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Discrimination: An Overview of the Federal Fair Housing Act and a Study of Discrimination Claims Filed Against Associations



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Introduction

At one point or another many associations have had discrimination charges filed, or threatened to be filed, against them for violations of either the Fair Housing Act or their state-specific anti-discriminatory laws. In some cases, the discrimination is obvious. For example, an association that refuses people of a particular religious faith to use the community amenities is clearly discriminating based on religion. Or, an association that enforces a restriction that prohibits residents of a particular race from living in the association would be discriminating based on race.

But more often than not discrimination by a homeowners association occurs in a more subtle form – not by direct discrimination but by enforcing a rule, restriction, or practice that has the effect of discriminating against one of the protected categories. Boards are often surprised when faced with a discrimination complaint, as they can clearly show that they've acted according to the strict letter of the governing documents. But associations are sued, and liability is sometimes found, just for that very reason: as a direct result of the association strictly enforcing the terms of its governing documents.

The consequences of discrimination, whether the board is aware it is discriminating or not, can be severe. Therefore, it is very important for an association to be able to identify and understand the ways an association can discriminate, so it can take proactive steps to prevent such claims from happening.

This article discusses:

- What is the Federal Fair Housing Act?
- What are the most common discrimination claims filed against associations?
- What are some proactive ways an association can minimize potential discrimination claims?

The Federal Fair Housing Act

What is the Federal Fair Housing Act?

In 1968 Congress enacted the Federal Fair Housing Act (the "Act"), which is codified in 42 U.S.C. §§ 3601 – 3619. The Act makes it unlawful for housing providers to discriminate based on race, color, religion, sex (including sexual harassment), and national origin. The Act was amended in 1988 to also prohibit discrimination based on familial status and disability.

The purpose of the law is to protect every American's fundamental right to fair housing—the choices of where to live and whether to own a home, for instance—regardless of factors of race, disability, and the several other protected statuses.

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What is considered discrimination under the Act?

The Act recognizes two types of discrimination: (i) discriminatory treatment and (ii) disparate impact. Discriminatory treatment is where the victim is expressly treated differently than others in the community based on his/her protected class. Discrimination through disparate impact occurs when a facially neutral rule has the effect of discriminating against a protected group. Courts have applied the Act to individuals, corporations, and others involved in the provision of housing and residential lending, including homeowners associations and condominium associations.

Who enforces the Act?

The U.S. Department of Housing and Urban Development (“HUD”) administers and enforces violations of the Act. Periodically, HUD will issue rule and guidelines explaining who is protected under the Act and how the Act is violated.

Common Discrimination Claims Filed Against Associations Under The Act

A. Familial Status

What is discrimination based on familial status?

Discrimination based on familial status is discrimination against families in which one or more children under the age of 18 live with:

- A parent,
- A person who has legal custody of the child or children, or
- The designee of the parent of legal custodian, with the parent or custodian’s written permission.

Familial status protection also applies to pregnant women and anyone securing legal custody of a child under 18.

Essentially, if an association treats families with children differently than other residents in the community, through direct discrimination or enforcement of a rule or restriction, it is violating the Act, with certain limited exceptions.

What are typical ways that associations discriminate based on familial status?

The most common way that associations discriminate based on familial status is by denying children equal use of the common areas through a rule or restriction. As stated above the Act prohibits discrimination “in any activities related to the sale, rental or use of a dwelling because of race, color, religion, sex, handicap, familial status or national origin.” “Use” of a dwelling in a community association also includes full use and enjoyment of any common areas or facilities. Associations can discriminate by denying the use of the common areas such as swimming pools, clubhouses, gyms and other such amenities based on familial status.

The following are some common association scenarios involving discrimination based on familial status:

- Adult Only Swim Time

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Over the past decade or so courts have applied the Act to association pool rules and regulations, and have held that restrictions on children's use of swimming pools, where those same restrictions do not apply to other adult residents, are considered discrimination under the Act.

Rules that establish "adults only" swim time discriminate against families with children by denying them equal access to the swimming pool. In one case, an association had two swimming pools and one of them had posted signs and notices allowing adults only. The court held these "Adults Only" notices amounted to an illegal discrimination based upon familial status and ordered they be changed to "Families Welcome," thereby prohibiting the association from barring families with children from using the pool, or limiting the use of any services or facilities available to adults, except as reasonably required for health and safety.

Other federal and state courts have similarly struck down "Adults-Only Swim Time" as discrimination based on familial status. However, neutral restrictions that actually result in adult-only swim time are accepted (e.g., "lap-swimming" pool time has been accepted as non-discriminatory in at least one court).

- No One Under Age 18 May Use the Pool Without Parent or Guardian

Although generally pool rules that treat families with children differently than other residents are discriminatory, one exception is if the rule: (i) is rooted in a "compelling business necessity" and (ii) constitutes the "least restrictive means" to achieve the desired effect. For example, keeping a pool safe is certainly a compelling business necessity. So, boards often draft rules that prohibit minors from using the pool without adult supervision. However, the rule must be reasonably limited to achieve the purpose of protecting the safety of its residents.

One association enforced a rule that prohibited children under age 18 from using the recreational facilities without a parent or guardian. The court found that the rule violated the Act because it was overly restrictive. Under such a rule, even a 17-year old certified life guard could not swim alone. Less restrictive means could achieve the same safety goals by requiring persons without swimming skills to be accompanied by a person with swimming skills, regardless of age.

Another example of a safety-based rule that was found to be discriminatory is a rule that prohibited baby strollers, walkers and playpens from the pool area. The court found that a rule allowing only lounge chairs in the pool area would have accomplished the same goal.

- Children that are Not Potty-Trained are Prohibited from Using Pool

Concern with sanitation is another compelling business necessity that is often cited as rationale for adopting rules that limit children's use of the pool. But forbidding non-toilet trained children or minors under a certain age from using the pool altogether would violate the Act because it is not the least restrictive means to achieve the goal of keeping a pool sanitary. Instead, the goal could be achieved by requiring all non-toiled trained persons to wear waterproof pants.

In one case, HUD found that a rule prohibiting all babies and small children not fully potty trained from entering or being carried into the pool, as a violation of the Act. HUD required the association to change its rule to the following:

Any person who is incontinent or not fully potty trained must wear appropriate waterproof clothing when entering or being carried into the pool.

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In another case HUD addressed the issue of pool rules designed to prohibit children in diapers from using the association's swimming pool. An association had a rule that prohibited children under the age of 5 from using the pool. The rule was said to be for the child's safety and because of the "possible presence of fecal material in the pool."

HUD rejected the association's argument based on testimony from an environmental specialist who testified that there is no health reason to exclude children of any age from a pool, and that a pool can be maintained in a healthful and clean condition, regardless of the ages of those who use the pool. She further testified regarding incidents of human waste in pools of all adult health clubs and that there is no correlation between the age of swimmers and the sanitary level of a pool. The association received a \$7,000 fine for violating the Act.

- No Children Playing on the Common Area

A rule that prohibits children from playing on the common area clearly treats families with children differently than others in the community. In one case, a housing rights center and several families sued a condominium association and its property management company for enforcing a rule that prohibited children from playing in the association's common areas. The court issued an order requiring the association to pay plaintiffs \$130,000.00 along with repealing all rules regarding children.

Although safety is often cited as the compelling business necessity for keeping children off the common area, a rule that prohibits children from playing on the common area in general could be found overly restrictive. However, if the rule is written in the least restrictive means to achieve the goal of safety on the common area, the rule will likely be upheld. For example, a court found valid an association rule that stated that children under the age of 14 must be supervised while playing in the association parking lot. The association was able to establish that the parking lot was the only place for children to play and that adult supervision was required to protect younger kids.

Also, when adopting rules that require minors to be accompanied by others, it is important to specify "adult" supervision rather than "parental" supervision, as the latter has been found by courts to presuppose traditional family structures and thus to be discriminatory under the law.

Are there any exemptions from discrimination based on familial status?

Yes. The Act does allow an exemption from the law for associations that follow the necessary steps to establish and maintain themselves as "Housing for Older Persons" ("HOPA") communities. In order to be considered a HOPA community, an association must satisfy the following requirements:

1. That the housing community be intended for occupancy by persons aged 55 or older;
2. That at least 80% of the units be occupied by a person who is aged 55 or older; and
3. That the housing community publishes policies and procedures that demonstrate its intent to qualify for the exemption.

An over-55 community that satisfies HOPA is exempted from the familial status provisions of the Act. It does not have to allow families with children to live in the community. For more information on HOPA see HUD's Questions and Answers Concerning the Final Rule Implementing the Housing for Older Persons Act of 1995.ⁱ

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B. Disability

Provisions aimed at protecting people with disabilities were added to the Act in 1988 along with familial status protections. An association that discriminates against people with disabilities, whether directly or by enforcing rules or restrictions which have the effect of discriminating against disabled individuals, is in violation of the Act.

What is a disability?

“Disability” (termed “handicap” under the Actⁱⁱ) is defined under the Act as:

1. a physical or mental impairment which substantially limits one or more major life activities,
2. a record of such an impairment, or
3. being regarded as having such an impairment.

The term “physical or mental impairment” includes, but is not limited to, such diseases and condition as orthopedic, visual, speech and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, Human Immunodeficiency Virus infection, mental retardation, emotional illness, drug addiction (other than addiction caused by current, illegal use of a controlled substance) and alcoholism.

A “major life activity” is broadly construed and includes caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

Note that the term disability includes *being regarded* as having a physical or mental impairment. To illustrate this factor, in one case an organization attempted to rent apartments for participants in its drug and alcohol rehabilitation program. They were denied rentals and later filed a lawsuit against the association manager claiming an illegal discrimination against disabled people. The court determined that the association manager did indeed unlawfully discriminate against disabled people by refusing to rent apartments to organization participants. The court further held that people who have been perceived as being drug users or addicts do fall under the definition of “disabled,” under the Act, if they can demonstrate that they are regarded as having an impairment, and that they are not currently using drugs.

Courts have been careful to limit coverage under the Act to impairments that are significant and not widely shared. In a 1994 case, a law student claimed to suffer from depression and sought coverage as “disabled” under federal law. The court found, through the plaintiff’s own evidence, that nearly 40% of third year law students report significantly elevated depression levels and that to interpret federal law to include this number of law students would be contrary to the purpose of providing protection for truly disabled people. The plaintiff was therefore denied coverage because she failed to meet the criteria for a disabled person under federal law.

What if the disability is not obvious? Can you request verification?

Ordinarily, an association may not inquire as to the nature and severity of an individual’s disability. However, in response to a request for a reasonable accommodation or reasonable modification (discussed below), if the disability is not obvious an association may request reliable disability-related information that is: (1) is necessary to verify that the person meets the Act’s definition of disability (i.e., has a physical or mental impairment that substantially limits one or more major life activities), (2) describes the needed accommodation, and (3) shows the relationship between the person’s disability and the need for the requested accommodation.

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How do associations typically discriminate against disabled persons?

Rarely do you hear about an association blatantly discriminating against disabled individuals enacting a facially discriminatory rule or regulation against a disabled person or group. Discrimination usually occurs in an association's failure to exempt the disabled individual or group from a facially neutral rule that has the impact of discriminating against the individual or group.

Specifically, the Act makes it unlawful for an association to refuse to make "reasonable accommodations" in rules, policies, practices, or services, when such accommodations may be necessary to afford persons with disabilities equal opportunity to use and enjoy a dwelling.

The Act also makes it unlawful to refuse disabled persons the right to make "reasonable modifications" of their unit or common area if such modifications may be necessary to afford such person full enjoyment of the premises.

Failure to grant reasonable accommodations and modifications are two common ways that associations discriminate against associations. Both types of discrimination will be discussed below.

What is a Reasonable Accommodation and what are some typical ways that associations fail to provide reasonable accommodations?

A "reasonable accommodation" is a change, exception, or adjustment in a rule, policy, practice, or service that may be necessary for a person with a disability to have an equal opportunity to use and enjoy a dwelling, including the common areas of the association.

In order show that an accommodation may be necessary, there must be an identifiable relationship, or nexus, between the requested accommodation and the individual's disability. In other words the requested accommodation must be related to the disability and assist the individual in obtaining equal use and enjoyment of the unit and common areas.

In addition, reasonable accommodations are provided *at the association's cost*, not the individual's. Although typically no cost is involved in providing the accommodation, certain reasonable accommodations may cause an association to incur expenses.

An accommodation may be denied if:

- If the request was not made by or on behalf of a person *with a disability*,
- If there is *no disability related need* for the accommodation.
- If providing the accommodation is *not reasonable* – i.e., if it would impose an undue financial and administrative burden on the association or it would fundamentally alter the nature of the association's operations.

HUD and the U.S. Department of Justice ("DOJ") issued a Joint Statement regarding Reasonable Accommodations under the Fair Housing Actⁱⁱⁱ. This Joint Statement provided several common reasonable accommodation scenarios and guidance on when accommodations are necessary.

The following are some common association scenarios involving reasonable accommodation requests:

- Request for Parking Spaces Near the Unit

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Assigned parking spaces are one of the most commonly requested accommodations. Typically, an association has a first-come, first serve parking policy, or the spaces are assigned exclusively to individual units, and a mobility-impaired resident wants one of parking spaces closest to her unit assigned to her exclusively.

In general, courts have indicated a tendency to require associations to free up nearby parking spaces as a reasonable accommodation for mobility-impaired people. In one case, an association was required to immediately provide a tenant with multiple sclerosis a convenient parking space, despite the association's policy of first-come/first-served and a tenant waiting list for available spaces.

In another case, a mobility-impaired person sued an association that denied him a convenient parking space. In this instance, the association had consulted an attorney who told the association it couldn't assign the space without an amendment to the master deed. The association sought to have its master deed amended for this purpose, but the amendment was voted down by the association membership. The court required the association to grant the plaintiff a convenient parking space and reasoned that, despite the failed amendment attempt, the association still had the power to regulate its own common elements, including parking spaces. The court found the association had a duty to comply with the Act's reasonable accommodation requirement by providing the plaintiff the requested space.

In addition, remember that the association, not the individual, bears the cost of a reasonable accommodation. Therefore, if the association must install signs, repaint marking, create curb cuts, etc., in order to provide the reasonable accommodation, the cost is borne by the association.

- Emotional Support Pets

One very common way in which an association can discriminate based on disability is to enforce a "no pet" policy, or some other pet restriction, against a disabled person who may need the pet to afford him or herself an equal opportunity to use and enjoy the person's unit or common areas.

A clear case of discrimination would be an association's refusal to allow a blind person the right to keep a seeing-eye dog, as: (i) the disability is obvious, and (ii) the need for the accommodation (i.e., allowing the seeing-eye dog) is necessary for the blind person to use and enjoy the premises.

DOJ and HUD, in their Joint Statement regarding Reasonable Accommodations, provide the following example of when a reasonable accommodation from pet restrictions must be provided:

A housing provider has a "no pets" policy. A tenant who is deaf requests that the provider allow him to keep a dog in his unit as a reasonable accommodation. The tenant explains that the dog is an assistance animal that will alert him to several sounds, including knocks at the door, sounding of the smoke detector, the telephone ringing, and cars coming into the driveway. The housing provider must make an exception to its "no pets" policy to accommodate this tenant.

The above are obvious examples of how the need for pets is necessary to afford the disabled individuals equal opportunity to use and enjoy the premises. However, the difficulty for many associations in granting reasonable accommodations to pet rules arises when: (i) the disability is not obvious, or (ii) the disability is obvious but the need for the pet as an accommodation to the disability is not.

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The disability of a person who wishes to keep an emotional support pet is usually not obvious, as the pet is often needed to assist an individual with a claimed *mental* impairment, rather than a physical impairment. So, the association may request reliable disability-related information that is: (1) is necessary to verify that the person meets the Act's definition of disability, (2) describes the needed accommodation, and (3) shows the relationship between the person's disability and the need for the requested accommodation.

The individual may be able to provide proof of the disability without 3rd party verification. For example, proof of receipt of disability benefits would be enough to show that a person is disabled. Third party verification of a disability could come from a doctor or other medical professional, a peer support group, a non-medical service agency, or a reliable third party who is in a position to know about the individual's disability.

However, once the association has established that the person meets the Act's verification of a disability, the inquiry on whether the person is disabled should stop. The association should then only seek information that is necessary to evaluate if the accommodation is needed because of the disability.

In one recent case, according to HUD's charges an association required a tenant, who was a Gulf War veteran, to pay a registration fee, provide proof of liability coverage, and sign a medical release for it to obtain his confidential medical records. The tenant provided medical documentation of his need for the assistance animal and obtained liability insurance, but refused to give Respondents access to his private medical information or to pay the \$150 fee. Even after it acknowledged that the veteran's dog was a medically necessary assistance animal, the association continued to demand that he pay the fee. The association also assessed a number of fines against the owner of the unit for the presence of the support dog, and the unit owners refused to renew the tenant's lease until he paid the fee and the fines. The tenant and his wife moved away rather than pay. Such fees and fines are prohibited by the Fair Housing Act, as are requirements that persons with disabilities obtain liability insurance and provide their medical records.

HUD issued the following charge of discrimination:

The charge seeks (1) a declaration that the association's policies violate the act; (2) an injunction prohibiting the association and its representatives from discriminating against any person because of disability in any aspect of the rental, sale, use or enjoyment of a dwelling in the development; (3) an award of damages suffered by the complainant for inconvenience and economic loss caused by the association's discriminatory conduct; and (4) assessment of a fine in the amount of \$16,000 against the association, the management company and the individual manager.

The charge will be heard by a U.S. administrative law judge unless one of the parties elects to have the case heard in federal district court.

Note that in conjunction with this particular case, HUD issued the following statement:

"Today, many veterans return home with mobility impairments or other conditions that can be alleviated by a support animal"...."HUD will enforce the Fair Housing Act against policies that prevent people with disabilities from having a medically necessary assistance animal at home."

Given HUD's statement, it would wise for associations to take particular care with respect to responding to emotional support pet requested by veterans.

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HUD has issued several other charges against housing providers, including associations, for failure to provide reasonable accommodations to disabled individuals who need emotional support animals. In most of the cases, the individual has provided information from health care practitioners or other qualified persons stating the individual is disabled and needs the accommodation, but the associations have requested further verification.

- Group Homes

Not only does the Act prohibit discrimination against individuals who are disabled, but the Act would require associations to provide reasonable accommodations to groups of individuals who are disabled. Case law across the country indicates that group homes serving people with disabilities are entitled to protections afforded under the Act, even though the covenants or ordinances governing the community prohibit such use.

The Colorado Supreme Court specifically addressed this issue of whether an operation of a group home for developmentally disabled children violated a residential use restriction in restrictive covenants in *Double D. Manor, Inc. v. Evergreen Meadows Homeowners' Association*, 773 P.2d 1046 (1989).

The covenant in question included a structural use (one "single-family dwelling") and a use restriction ("residential use"). The Court held that use of property as a home for developmentally disabled children was a "residential use" for purposes of the restrictive covenant applicable to the property. The Court found that a state licensed group home for eight persons with mental illness is a residential use of property for zoning purposes and that a state license group home for eight developmentally disabled persons is declared to be a residential use for zoning purposes.

- Requests for Interpreters

What about a hearing-impaired individual who needs a sign language interpreter for various activities in the community? There has been at least one federal lawsuit filed against an association by a disabled resident for failure to provide him an interpreter for his use in the community. The association had hosted a hurricane preparedness event featuring local police, firefighters, and other professionals. The resident requested that a sign language interpreter be hired at the association's cost, so he could attend and participate. The association refused, which landed it in a lawsuit for discrimination.

A request by a hearing-impaired individual for a sign language interpreter in order to participate in important decision-making activities at an association meeting affecting legal rights or financial obligations as a homeowner, would seem to be an appropriate reasonable accommodation request to be made by the individual. And, if the provision of a sign language interpreter is not a financial or administrative hardship for the association, it would be appropriate to provide and pay for the services.

But what if the individual requests a sign language interpreter at not just the annual meetings, but all the board meetings and other functions (e.g., social events, committee meetings, etc.)? Does the association have to pay for a sign language interpreter to attend each event? Requests for accommodations that may not be reasonable are discussed in the next section.

When is a request not reasonable?

If the request: (i) imposes an undue financial and administrative burden on the association, or (ii) would fundamentally alter the nature of the association's operations, it is not reasonable.

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The determination of undue financial and administrative burden must be made on a case-by-case basis considering various factors, such as the cost of the requested accommodation, the financial resources of the provider, the benefits that the accommodation would provide to the requester, and the availability of alternative accommodations that would effectively meet the requester's disability-related needs.

As an example of when a request may place an undue financial and administrative burden on a housing provider, the HUD and DOJ Joint Statement provide the following:

As a result of a disability, a tenant is physically unable to open the dumpster placed in the parking lot by his housing provider for trash collection. The tenant requests that the housing provider send a maintenance staff person to his apartment on a daily basis to collect his trash and take it to the dumpster. Because the housing development is a small operation with limited financial resources and the maintenance staff are on site only twice per week, it may be an undue financial and administrative burden for the housing provider to grant the requested daily trash pick-up service. Accordingly, the requested accommodation may not be reasonable. If the housing provider denies the requested accommodation as unreasonable, the housing provider should discuss with the tenant whether reasonable accommodations could be provided to meet the tenant's disability-related needs – for instance, placing an open trash collection can in a location that is readily accessible to the tenant so the tenant can dispose of his own trash and the provider's maintenance staff can then transfer the trash to the dumpster when they are on site. Such an accommodation would not involve a fundamental alteration of the provider's operations and would involve little financial and administrative burden for the provider while accommodating the tenant's disability-related needs.

A “fundamental alteration” is one that alters the essential nature of the association’s operations. For example, if a mobility-impaired resident asks the association to hire a car service to take him or her to work as a reasonable accommodation, and the association does not provide any transportation services for its residents, this request would require a fundamental alteration in the nature of the association’s operations.

If the association refuses a request as not reasonable, the association should still discuss with the individual whether there is an alternative accommodation that would effectively meet the individual’s disability-related needs without fundamentally altering the association’s operations or imposing an undue financial and administrative burden on the association.

What is a Reasonable Modification and what are some typical questions associations must answer when evaluating a reasonable modification request?

A reasonable modification is a structural change made to existing premises, occupied or

to be occupied by a person with a disability, in order to afford such person full enjoyment of the premises. Reasonable modifications can include structural changes to interiors and exteriors of dwellings, and to the common areas.

Like reasonable accommodations, a modification must be reasonable and there must be some relationship, or nexus, between the modification request and the individual’s disability. A request for modification may be denied if the request was not made by or on behalf of a person *with a disability*, or if there is *no disability related need* for the modification.

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The big difference between a reasonable accommodation and a reasonable modification is that *the individual*, not the association, *bears the cost of installing the modification*. However, the cost for removing the modification, if installed on the common area, is borne by the association.

Also, since reasonable modifications are often made to the exterior of a unit and/or on the common areas, associations should be concerned with architectural review requirements for the modification, as well as responsibility for future maintenance of the modification.

Here is an example of a reasonable modification request that highlights the various issues that could arise for an association when evaluating the request:

A mobility-impaired owner who uses a wheelchair purchases a unit in a condominium complex. He asks the association if he can install a wheelchair ramp to the exterior of his condominium unit in order to provide access to his unit. The ramp will be installed on the common elements of the association.

1. *Is the association required to grant the modification?*

Yes. Both the disability is obvious and the need for modification is obvious. The owner needs the wheelchair ramp to gain access to his unit using his wheelchair.

2. *Who pays for the wheelchair ramp?*

The owner.

3. *What kind of architectural conditions can the association place on the proposed ramp?*

The association can still ask the owner to submit an architectural review request form, but note that any unreasonable delay on reviewing the request will expose the association to liability. Therefore, the association should review reasonable modification requests priority over standard requests.

Understandably, an association would be concerned with the aesthetic harmony of the ramp with the rest of the community. The association can require alternative design if it imposes no additional costs to the owner, and still meets the owner's needs.

The association cannot require the owner to use a particular contractor to do the work. However, the association can require that owner submit plans and specifications, apply for appropriate building permits, and satisfy other conditions specified by the Board, to ensure the work is performed in a safe and workmanlike manner.

Although an association may be concerned with potential liability since the ramp is to be installed on the common areas, the association cannot require the owner to obtain special liability insurance additional insurance over the ramp as a condition of approval.

4. *Who maintains the ramp?*

The owner is responsible for the upkeep and maintenance of the ramp *if it is exclusively used by him*. However, if the ramp is made to an area that is normally maintained by the association and used by others (i.e., general common elements) then the association has to maintain it. For example, a ramp installed to the entrance of a condominium building, as opposed to just the owner's unit, is normally maintained by the association and used by other residents. Therefore, the association would be required to maintain the ramp.

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5. *Does the association have to provide snow removal on the ramp?*

If the ramp is installed on a portion of common area for which the association normally provides snow removal service, the association will have to pay for snow removal on the ramp.

If the ramp is installed on a portion of common area for which the association does not normally provide snow removal service, or which is required to be maintained by the owner, the owner will have to pay for snow removal on the ramp.

6. *If the owner moves or no longer needs the modification, must the owner restore the common area to its original condition?*

No. Modifications to the common area are not required to be restored to original condition. If the association wants to remove the ramp, it must do so at its cost.

In addition, like reasonable accommodations, there needs to be a relationship between the requested modification and the disability. The DOJ and HUD issued a Joint Statement regarding Reasonable Modifications under the Fair Housing Act^{iv}, which provides the following example of when a requested modification may be denied because of no relationship between the disability and the need for the modification:

A homeowner with a mobility disability asks the condo association to permit him to change his roofing from shaker shingles to clay tiles and fiberglass shingles because he alleges that the shingles are less fireproof and put him at greater risk during a fire. There is no evidence that the shingles permitted by the homeowner's association provide

inadequate fire protection and the person with the disability has not identified a nexus between his disability and the need for clay tiles and fiberglass shingles. The homeowner's association is not required to permit the homeowner's modification because the homeowner's request is not reasonable and there is no nexus between the request and the disability.

Finally, what if the modifications should have been there per federal law in the first place? Does the disabled individual still have to pay for it?

The Act provides that covered multifamily dwellings built for first occupancy after March 13, 1991, shall be designed and constructed to meet certain minimum accessibility and adaptability standards. If any of the structural changes needed by the disabled individual are ones that should have been included in the unit or public and common use area when constructed, at least one federal court has held that the individual may have a potential claim against the housing provider for failing to make the modifications. However, if the requested structural changes are not a feature of accessible design that should have already existed in the building pursuant to the design and construction requirements under the Act, then the individual is responsible for paying for the cost of the structural changes as a reasonable modification.

C. Other Potential Discriminatory Actions under the Act

Discrimination claims filed against associations are usually based on familial status or disability. However associations also regularly get sued for other types of discrimination, such as the following.

- **Religious Discrimination:** In one case the association had a rule that prohibited residents from placing personal objects in the common areas, including hallways and doorways. A Jewish owner filed a religious discrimination complaint against the association for failure to allow her to keep a mezuzah affixed to her doorpost. The court rules that the Act requires accommodation of disabled persons, and that no such accommodation was required for religious beliefs and practices. Therefore, a religion-neutral, exception-free rule would not be discriminatory even if it may conflict with some residents' religious practices.
- **Racial Discrimination:** A prospective tenant who is African-American sued a community manager and the association for racial discrimination when the manager falsely represented that the unit had already been rented, when in fact it was vacant. The association asserted that it was exempt from the Act because it did not own or lease any of the condominiums itself, even if its bylaws gave it the authority to reject potential lessees. A Florida U.S. District Court found that associations are subject to the Fair Housing Act where they have the authority to reject potential lessees, and the association's actions in this particular case were rooted in negative racial stereotypes.
- **Rights of First Refusal:** Some governing documents allow the association, or the owners within the association, to be given the opportunity to purchase a condominium unit which is for sale, prior to allowing the unit to be purchased by an outside third party. This has given rise to claims that the association is discriminating against potential purchasers who fall within the protected categories under the Act by preventing their purchase of the unit.
- **Non-Uniform Enforcement:** A person may claim that an association is only enforcing a covenant against him because of his race, religion or some other protected category. If the individual can show a pattern of enforcement only against similarly situated people, or the failure to enforce violations against other people who are not similarly situated, the association is exposed to liability for discrimination.
- **Failure to Enforce / Refusal to Intervene:** One community association member was persistently harassing the former president of the association, who was of a different ethnicity than the harasser. The harassment was extreme, including physical threats and racial and sexual slurs. The woman filed suit against the board when it refused to intervene, and a District Court ruled that a community association board has the same obligation as a landlord in a rental building to protect residents from sexual and racial discrimination. The association eventually settled the case by paying the former president \$550,000 and agreeing to purchase her condominium unit.
- **Failure to Obtain FHA:** Recently, the Ohio Civil Rights commission filed suit against an association for failing to obtain FHA certification based on discrimination. In the case filed, a single mother with one child attempted to purchase a condominium in a community that was previously FHA-certified. The community, however, had made the decision not to seek FHA recertification after its initial certification expired. Since the community was not certified, the loan failed and the Commission filed suit.

While there are undoubtedly facts specific to this case, it appears that the failure to seek certification gave rise to a claim that the lack of certification had a disparate impact based on familial status.

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Other Claims of Discrimination Outside Of The Act

While charges against associations for discrimination are often filed for violations of the Act, associations are also faced with other claims of discrimination outside of the Act.

- LGBT or Marital Status Discrimination

The Act only covers discrimination based on the following categories: race, color, religion, sex, national origin, familial status and disability. However, many states extend the prohibition against discrimination to other categories beyond those stated under the Act. In addition to the protected categories listed under the Act, Colorado anti-discrimination laws also prohibit discrimination based on creed, ancestry, sexual orientation, marital status and retaliation. See C.R.S. 24-34-501, et seq. So, for example, if a Colorado association attempts to enforce restrictions that directly discriminate against, or have a disparate impact on, same-sex couples or unmarried couples, this would violate Colorado's anti-discrimination laws, even though it might not be found to violate the Act.

Note, however, that while the Act does not specifically include sexual orientation and gender identity as prohibited bases, HUD has issued a policy^v and regulations^{vi} that prohibit discrimination on the basis of gender identity, sexual orientation, or marital status in all federally-funded housing programs.

- Tenants

We have seen a growing number of associations who adopt restrictions that treat tenants differently than owners, the most common one being a rule or restriction that prohibits only tenants from having pets (while allowing owners to have them). Are tenants a protected category under the Act? No. And, we have not found any state anti-discriminatory laws that extend protection to tenants. Of course tenants, like any other individual, can be discriminated against on the basis of one of the *other* protected categories, such as disability, familial status, or race.

- Sex Offenders

Some associations refuse registered sex offenders from access to common area facilities or amend the governing documents to prevent sex offenders from purchasing property in the community. As basis for adopting these restrictions, associations claim that members of the association are entitled to adequately protect themselves and their children from sex offenders. Are they protected under the Act? No. Sex offenders, by virtue of their status, are not considered persons with disabilities protected by the Act, and we have not found any state anti-discriminatory laws that extend protection to sex offenders.

Proactive Ways To Reduce Discrimination Claims

Today's fair housing laws impose many obligations on homeowner associations as well as prohibit many seemingly reasonable actions by associations. And while there are many pitfalls, implementing the following practices will help you avoid stepping into what can be a snake pit of liability.

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1. Adopt a Reasonable Accommodation/Modification Policy:

As stated above, charges are regularly filed against associations for discrimination based on disability. An association should adopt a policy that sets forth its compliance with a disabled individual's need for a reasonable accommodation or modification under the Act. This will help the board act appropriately and uniformly with respect to all reasonable accommodation or modification requests under the Act.

The policy should cover the following:

- a. How disabled individuals may request a reasonable accommodation or modification (i.e., form for request)
- b. The guidelines that the board will consider in evaluating the request, such as:
 - i. Whether the individual has a disability as defined by the Act
 - ii. That if the disability is not readily apparent, the board may request documentation verifying the disability, and the relationship between disability and the accommodation or modification.
 - iii. That if the request is for a modification, the individual will be required to submit plans and satisfy other conditions to ensure the work is performed in a safe and workmanlike manner.
 - iv. That the board may determine whether the accommodation or modification is necessary to afford the resident an equal opportunity to use and enjoy his/her home or the community.
 - v. That the board may determine whether the accommodation or modification is reasonable.
 - vi. That if the request requires the association to spend money, the board may consider the association's financial resources, the cost of the request, and the availability of other less expensive alternative accommodations that would effectively meet the resident's needs, in determining whether the request is reasonable.
- c. That the board will respond within a reasonable time of receiving the complete request.
- d. A standard form for use in verifying disabilities and the need for the accommodation, where the disability and need are not readily apparent.

In addition to adopting a policy, associations should follow these practice pointers when faced with a reasonable accommodation or modification request:

- ✓ Do not request verification if the disability is obvious and it is obvious how the requested modification will afford the individual equal opportunity to use and enjoyment of home or community.
- ✓ The applicant for a request is not required to be an owner or the person in need of the accommodation or modification. It can be someone making the request on behalf of the disabled individual.
- ✓ The health care provider providing verification of the disability is not required to be a physician.
- ✓ Respond to requests in writing in a timely manner.
- ✓ If there is no request, there is generally no obligation to make the accommodation. However, if a verbal request is made, follow through. Also, if an accommodation is obvious, offer it.
- ✓ Do not deny a request because of a related or unrelated violation at time of request. Place all violation issues on hold while applicant obtains requested information.
- ✓ Thoroughly document the reason for denial.

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2. Review Restrictions, Rules and Regulations for Discriminatory Language:

A quick glance at an association's rules will often reveal at least one instance of discrimination. Courts have held that the mere publication and distribution of a discriminatory rule is a violation of the Act, whether the rule is attempted to be enforced by the association or not. This exposes association officers and managers to potential liability for simply performing part of their duties of disseminating governing documents to residents. Often, an association isn't even aware it has old rules in its documents that violate the Fair Housing Act. For this reason, an association should have its governing documents reviewed by an attorney to make sure all rules and regulations comply with the Act. Similarly, an association should consult an attorney when adopting new rules or amending old ones—for the same reason.

3. Consult your Attorney.

If you receive a request from a disabled individual in your community, do not hesitate to contact your lawyer. It may sound self-serving, but, fair housing laws contain many pitfalls for the unwary. An attorney can help you identify the association's legal obligations and duties in each particular case.

4. Enforce your Covenants in a Consistent Manner.

Picking and choosing who you will enforce your covenants against is never a sound practice, but it can be fatal in a fair housing setting.

5. Engage the Individual Seeking an Accommodation in an Interactive Dialogue.

This can be achieved by inviting the person to the next board meeting or through written correspondence such as letters and e-mails. Work with the individual to create a solution to the situation that meets all parties' needs.

6. Be Professional.

Be professional at all times when addressing individuals alleging discrimination or seeking an accommodation. The topic of discrimination is often emotionally charged. Keep your emotions in check, as you may say something you later regret that exposes the association to liability.

7. If Your Association is Faced With a Discrimination Complaint:

- ✓ Be civil. Don't strike back at the person who filed the complaint.
- ✓ Don't ask the complainant why they filed it or the substance of it. That is the job for HUD or the state discrimination agency. Just comply with the process.
- ✓ Take the complaint seriously. Be responsive and provide information quickly and truthfully. If there has been no discrimination, and investigation and review of the requested information will reveal this. Understand the process under state law and federal law. For complaints filed under Colorado anti-discrimination laws, see <http://cdn.colorado.gov/cs/Satellite/DORA-DCR/CBON/DORA/1251629147198>. For HUD complaints under the Act see: http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/complaint-process.

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- ✓ Keep Good Records. Community associations with well-documented procedures can demonstrate to investigators that no discrimination occurred.

Conclusion

Although associations are subject to the Fair Housing Act, few boards are familiar enough with the Act to be able to identify the multitude of ways they could be exposing themselves and the association to claims of discrimination. To avoid liability, and sometimes severe penalties for a finding of discrimination, boards need to fully understand and comply with the Act and their state's anti-discriminatory laws. With a little effort on the front end, such as adopting a policy or reviewing their rules and regulations for discriminator language, boards will reduce or eliminate discrimination claims from being filed altogether.

ⁱ <http://www.hud.gov/offices/fheo/library/hopa95.pdf>

ⁱⁱ Note that the Act uses the word "handicap" instead of the current preferred term "disability," but both words have been found to have the same legal meaning. Courts refer to the fact that the definition of "disability" in the Americans with Disabilities Act is taken almost verbatim from the definition of "handicap" in the 1988 Fair Housing Amendment Act as support for the idea that both terms are legally interchangeable.

ⁱⁱⁱ <http://www.hud.gov/offices/fheo/library/huddojstatement.pdf>

^{iv} http://www.hud.gov/offices/fheo/disabilities/reasonable_modifications_mar08.pdf

^v http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2010/HUDNo.10-139

^{vi} http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/LGBT_Housing_Discrimination