Alert

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COZEN O'CONNOR

Are "Fair Chance" Housing Ordinances an Unconstitutional Infringement on Landlords' Rights?

We continue to monitor legislation affecting the residential landlord-tenant relationship and note here that "fair chance" housing ordinances are emerging in cities across the nation, including Seattle, Minneapolis, and Oakland and Berkeley, Calif. These ordinances are driven by civil rights advocates, tenants' rights groups, and other housing advocates concerned with the affordability crisis we referenced in our previous discussion on the issue. These advocates note that, in addition to credit challenges, persons looking to rent in these cities are barred from consideration if they have any criminal background. They argue that consideration of an applicant's criminal history creates unfair bias in housing decisions.

The Seattle Fair Chance Housing Ordinance — First in the Nation

Seattle led the way in the effort to reduce barriers to renting by enacting the Fair Chance Housing Ordinance effective in February 2018. The Seattle ordinance declares it an "unfair practice" for a private residential landlord to consider — or even request — an applicant's criminal history when making a rental decision. Incredibly, the ordinance even proscribes a denial of tenancy based on the applicant's appearance on a sex offender registry due to a crime committed as an adult, unless the landlord can prove to the satisfaction of the Seattle Office for Civil Rights that the application denial was based on a "legitimate business reason."

Under this ordinance, each of the following decisions by the landlord would constitute a prohibited "adverse action" if predicated upon an applicant's criminal history:

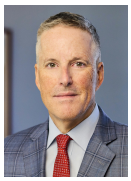
- Rejecting applicants;
- Offering to rent to applicants on different terms and conditions than offered to other applicants;
- Refusing to add additional persons to an existing lease; or
- Terminating a lease.

The housing advocates behind the Seattle ordinance convinced the city to prohibit landlords from unfairly denying applicants housing based on criminal history and to prohibit the use of advertising that automatically or categorically excludes people with arrest records, conviction records, or criminal history, arguing that no sociological research has established a relationship between a criminal record and an unsuccessful tenancy. These advocates claim that the Seattle ordinance addresses long-standing bias against people who have served their time, are seeking to provide for themselves and their families, and yet have faced barriers to safe, stable housing. To landlords, however, this ordinance means less control over who will reside in their buildings, potentially exposing themselves to liability and their tenants to dangerous criminals.

In 2018, landlords and other housing advocates opposed to the Seattle ordinance sued to determine its constitutionality, arguing that the ordinance abridged fundamental property rights and violated due process and free speech protections of the state and federal constitutions.

The Washington State Supreme Court recently issued an opinion in this lawsuit, known as *Yim v. City of Seattle*. Its decision held that the most deferential level of judicial review, "rational basis," applied to the case. Through this lens, courts will ask whether the Fair Chance Housing Ordinance is "rationally related" to a "legitimate" government interest. Likely, Seattle's Fair Chance Ordinance will withstand this inquiry and serve as precedent across the nation.

New Ordinances Even More Restrictive of Landlords — Minneapolis and Oakland



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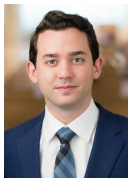

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Related Practice Areas

- Real Estate

As several major metropolitan areas have enacted — or are considering — similar ordinances, we are urging our multifamily owners to closely monitor municipal and state legislation in their markets. Critically, the fair chance ordinances implemented by other municipalities since the *Yim* decision *have been more burdensome* than the Seattle example, indicating that a trend towards greater restriction may be emerging.

The Minneapolis Fair Chance Ordinance, which becomes effective for the majority of landlords on June 1, 2020, generally prohibits landlords from rejecting applicants on the following grounds, unless the landlord conducts a costly and time-intensive "individualized assessment" of each applicant before rejecting the applicant:

- Committed first-degree murder, arson, robbery, criminal sexual conduct, or kidnapping, so long as the conviction is at least 10 years old;
- Committed lesser felonies, so long as the conviction is at least seven years old;
- Committed misdemeanors or suffered evictions, so long as the conviction or judgment is at least three years old;
- Settled an eviction action more than one year ago;
- Won or had an eviction action dismissed;
- Have insufficient rental or credit history; or
- Have poor credit scores.

Oakland also has enacted a Fair Chance Ordinance that *wholesale* prohibits landlords from requesting, obtaining, or considering a tenant or tenant-applicant's criminal history. While there are carve outs for certain sex and drug offenses, these exceptions apply only where: (i) the landlord informs the tenant-applicant of the types of criminal history it will be seeking and affords the tenant-applicant an opportunity to withdraw its application, and (ii) the landlord provides the tenant-applicant a signed lease conditioned only upon a criminal history check. Additionally, the Oakland ordinance requires landlords to provide tenant-applicants with notices regarding filing a complaint with the city and mandates that landlords demonstrate fair housing compliance annually. In addition to monetary penalties, failure to comply with the Oakland ordinance can result in criminal penalties for the landlord.

Legal Arguments

The objections to these fair chance ordinances are premised on two legal grounds: (1) violation of substantive due process and (2) violation of free speech rights.

The substantive due process objection questions whether the government's method of depriving a person of life, liberty, or property is justified. Here, the determinative question is whether the means employed are unreasonable, overbroad, or unduly burdensome in relation to the objective. In *Yim*, the landlords argued that the disposition of real property is a fundamental right, for which the courts should apply a more strict substantive due process analysis, under which the ordinance should fail.

The free speech objection questions whether the ordinance unduly restricts a landlord's right to freely communicate with prospective and existing tenants. In *Yim*, the landlords argued that the prohibition of seeking truthful information regarding criminal backgrounds violated their free speech rights. Here, landlords, as commercial enterprises, have the right to protect such communications because they serve individual and societal interests in assuring informed and reliable decision-making.

Since the Washington State Supreme Court's decision in *Yim*, the landlords have filed an appeal to the United States Supreme Court. The Court has the discretion to hear this appeal. Given its recently renewed focus on property rights, along with the underlying constitutional issues and broad import of the case, we are relatively confident the Supreme Court will accept the appeal. We will know if the Court decides to hear the appeal on April 16, 2020 and report back.

Cozen O'Connor continues to investigate constitutional arguments as the legal and factual frameworks on this issue develop, including ordinances in Portland and other cities around the nation.