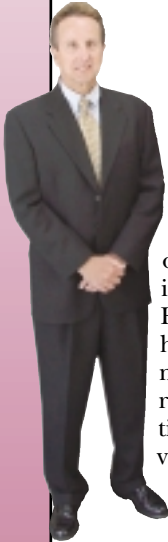


News

Joel M. Kriger, APC - Community Association Division

Fair Housing Guidelines and Strategies

BY JOEL M. KRIGER, ESQ.



Be aware, know the rights of those living in your communities or you may be in violation of a law that is deeper in scope than you think! More and more associations are the subject of Fair Housing complaints. These complaints are prosecuted by the State Department of Fair Employment and Housing who represent the interests of the owners and residents in the community. Some Homeowner Associations have paid very large settlements for violations of these rules. Don't let your associations make the same preventable mistakes.

Fair Housing Rules Can Be Hard to Recognize

Many board members and associations have been unconcerned with fair housing rules. They mistakenly believed that as long as they never discriminate against blacks, women or minorities – there is no problem. Unfortunately, this is not the case. A rule setting curfew for children in the common areas, requiring them to be accompanied by an adult at all times or limiting their use of the swimming pool may be considered discriminatory and a violation of the fair housing laws. Failing to make exceptions in the Association rules for individuals who are “disabled” violates the fair housing laws because a “reasonable accommodation” must be made under certain circumstances.

Part One — Familial Discrimination

This article is in two parts. The first part will cover the area of familial discrimination, then discusses the federal and state fair housing laws and sensitize boards of directors to these issues. The second part deals with the rules surrounding “reasonable accommodation” for disabled persons. Under these laws, an association is required to make an exception to its rules when necessary so that a

disabled person can have the same use and enjoyment of the dwelling as an individual who is not.

Difference Between FHA and FEHA

The Fair Housing Act (FHA) is a federal law which prohibits discrimination by providers of housing based upon race or color, religion, sex, national origin, familial status, or disability. The Fair Employment and Housing Act (FEHA) is a state law that prohibits discrimination in rental, sale and terms and conditions of housing based on FHA criteria. The state law expands the categories of discrimination to include sexual orientation, marital status, ancestry, age, source of income or medical condition.

The FHA and FEHA's primary focus is discrimination in rental, sale and terms and conditions of housing. Even though Associations do not sell or rent units, they adopt rules which can be considered discriminatory. The law prohibits rules that limit the use of privileges, services or facilities

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associated with a dwelling because of race, color, religion, sex, handicap, familial status, or national origin of the owner or tenant. Familial discrimination is the one that most affects associations.

Exploring Familial Discrimination

Familial discrimination is discrimination against families with children under age 18. The following are some restrictive rules that were adopted by an association in San Diego County similar to the case referenced below:

1. Use of roller skates, skateboards, bicycles or scooters on the sidewalks, lawns and planted areas within the complex is prohibited;
2. No running, walking, ball playing or throwing games will be allowed on the landscaped and shrubbed areas. No ball playing or throwing games are allowed on the grass area.
3. No children over the age of 13 shall be allowed loitering, playing, etc. in the common areas after the hour of 10:00 p.m. May through September, 9:00 p.m. October through April.

Rules based upon legitimate health and safety concerns of the children using these common areas are appropriate. As long as justifications can be demonstrated, the rule should fall within the requirements of the law.

Association Rules Changed and Damages Awarded to Father and Children

In the case of *U.S. v. Hagadone*, a complaint was filed by the Department of Justice against a property that had similar rules restricting children's use of facilities. Matthew Smith, a single father, had visitation rights with his children on weekends. Whenever the children were visiting the property, frequent problems and alleged violations occurred. The complaint filed with the Department of Justice resulted

in management being forced to change its rules on common area use based on familial discrimination. Further, there was an award of damages in the amount of \$18,666 to Matthew Smith and \$2,800 to each of his three children.

Tips on Pool and Common Area Rules

Pool and common area facilities are an area where associations attempt to restrict usage by age. Here are some common sense tips on pool and common area rules:

1. Don't ban children from the pool.
2. Rules requiring supervision for children under 14 addresses health and safety concerns and are legitimate.
3. Don't create "adult only" pools.
4. Don't restrict children's access to prescribed hours.
5. Set neutral behavior rules.

The critical point is that not all age-based rules are illegal. Rules based upon legitimate health and safety concerns of the children using these common areas are appropriate. As long as justifications can be demonstrated, the rule should fall within the requirements of the law.



Part Two — Reasonable Accommodations

Under federal and state law, homeowner associations are required to make exceptions to their rules for disabled persons, under certain circumstances, on a case-by-case basis. Residents who request and are improperly denied a reasonable accommodation from the association can file a complaint with the State Department of Fair Employment and Housing that will investigate the complaint and enforce the law against the association if a violation has occurred. This article will explain the ground rules for processing, granting and denying requests for reasonable accommodations from residents.

Guidelines and Strategies — Requirements to Grant Reasonable Accommodations

It is unlawful for any person, including community associations, to refuse to make reasonable accommodations in rules, policies, or practices when such accommodations may be necessary to afford a person with a disability equal opportunity to use and enjoy a dwelling unit or the common area according to the Fair Housing Act (FHA). An Association may not enforce existing rules that prevent persons with disabilities from equal enjoyment of the premises.

One example is the enforcement of a rule that “requires assigning parking spaces on a first-come, first-served basis against a person whose mobility is impaired.” This person obviously, because of the disability, has the need for a reserved parking space as close as possible to his own unit. The association, when it controls the right to assign parking, must honor a disabled applicant’s request for assigned parking. *Shapiro v Cadman Towners, Inc. (2d Cir 1995) 51 F3d 328.*

An association would also be in violation of the FHA by enforcing a rule prohibiting nonresidents from using the common facilities where a resident with a disability was unable to use the laundry room and nonresidents were barred from using the laundry room to do the disabled person’s laundry. Similarly, an association would be in violation if it enforced a rule prohibiting vans if a van was necessary to transport a person in a wheelchair. Again, the association is required to afford the person with a dis-

ability equal enjoyment of the premises. 24 CFR 100.204.

Sometimes the existence or extent of the disability of the person is called into question in their “request for accommodation.” It is unlawful to inquire about the existence or extent of a disability of a prospective resident, however, once an applicant or resident requests an accommodation, the provider is entitled to obtain information necessary to evaluate whether the person meets the FHAs definition of disability and the necessity for the accommodation because of the person’s disability.

Processing Requests for Accommodation

Procedures that permit the rapid processing of applications for reasonable accommodations should be established by community associations. If an association causes an “undue delay” in responding to a reasonable accommodation request it may be deemed as a failure to provide a reasonable accommodation.

Federal fair housing laws require you to grant reasonable accommodations to the disabled. However, there are some cases where members who are not disabled try to take advantage of the law to get something they are not entitled to. This could be a better parking space, or an exception to an association rule such as allowing a companion dog for depression. Most member requests are legitimate, but how do you determine when a request is not and should be denied?

Verification Form – The best method is to get verification from the member’s health care provider or other professional, such as a therapist or social worker. To assist you in obtaining verification, a Model Form entitled *Reasonable Accommodation Request Verification* has been provided, which you can download from <http://XRL.US/verify>

Granting Requests

When granting accommodation requests, verification that the member is really disabled should be obtained when it is not an obvious disability. The person with a disability, a family member or someone else who is acting on behalf of the disabled person can make the reasonable accommodation request.

Again, the best way, when not an obvious disability, is to verify the reasonable accommodation request by use of a standard form to the health care provider. Give the form to the member to deliver to the health care provider in the interest of privacy. Using the stand-

ard form ensures that you give the same treatment to all members requesting an accommodation and that you get all necessary information to evaluate requests.

Tell the member that the health care provider must complete the form and not just write a letter to back up the request. The following is what a Board or Management Company might say to the member:

“We make reasonable accommodations only to members who are Disabled as defined by federal and state law and who need the accommodation to have an equal opportunity to use and enjoy their units. If you would like an accommodation, you must have your health care provider – such as a physician – verify these points by use of a form that we’ll provide to you. To be fair to all members, we ask that the health care provider complete this form rather than write a letter to verify your request.”

When using the Verification Form:

1. Fill in the name and address of the health care provider, the community association, and the member.
2. Then ask the member to sign the release statement [shows the health care provider that the member has authorized the release of confidential information to the association].

The Verification Form form explains to the health care provider that the member has requested an accommodation be made. It states that although the rules don’t typically allow for the accommodation in question, the association will consider the request if the member is disabled and requires it. The health care provider is asked three questions:

1. Is member “disabled”? It asks if the member meets the definition of “disabled” under the law. It reprints the applicable definition from the fair housing regulations for understandability. Federal law bars you from requesting information about the nature or extent of the disability, or any other details about the member’s condition
2. Is accommodation needed? It asks if the member needs the accommodation, in the health care provider’s professional opinion, in order to have the same opportunity that a nondisabled person has to use and enjoy his or her unit.
3. Can condition be treated? It asks whether the member’s disability can be treated in order to prevent any substantial limits to the member’s major

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life activities. Major life activities are defined as:

“Those activities that are of central importance to daily life, such as seeing, hearing, walking, breathing, performing manual tasks, caring for one’s self, learning, and speaking.”

This form also asks the health care provider whether he would be willing to testify in any proceeding related to the member’s need for the accommodation. However, if the provider says no, it doesn’t mean that you should reject the request.

Albeit the health care provider’s response is only a single piece of evidence in making a decision to grant an accommodation, pay close attention to the health care provider’s recommendations. Use of the Verification Form can help to weed out improper requests.

Denying Requests

There are instances when an association can deny a request for a reasonable accommodation without violating the Fair Housing Act.

An association can deny a request for a reasonable accommodation 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 accommodation. If the request for a reasonable accommodation is not reasonable, the request can also be denied.

“It is not reasonable if it would impose an undue financial and administrative burden on the association or it would fundamen-

tally alter the nature of the provider’s operation,” according to the Fair Housing Act.

To determine an undue financial and administrative burden, the association must decide on a case-by-case basis weighing various factors including 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.

When an association refuses a requested accommodation because it is NOT reasonable, the association should discuss with the requester whether there is an alternative accommodation directly addressing the requester’s disability-related needs. Of course this alternative should be without a fundamental alteration to the association’s operations and without imposing an undue financial and administrative burden. If the alternative accommodation effectively meets the requester’s disability-related needs and is reasonable, the association must grant the accommodation. It is important to use an interactive process in which the association and the requester discuss the disability-related need for the accommodation and possible alternative accommodations. This often results in an effective accommodation for the requester that poses no undue financial and administrative burden for the association.

The “Fair Housing Act” is an act to follow! There is no room for discrimination in common interest developments. ■

Who is Covered Under the Fair Housing Act

- Hearing or vision impaired
- Physically disabled
- Mental illness or retardation
- AIDS or HIV infection
- Epilepsy
- Cerebral Palsy
- Use of a wheelchair or walker
- Use of a personal care attendant
- Use of a service animal
- Persons who have a record of a disability or who are currently under treatment for same or who are regarded as such
- Alcoholics, in treatment or not
- Prior drug users who have completed a rehab program
- Persons using prescription drugs under a physician’s direction

Notes on Companion Animals

Companion animals differ from service animals, like guide dogs, with which we are familiar. Companion animals have been prescribed by a doctor as part of the patient’s therapy. Therefore persons qualifying for coverage under ADA have a right to keep them regardless of an association’s refusal to allow pets in the home or unit.

Learn more about fair housing by accessing the following Web sites:

<http://XRL.US/FairHousing>

<http://XRL.US/DiscriminationComplaints>

Enforcement Information

HUD Fair Housing Enforcement Office — Washington, DC

US Department of Housing & Urban Development Fair Housing & Equal Opportunity Division –
820 First St., NE Suite 450,
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Mr. James Black, Director



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