



# CONSISTENCY AND CARE HELP TO MITIGATE THE RISK OF DISCRIMINATION CLAIMS

You're going about your business as a board member, reviewing various requests made by homeowners in the community. One homeowner wants you to install better lighting outside her unit, another wants a ramp placed in front of her home to make it more accessible, and one wants to install artificial turf in their yard. You base your decisions on what you think is best for the community, in light of the Covenants, Conditions and Restrictions ("CC&R") and other relevant documents. But did you consider that some of the homeowners' requests may be protected under the law? If so, the denial of a homeowner's request made by the board may seem like a decision based on sound judgment, but it may lead to a lawsuit later!

## Discrimination

Condominiums, cooperatives, homeowner and/or community associations ("associations") are considered housing providers. As such, they are governed by the federal Fair Housing Act (FHA).<sup>1</sup> The FHA protects individuals from discrimination based upon race, color, national origin, religion, gender (which encompasses gender identity and sexual orientation), familial status, and disability when they are renting or buying or engaged in activity related to obtaining housing.<sup>2</sup> In addition to the FHA, many states have similar laws.<sup>3</sup> It is important to understand federal, state and local anti-discrimination laws and how they relate to the business of the association. Seeking the advice of a lawyer can assist board members in understanding and applying the law.

### Example:

*Plaintiffs were residents of a community run by a homeowners' association. They had three children, aged 5, 3 and 1. The community's CC&Rs limited use of the clubhouse to adults (defined as those 19 and older), prohibited use of the swimming pool and spa by individuals under 14 unless accompanied by an adult and limited the number of guests those aged 14 to 18 could have at the swimming pool and spa. A sign was posted outside the tennis courts which stated that adults had court privileges over children during the week after 3pm and at all times on weekends and holidays during the summer. Upon moving into the community, the Plaintiffs submitted an application to build a fence to enclose their backyard in order to safeguard their children. The association denied the*

*request stating that the community was designed to make such enclosures unnecessary and because they wished to maintain a "parklike setting".*

*The Plaintiffs filed a lawsuit alleging that the association's rules, signs and denial of their application to build a fence violated the FHA because the association's actions constituted discrimination based on familial status. The court agreed, finding that though the board stated that the reason the rules limited the number of guests those aged 14 to 18 could have at the pool was to prevent the pool from becoming overcrowded and to prevent vandalism, the reasoning was not "legitimate". The court held that the limitation on the use of the tennis court exhibited a preference for adults and was therefore discriminatory. The court also found that the denial of the request to build a fence for the children's safety was discriminatory because shortly after their request was made, the architectural rules that once allowed some enclosures were amended to ban all fences seemingly to deter more families from moving into the community. Finding the actions of the association amounted to familial status discrimination, the court ruled in the Plaintiffs' favor and set the matter for trial for the purpose of determining the amount of damages.<sup>4</sup>*

Claims of discrimination and harassment are common. Allegations reported by an owner, employee, or anyone else that they have been discriminated against or harassed, should be handled with care. Any such report should be investigated promptly and thoroughly.<sup>5</sup> In fact, the CC&Rs should include a protocol to follow when such a situation arises. An association may be held liable for conduct which is reported to the association if it fails to act when it has knowledge of harassment.<sup>6</sup> Consulting an attorney may be wise in these situations. The association should consider providing education to board members and employees regarding the rights of owners and others so that they understand what actions may be considered discriminatory.<sup>7</sup> Having a process to address these situations promptly and objectively can mitigate the risk and may prevent litigation.

Having a process to address issues that arise is critical. This is because even when you think you are making the right decision or following the established rules in the CC&Rs, it is possible that the way the rules are applied in a situation may conflict with the law or have the potential

to be perceived as being made without adherence to legal requirements. An example of when this may come into play is when a community has rules about the use of units by homeowners or what homeowners can display outside their home. It is not unusual for the CC&Rs to state that homeowners should use their homes for residential use only. It is also common for the CC&Rs to set rules regarding what homeowners can display on their properties or balconies. However, the application of such rules to specific situations may not be so simple. For example, what happens when a homeowner wants to have prayer meetings in their home? Is that a non-residential use? Or what happens when a homeowner's practice of religion extends outside the home, such as a Christmas tree on a balcony, a wreath on a door or a menorah on the front lawn? Handling these situations is not always simple. For example, a judge in Texas ruled that a homeowner's use of their home as a synagogue did not have enough of a negative impact on a community to have the homeowner cease its operation despite complaints that it was causing noise and traffic issues.<sup>8</sup> However, in another case in the same state, a judge ruled that residential use restrictions written into a deed preventing a priest from providing followers a place to stay and from having meetings with colleagues to discuss the building of a worship hall, did not violate the FHA. The judge ruled that the association's deed restrictions were permissible and that the association could restrict the priest's use of his residence to what was typical of a single family residential home.<sup>9</sup>

The two cases above illustrate that the application of community rules may have legal implications. An attorney can help you navigate the decision making process by providing a legal perspective of which the board may not be aware.

### Enforce Rules Consistently

When taking steps to ensure you are in compliance with the law, a good place to start is a review of the CC&Rs. It is an opportunity to provide guidance to the community on how to act and treat one another. In considering how the community should be run and with what values, the board should review the FHA and state and local housing legislation to ensure compliance.<sup>10</sup>

It is important that the CC&Rs are consistently followed and applied to all homeowners in the same manner in order to avoid claims of selective enforcement.<sup>11</sup> Selective enforcement occurs when the rules are not applied in the same manner to all members of a community, applying them in some situations but not in others.<sup>12</sup> A homeowner may feel that they are the victim of selective enforcement when they discover that they were fined for a violation of the CC&Rs when others were not fined for the same violation or when they are denied approval to make a change to their property when another homeowner was allowed to make the same change that they previously requested. When rules are not applied in a consistent manner, the homeowner is left to wonder why they were singled out and are being treated differently.<sup>13</sup> In some circumstances, a homeowner may believe that the reason for the different treatment is due to discrimination.

Setting up clear decision-making procedures may help to mitigate the risk of discrimination claims if they are objective and applied consistently. When the association decides to take action, the decision making process and the decision itself should be well documented. This can help to explain to a homeowner how the decision was reached and can be helpful to substantiate the decision making process in a court of law, should that become necessary. It is also helpful to create a way for homeowners to submit a complaint and a forum in which it is addressed. This will provide a way to resolve the issue before it escalates into legal action, such as a lawsuit.<sup>14</sup>

### Homeowner Requests For An Accommodation

Disability accommodation requests are another area of the law that can be difficult to navigate. Someone is disabled if they have a physical or mental impairment that substantially impacts one or more life activities, has a record of such an impairment, or is regarded as having such an impairment.<sup>15</sup> A request for an accommodation is a request by a disabled homeowner to be allowed to make a change to their home or do something that ordinarily would be considered a violation of the association's governing documents. Under the FHA, the association is required to provide reasonable accommodations at the request of a disabled person such that the person is able to use and enjoy their home and common spaces, unless the association can prove that providing the accommodation would be an undue administrative or financial burden. Reasonable accommodation is defined as a moderate change to the association's policy that would not be considered a fundamental change.<sup>16</sup> A homeowner may also make a request for a reasonable modification, which involves a change to the structure of the existing premises. If such a request is made, the cost of the modification may be borne by the homeowner.

When a disabled person requests an accommodation, if the association does not grant the request outright because it is an undue administrative and financial burden or a fundamental alteration to their program, the association must have further conversations with the homeowner known as the "interactive process" to try to arrive at a solution for addressing the disabled individual's needs. If the disability is apparent, the association should not request additional information, other than questions seeking clarification as to how the request relates to the disability if it is unclear. However, if the disability is not obvious then the association may ask for documentation verifying that the person is disabled, which may include a third party, such as a doctor. However, the association should not request medical records.<sup>17</sup>

Though in most situations an association will have to comply with the FHA, there are situations an association may face in which it must also comply with the Americans With Disabilities Act (ADA) because some of its amenities or common areas are used by the public. At times this means modifications must be made to the space so that it can be accessible. Such modifications are required under the law unless doing so would fundamentally alter the nature of the

facility.<sup>18</sup> Though associations are not generally open to the public, some of the association's amenities may be, such as a pool or restaurant or golf course. If those that are not members of the association are able to pay to access the association's amenities or if the public is allowed access to amenities on occasion, such as for an event on the community's premises, the association may be considered a public space and therefore required to be ADA compliant.<sup>19</sup>

## Conclusion

You don't know what you don't know. Realize that when it comes to running an association the board may be faced with questions, requests or situations for which the board makes a decision that seems fair and in the best interest

of the community. However, there may be more you need to consider before making such decisions. When a request comes in:

- Stop
- Listen
- Understand the law and/or regulations that may apply
- Consider consulting with an attorney
- Follow a plan to address the issue

Spending the money and time to confirm that your decision is appropriate and proper under the law may prevent a lawsuit later. The law can be complex. Don't go it alone!

Endorsed by:



Underwritten by:



Administered by:



## ADDITIONAL RESOURCES

- [Addressing and Preventing Discrimination in HOAs - HOAresources \(caionline.org\)](#)
- [FHEO Home | HUD.gov / U.S. Department of Housing and Urban Development \(HUD\)](#)
- [Federal laws protect HOA members from discriminatory actions. — Homeowners Protection Bureau, LLC \(hopb.co\)](#)
- <https://uscode.house.gov/view.xhtml?path=/prelim@title42/chapter45&edition=prelim>
- <https://www.hud.gov/sites/documents/huddojstatement.pdf>
- <https://ifhcidaho.org/resources/guide-to-reasonable-accommodation-in-housing-under-the-fair-housing-act/>
- <https://www.justice.gov/crt/fair-housing-act-1#disability> Homeowners' Associations (HOA) and Discrimination | Lawyers.com
- [https://www.wilmingtonbiz.com/insights/mike\\_stonestreet/the\\_fha\\_ada\\_and\\_community\\_associations\\_what\\_boards\\_need\\_to\\_know\\_part\\_1/2881](https://www.wilmingtonbiz.com/insights/mike_stonestreet/the_fha_ada_and_community_associations_what_boards_need_to_know_part_1/2881)
- [https://www.wilmingtonbiz.com/insights/mike\\_stonestreet/the\\_fha\\_ada\\_and\\_community\\_associations\\_what\\_boards\\_need\\_to\\_know\\_part\\_2/2890](https://www.wilmingtonbiz.com/insights/mike_stonestreet/the_fha_ada_and_community_associations_what_boards_need_to_know_part_2/2890)

<sup>1</sup> Mike Stonestreet, The FHA, ADA, and Community Associations: What Boards need to Know (Part 1), [https://www.wilmingtonbiz.com/insights/mike\\_stonestreet/the\\_fha\\_ada\\_and\\_community\\_associations\\_what\\_boards\\_need\\_to\\_know\\_part\\_1/2881](https://www.wilmingtonbiz.com/insights/mike_stonestreet/the_fha_ada_and_community_associations_what_boards_need_to_know_part_1/2881)

<sup>2</sup> U.S. Department of Housing and Urban Development, Reasonable Accommodations And Modifications, Reasonable Accommodations and Modifications | HUD.gov / U.S. Department of Housing and Urban Development (HUD)

<sup>3</sup> State Fair Housing Protections, The Policy Surveillance Program, <https://lawatlas.org/datasets/state-fair-housing-protections-1498143743>

<sup>4</sup> Hill v. River Run Homeowners Ass'n, 438 F. Supp. 3d 1155, 2020 U.S. Dist. LEXIS 22023, 2020 WL 603473

<sup>5</sup> Avoiding Condo and Co-Op Discrimination Claims, Tane Waterman & Wurtzel, P.C., November 16, 2020, <https://www.twny.com/blog/2020/11/avoiding-condo-and-co-op-discrimination-claims/>

<sup>6</sup> When HOAs and COAs are Liable for Neighbor-to-Neighbor Harassment, Condominium Associates blog, <https://condominiumassociates.com/blog/2020/3/5/when-hoas-and-coas-are-liable-for-neighbor-to-neighbor-harassment>

<sup>7</sup> Tane Waterman & Wurtzel, P.C., supra note 5.

<sup>8</sup> HOA Religious Discrimination: What the BOD And Homeowners Should Know, HOA Management, <https://www.hoamanagement.com/hoa-religious-discrimination/>

<sup>9</sup> Tien Tao Association Inc. v. Kingsbridge Park Community Association Inc., (1997) Court of Appeals of Texas, Houston (1st Dist.), No. 01-96-00395-CV, Decided: September 25, 1997, FindLaw, <https://caselaw.findlaw.com/court/tx-court-of-appeals/1215002.html>

<sup>10</sup> Your Board's Responsibility Regarding Housing Discrimination, KW Property Management and Consulting, <https://kwpmc.com/property-management-blog/your-boards-responsibility-regarding-housing-discrimination/>

<sup>11</sup> <https://www.hoaleader.com/public/Ah-That-Timeless-Question-This-HOA-Conducting-Selective-Enforcement.cfm>

<sup>12</sup> HOA Selective Enforcement: Playing It Fair, Cedar Management Group, <https://www.cedarmanagementgroup.com/hoa-selective-enforcement/>

<sup>13</sup> <https://www.hoaleader.com/public/Ah-That-Timeless-Question-This-HOA-Conducting-Selective-Enforcement.cfm>

<sup>14</sup> Cedar Management Group, supra note 12.

<sup>15</sup> Title 42 U.S.C. § 12102

<sup>16</sup> U.S. Department of Housing and Urban Development, supra note 2.

<sup>17</sup> U.S. Department of Housing and Urban Development, FHEO Notice: FHEO-2020-02 (January 28, 2020), <https://www.hud.gov/sites/dfiles/PA/documents/HUDAsstAnimalNC1-28-2020.pdf>

<sup>18</sup> U.S. Department of Housing and Urban Development, supra note 2.

<sup>19</sup> Hans C. Wahl, Community Associations And The Americans With Disabilities Act (ADA), <https://www.cobbgonzalez.com/community-associations-and-the-americans-with-disabilities-act-ada/#:~:text=A%20condominium%20association%20that%20has,not%20apply%20to%20that%20association.>

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