be taken. . . for or applied to public use without adequate compensation being made." Tex. Const. art. I, § 17. Federal and Texas courts apply the same standards in evaluating takings claims. Hearts Bluff Game Ranch, Inc. v. State, 381 S.W.3d 468, 477 (Tex. 2012) ("We consider the federal and state takings claims together, as the analysis for both is complementary.").

HN15 Before addressing the merits of a takings claim, the Court must be convinced the claim is ripe, even if neither party has raised the issue. Urban Developers,

L.L. C. v. City of Jackson, Miss., 468 F.3d 281, 292 (5th Cir. 2006). Here, the Intervenor raises the ripeness issue, arguing adjudication of the takings issue is premature and speculative because the Ordinance, on its face, does not require landlords to reduce [**35] the rents or security deposits they typically charge. While the Intervenor fails to further elaborate, their ripeness objection appears to be that because the Ordinance has yet to take effect, we cannot know whether any landlord will actually lose money due to operation of the Ordinance.

The Intervenor approaches the problem incorrectly. To the extent the Intervenor [**902] is pointing out the Association's challenge presents no concrete controversy concerning application of the Ordinance to specific landlords, the Court agrees. The Association has raised, however, a pre-enforcement facial challenge to the constitutionality of the Ordinance itself. Thus, "the only question before this court is whether the mere enactment of [the Ordinance] constitutes a taking," and the applicable test is whether the Ordinance "denies an owner economically viable use of his land." Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 493, 107 S. Ct. 1232, 94 L. Ed. 2d 472 (1987) (some internal quotes omitted) (quoting Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 295—96, 101 S. Ct. 2352, 69 L. Ed. 2d 1 (1981)).⁷

⁷ The Intervenor cites Pennell v. City of San Jose, 485 U.S. 1, 108 S. Ct. 849, 99 L. Ed. 2d 1 (1988), in support of their contrary position. Pennell is distinguishable. Pennell involved a rent-control ordinance requiring city officers to consider "hardship to the tenant" in deciding whether to approve certain rent increases. *Id.* at 10. Importantly, the ordinance also provided [**36] that in making the ultimate decision to approve or disapprove a rent increase, the officer "may" disapprove an increase because of tenant hardship. *Id.* Because there remained a material question, given the discretion afforded city officers, as to how the ordinance would ultimately be applied, the Pennell court found the case did not present a sufficiently concrete factual setting for adjudication of the takings claim. *Id.* Here, the Ordinance involves no such discretion: the City has not contested the fact it intends to apply the Ordinance such that all landlords subject to its strictures are prohibited from discriminating against voucher holders solely because they are voucher holders. "One does not have to await the consummation of threatened injury to obtain preventive relief." Blanchette v. Conn. Gen. Ins. Corps., 419 U.S. 102, 143, 95 S. Ct. 335, 42 L. Ed. 2d 320 (1974) (quoting Pennsylvania v. West Virginia, 262 U.S. 553, 593, 43 S. Ct. 658, 67 L. Ed. 1117, 1 Ohio Law Abs. 627 (1923)).

The Association argues the Ordinance does just that, but the Court is unpersuaded. Landlords remain free to rent their property to paying tenants. No landlord is required to lower the rent he or she charges for a unit because a voucher holder cannot afford to rent it. Property owners who accept HCVP tenants receive compensation for doing so in the form of rent payments from the government. Further, **[**37]** the Ordinance substantially advances an obviously legitimate government interest: ensuring low-income persons will have access to affordable housing throughout the City of Austin. See Dolan v. City of Tigard, 512 U.S. 374, 385, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994) ("A land use regulation does not effect a taking if it substantially advances legitimate state interests and does not deny an owner economically viable use of his land." (internal quotes omitted)); Mayhew v. Town of Sunnyvale, 964 S.W.2d 922, 933—34 (Tex. 1998) (discussing substantial-advancement requirement).

The Court concludes the Association has failed to carry its burden to show a substantial likelihood of success on

the merits of its takings claim.

Conclusion

The Association has failed to demonstrate a substantial likelihood of success on the merits on any of its challenges to the Ordinance. The Court therefore need not consider the other preliminary injunction factors before denying the motion for injunctive relief.

Accordingly,

IT IS ORDERED that Plaintiff Austin Apartment Association's Motion for Preliminary Injunction [#4] is DENIED.

SIGNED this the 27th day of February 2015.

/s/ Sam Sparks

SAM SPARKS

UNITED STATES DISTRICT JUDGE

ORDINANCE NO. 20141211-050

AN ORDINANCE AMENDING CITY CODE CHAPTER 5-1 RELATING TO SOURCE OF INCOME AND HOUSING DISCRIMINATION.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF AUSTIN:

PART 1. City Code Sections 5-1-1 (*Declaration of Policy*) and 5-1-2 (*Scope*) are amended to read as follows:

§ 5-1-1 DECLARATION OF POLICY

- (A) It is the policy of the City to bring about through fair, orderly and lawful procedures, the opportunity of each person to obtain housing without regard to race, color, creed, religion, sex, national origin, disability, student status, marital status, familial status, sexual orientation, gender identity, [øx] age, or source of income.
- (B) This policy is established upon a recognition of the inalienable rights of each individual to obtain housing without regard to race, color, creed, religion, sex, national origin, disability, student status, marital status, familial status, sexual orientation, gender identity, [øx] age, or source of income; and further that the denial of such rights through considerations based on race, color, creed, religion, sex, national origin, disability, student status, marital status, familial status, sexual orientation, gender identity, [øx] age, or source of income, is detrimental to the health, safety and welfare of the inhabitants of the City and constitutes an unjust denial or deprivation of such inalienable rights which is within the power and the proper responsibility of the government to prevent.

§ 5-1-2 SCOPE

- (A) To provide a procedure for investigating and settling complaints of discriminatory housing practices which are violations of state and federal law, to provide rights and remedies substantially equivalent to those granted under federal law and to permit the director to accept referrals of complaints from the Secretary of Housing and Urban Development and from the Civil Rights Division of the Texas Workforce Commission. Article 2 (*Discrimination in Housing – Fair Housing Act Compliance*) prohibits discrimination in housing on the basis of race, color, sex, religion, disability, familial status or national origin and establishes procedures to enforce the provisions of federal and state law.

- (B) Even though federal law protects individuals against discrimination in housing based on race, color, sex, religion, disability, familial status or national origin, it is the policy of the City that no person should be denied opportunity to obtain housing on the basis of creed, student status, marital status, sexual orientation, gender identity, [øf] age, or source of income.

PART 2. City Code Section 5-1-13 (*Definitions*) is amended to add a new definition of "Source of Income" to read as follows and to renumber the remaining definitions accordingly.

- (24) SOURCE OF INCOME means lawful, regular, and verifiable income including, but not limited to, housing vouchers and other subsidies provided by government or non-governmental entities, child support, or spousal maintenance, but does not include future gifts.

PART 3. City Code Sections 5-1-51 (*Discrimination in Sale or Rental of Housing*), 5-1-52 (*Publication Indicating Discrimination*), 5-1-53 (*Availability for Inspection, Sale, or Rental*), 5-1-54 (*Entry Into Neighborhood*), 5-1-56 (*Residential Real Estate Related Transactions*), and 5-1-57 (*Brokerage Services*) are amended to read as follows:

§ 5-1-51 DISCRIMINATION IN SALE OR RENTAL OF HOUSING.

- (A) A person may not refuse to sell or rent a dwelling to a person who has made a bona fide offer; refuse to negotiate for the sale or rental of a dwelling; or otherwise make unavailable or deny to a dwelling to any person based on race, color, religion, sex, sexual orientation, gender identity, age, familial status, disability, marital status, student status, creed, [øf] national origin, or source of income.
- (B) A person may not discriminate against a person in the terms, conditions, or privileges of sale or rental of a dwelling or in providing services or facilities in connection with the sale or rental, based on race, color, religion, sex, sexual orientation, gender identity, age, familial status, disability, marital status, student status, creed, [øf] national origin, or source of income.
- (C) This section does not prohibit discrimination against a person because the person has been convicted under federal law or the law of any state of the illegal manufacture or distribution of a controlled substance, but does not permit discrimination based on a disability.

§ 5-1-52 PUBLICATION INDICATING DISCRIMINATION

A person may not make, print, or publish or cause to be made, printed, or published any notice, statement, or advertisement with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, sexual orientation, gender identity, disability, age, familial status, marital status, student status, creed, [øf] national origin, or source of income, or an intention to make such a preference, limitation, or discrimination.

§ 5-1-53 AVAILABILITY FOR INSPECTION, SALE, OR RENTAL

A person may not represent to a person based on race, color, religion, sex, sexual orientation, gender identity, disability, age, familial status, marital status, student status, creed, [øf] national origin, or source of income that a dwelling is not available for inspection, sale or rental when the dwelling is available for inspection.

§ 5-1-54 ENTRY INTO NEIGHBORHOOD

A person may not, for profit, induce or attempt to induce a person to sell or rent a dwelling by representations regarding the entry or prospective entry into a neighborhood of a person of a particular race, color, religion, sex, sexual orientation, gender identity, disability, age, familial status, marital status, student status, creed, [øf] national origin, or source of income.

§ 5-1-56 RESIDENTIAL REAL ESTATE RELATED TRANSACTIONS

(A) A person whose business includes engaging in residential real estate related transactions may not discriminate against a person in making a real estate related transaction available or in the terms or conditions of a real estate related transaction because of race, color, religion, sex, sexual orientation, gender identity, disability, age, familial status, marital status, student status, creed, [øf] national origin, or source of income.

(B) In this section "residential real estate related transaction" means:

(1) Making or purchasing loans or providing other financial assistance:

- (a) To purchase, construct, improve, repair, or maintain a dwelling; or
- (b) Secured by residential real estate; or

(2) Selling, brokering, or appraising residential real property.

§ 5-1-57 BROKERAGE SERVICES

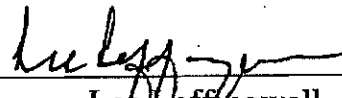
A person may not deny any person access to, or membership or participation in, a multiple-listing service, real estate brokers' organization or other service, organization, or facility relating to the business of selling or renting dwellings, or discriminate against a person in the terms or conditions of access, membership, or participation in such an organization, service, or facility because race, color, religion, sex, sexual orientation, gender identity, disability, age, familial status, marital status, student status, creed, [or] national origin, or source of income.

PART 4. This ordinance takes effect on January 12, 2015.

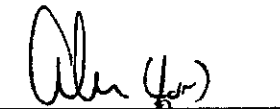
PASSED AND APPROVED

December 11, 2014

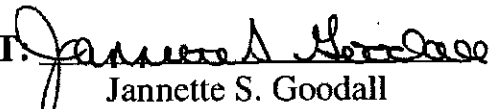
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Lee Leffingwell
Mayor

APPROVED:


Karen M. Kennard
City Attorney

ATTEST:


Jannette S. Goodall
City Clerk



TO: Councilor Duson, Chair
Members of the Housing Committee

FROM: Tyler Norod, Housing Planner
Mary Davis, HCD Division Director

DATED: August 19, 2016

RE: Tenant Relocation Assistance Proposal

As part of the Housing Committee's public process, Councilor Jon Hinck put forward an idea for a Tenant Relocation Assistance Ordinance similar to an ordinance in place in Seattle, Washington. Seattle's ordinance provides benefits for residential tenants who are displaced by housing demolition, substantial rehabilitation or alteration, change of use, or removal of use restrictions. Benefits include payment of relocation assistance and advanced notice of any planned development. The program in Seattle affects tenants who earn at or below 50% of Area Median Income (AMI). In Portland this would be the equivalent of \$38,400 for a family of four or \$26,900 for a single individual. Seattle's payment is set at \$3,490.00 to be split equally by the City and landlord. Property owners are not allowed to get building permits until they obtain a license through the city of Seattle which can take up to six months. Tenants also have 30 days to apply for assistance and must receive a minimum of 90 day notification from their landlord. If this policy is pursued, Portland may want to consider tying the relocation payment to three times the average rent paid by the tenant over the last three months. This would help the tenant find a comparable unit and pay the typical first, last, and security payment of a new rental. Additional information on Seattle's program is attached to this memo.

The intent of a Tenant Relocation Assistance Ordinance would be to help some of the City's most vulnerable residents maintain mobility and find new accommodations while allowing for the development of additional units, investment in private property, and maintenance of the City's aging housing stock. Currently, the City administers a Tenant Based Rental Assistance Program funded through the federal HOME Program. This program is designed to provide security deposits, short term rental assistance and utility allowances for individuals and families residing in homeless shelters or as preventative assistance to individuals and families in danger of becoming homeless due to eviction. Portland's TBRA vouchers are typically provided to households who earn up to 30% AMI. The City has budgeted approximately \$130,000 in TBRA funds for FY 17. In April of 2016, the program budget was increased by \$25,000. So far this year, TBRA vouchers have helped 138 households. While the program is very effective in providing assistance to a significant number of vulnerable residents, demand for the funds typically outpace supply. It should be noted that HOME regulations allow TBRA to be used for relocation and displacement assistance only when HOME funds are used to rehabilitate rental housing. Any increase in TBRA funding directly competes with HOME fund allocations to other programs, such as the Housing Rehab Program and Housing Development Funds which often lead to the retention or creation of longer term affordable housing.

Assuming Portland were to mimic Seattle's ordinance and split the relocation payment with the landlord the City would likely need to identify where the financial resources would come from. Given recent budget concerns this could be a hurdle to developing a successful program.

Another concern with the proposal would be the potential impact on the timeline required for acquiring building related permits in the City. Maine has the oldest housing stock in the nation. As such, much of our buildings are in need of repair. In response to feedback from the public, Portland has recently begun to reorganize the inspections and permitting department in an effort to increase efficiency and safety, while decreasing waits for permits.

Given the real and significant costs associated with an ordinance of this nature some landlords may look for ways to vacate their units prior to triggering relocation payments. This may be done by rent increases or non-renewal of leases "prior to building plans being in place". This issue is particularly difficult to enforce. Seattle does not have rent control but does note that it would be a violation of the Relocation Ordinance to increase rents for the purpose of avoiding payment. It is unclear how this violation would be determined.

The ordinance would also have the potential to create a perverse incentive for landlords to not rent to households who earn less than the prescribed income levels. This may further accentuate the problems faced by low income residents searching for housing in a competitive market. One way to mitigate this potential issue would be for the City to pay the entire relocation fee for eligible households. This would help incentivize maintenance in our aging housing stock while helping households in need transition to new housing. As noted above, this option to rely solely on City resources may be problematic given City budget constraints.

Seattle Permits

— part of a multi-departmental City of Seattle series on getting a permit

Seattle's Tenant Relocation Assistance Ordinance

Updated April 1, 2016

What is the Tenant Relocation Assistance Ordinance?

This is an ordinance enacted by the Seattle City Council on June 25, 1990, which provides benefits for residential tenants who will be displaced by housing demolition, substantial rehabilitation or alteration, change of use or removal of use restrictions. Benefits include payment of relocation assistance to low income tenants and advance notice of the planned development.

Who is affected?

The ordinance affects owners of residential property occupied by a tenant if that tenant will have to move because of any of the actions listed above. The Seattle Department of Construction and Inspections (Seattle DCI) cannot issue any permits for housing demolition, change of use or substantial rehabilitation unless the requirements of the ordinance are met.

What is required?

Owners of property slated for redevelopment or rehabilitation must obtain a Tenant Relocation License from Seattle DCI before any master use, demolition, or building permit will be issued. Application for a license is required at the same time as application for project permits.

Who is eligible for relocation assistance?

Tenants are eligible for relocation assistance payments of \$3,490.00 if they qualify as low income, defined as having a family income of no more than 50 percent of the King County median income. The property owner is responsible for paying half of the relocation assistance, \$1,745.00; the City pays the other half.

How long does it take to get a license?

It usually takes six months to obtain a license. The owner must provide tenants with program information and notice of the project. Tenants have 30 days to apply for relocation assistance. After Seattle DCI evaluates eligibility, a 90-day notice to all tenants is required to be issued and to expire before a Tenant Relocation License can be issued, regardless of whether tenants are eligible for relocation assistance payments. Program forms are provided by the City and there are specific procedures which must be followed; these are explained in the license application materials.

How to apply for a relocation license.

To apply for a Tenant Relocation License, **make an appointment** with Seattle DCI's Property Owner and Tenant Assistance unit, located on the 19th floor of Seattle Municipal Tower at 700 Fifth Ave., or call (206) 615-0808. Please bring the property legal description, Seattle DCI project number, and a list of tenants' names and telephone numbers when applying for a license.

REMEMBER: NO permit can be issued by Seattle DCI if the work it involves will displace tenants UNLESS a Tenant Relocation License has been obtained. To avoid delays in your project, find out if you need a license and apply right away if you do.

Can a rent increase be used to displace tenants?

It is a violation of the Tenant Relocation Assistance Ordinance to increase a tenant's rent for the purpose of avoiding applying for a Tenant Relocation License.

Access to Information

Links to electronic versions of the Tenant Relocation Assistance Ordinance at the "Codes & Rules" page of our website at **www.seattle.gov/sdci**. Paper copies of these documents are available from our Public Resource Center, located on the 20th floor of Seattle Municipal Tower at 700 Fifth Ave. in downtown Seattle, (206) 684-8467.

www.seattle.gov/sdci

Tenant Relocation License

Eligibility Income Thresholds

Household Size	50% of AMI*
1 Person	\$31,650
2 People	\$36,150
3 People	\$40,650
4 People	\$45,150
5 People	\$48,800
6 People	\$52,400
7 People	\$56,000
8 People	\$59,600

* 50% Area Median Income published by HUD, effective April 1 2016

Removal of use restriction OR Application to SDCI for rental housing

- Demolition
- Change of use
- Rehabilitation

Application to SDCI for a Tenant Relocation License

30-day maximum

Owner delivers information and eligibility forms to tenant

30 days with possible extension

Tenant returns eligibility forms to SDCI

15 days maximum

Eligibility Determination Notice to tenant and owner

10-day appeal period

Hearing Examiner appeal

30 days maximum

yes

no
yes

Eligible < 50% of county median income

5 days maximum

Owner pays \$1,745.00/household to SDCI

Eligible tenant applies to SDCI for payment

Payment made to tenant by SDCI

Not eligible > 50% of county median income

Owner issues 90-day notice to tenant

90 days

LICENSE ISSUED

Tenant required to vacate after separate termination of tenancy notice



Planning & Urban Development Department

TO: Councilor Duson, Chair
Members of the Housing Committee

FROM: Tyler Norod, Housing Planner
Housing and Community Development Division

DATE: August 19, 2016

SUBJECT: The "Leeway Program"

The "Leeway Program" was proposed by Councilor Spencer Thibodeau. The proposal combines ideas related to minimum notification requirements and tenant relocation assistance presented by the general public and Councilor Jon Hinck.

Currently, landlords are required to provide tenants-at-will a minimum of 30 days notice for non-renewal of a lease and 45 days for any rent increase. A framework for the Leeway Program drafted by Councilor Thibodeau is attached. Its basic provisions would require landlords to provide a minimum notification of 90 days for non-renewal of a lease but would also give the landlord the ability to reduce the requirement to the state mandated 30 days if the landlord pays the tenant a to be determined fee likely proportional to the tenants monthly rent. Of course, it should be noted, that such an increased notice requirement would not be able to be enforced through the formal FED (eviction) process and may not actually provide the tenant with advanced notice. That is, under State law, a landlord could obtain an order for possession of a unit from the Court and evict a tenant even if they did not provide the additional notice required by the City (since the advanced notice is not required under the State law which governs the FED process). Instead, a separate action involving the violation of the City's advanced notice requirement would need to be enforced by the City as a civil violation of the City's Code and could possible subject a landlord to fines.

Although clear in its intent to provide greater security to tenants and flexibility to landlords, this proposal raises a few questions that need consideration:

- 1) If minimum notification periods were increased couldn't the landlord propose a similar agreement with the tenant without the City's knowledge and allowing the tenant to choose the path forward that best suits their needs?
- 2) The current 30 day notification allows landlords to use the tenant's security deposit to cover last month's rent should a disgruntled tenant choose not to pay after being informed about the landlord's decision not to renew. By increasing the minimum notification to 90 days there may be an incentive for less than scrupulous tenants to not pay the final three months or use the threat of non-payment to incentivize the landlord to pay the fee.

- 3) To avoid conflict, this policy necessitates that the choice of paying the fee or abiding by the 90 day notification period be made by one party, either landlord or tenant. In either situation the other party may place greater value on time or money. This may end up being advantageous to the landlord over the tenant or vice versa adding complexity to the inherent value of such a program.
- 4) Should this program only apply to households earning a predetermined income level or would it be open to everyone?
 - a. By setting income limits, the City may inadvertently disincentivize landlords from renting to certain households.
 - b. If the policy is for all households then are we adding a potential extra cost to landlords with higher income tenants who may not be in need of additional housing security?

The “Leeway Program”
Portland Maine City Council, Housing Committee
6/22/2016, Submitted for Consideration
Spencer Thibodeau, District 2

Quick Overview: The “Leeway Program” affects all “at-will” tenants in Portland’s housing market. The program provides, by right, a 90-day notice period to all at-will tenants unless, the Landlord chooses to buyout the 90 day right at an amount not to exceed one (1) month’s rent. Tenant must agree to the buyout price (alternative solution is to set a fixed price 1 month’s rent, ½ a month’s rent, \$400.00, etc). If the Landlord exercises the buyout option, Tenant shall have the statutorily prescribed thirty (30) day notice period to vacate the apartment (unless vacated earlier upon agreement of the parties).

Exemptions: While housing insecurity was tagged as a big concern, the “Leeway Program” provides flexibility for Landlord’s in certain necessary situations:

1. *Health and Safety.* The burden is on the Landlord to provide evidence of the Apartments fitness or lack thereof for human habitation.
2. *Bad Actors.* Landlord shall present evidence of safety issues associated with Tenants and the disruption to a safe and quiet environment for all Tenants of the building.
3. *Short Term Rentals, AirBnB, VRBO, etc.* To the extent not already covered by a separate agreement, the “Leeway Program” would not affect tenancies with a term of less than 30 days.
4. *Existing Statutory Remedies.* Landlords may still terminate tenancy upon 14 MRSA 6002 (1), which allows for tenancy to be terminated in seven (7) days for specific violations.

Notice: Notice shall be presented to Tenant by Landlord in accordance with 14 MRSA 6002. Negotiation of Buyout does not reset notice period. (**Note:** Alternative to avoid negotiation is to set specific price, i.e. ½’s month rent).

Example (90 Day Notice): T rents from L without a lease commencing on June 1, 2015 for \$1,200.00 per month. On September 28, 2015, L decides she no longer wants to lease to T. L provides T with notice on September 29, 2015. T must vacate the apartment by December 31, 2015.

Example (Buyout): T rents from L without a lease commencing on June 1, 2015 for \$1,200.00 per month. On September 28, 2015, L decides she no longer wants to lease to T. L provides T with notice on September 29, 2015 and offers T, \$800 to vacate by October 31. T counteroffers to L to leave for \$1,000.00 on September 30, 2015. L accepts T’s offer on October 1, 2015. T must vacate on or before October 31, 2015.

Goal: To provide flexibility to both Landlords and “at-will” Tenants to end tenancy. Hence the name, “Leeway.”