



Mulcahy Memo – March, 2019

Published for clients and friends of the Mulcahy Law Firm, P.C.

by Beth Mulcahy, Esq.



Dear Clients and Friends,

March is one of my favorite months of the year! Arizona weather is perfect outside. Shamrock shakes, green beer and corned beef sandwiches are readily available. And, everyone celebrates St. Patrick's Day by wearing green and being festive whether they are Irish or not. "Happy St. Patrick's Day" ("Lá fhéile Pádraig sona dhuit!") a little bit early to all our clients and friends!

Our firm has four free educational classes scheduled for board members and managers in Scottsdale, Glendale, Peoria and Surprise on a variety of community association law topics in the next 30 days! For registration information or to view a full listing of our classes, please click [here](#).

The Arizona Legislature is currently in session and we need to keep close tabs on bills pertaining to community association law. While the legislature is in session, our firm prepares a weekly summary of these proposed bills and posts them to our website. For a listing and summary of the pending bills, please click [here](#).

Federal Laws for Community Associations

Does your board know what to do if a disabled owner requests a "reasonable modification" to your common areas or if a group home wants to move into your neighborhood? This month's Mulcahy Memo discusses everything need to know about the Fair Housing Act for Community Associations. To read the complete memo, please scroll down to the end of this article.

Board Member Boot Camps

A reminder! Our firm is now offering board member boot camps. Many of our clients are taking advantage of this personal education time with our firm to answer their questions and help their boards be more effective. Each program is offered at hourly rate and covers a variety of topics, including board of director duties, compliance with Arizona and federal laws, potential pitfalls and Q&A. The boot camp can be held at a location chosen by the board or at our office. We can tailor the session to fit your board's desires as we understand that each board is unique and has different needs. For more information, please contact Beth Mulcahy, at 602.241.1093 or bmulcahy@mulcahylawfirm.com.

Free CCR review

Did you know that Mulcahy Law Firm, P.C. offers a complimentary 15-minute review of an association's documents to determine the amendment procedure/requirements for each document and gives a brief summary of what should be amended and projected costs to amend the documents? If your board is interested in this complimentary document review, please contact Beth Mulcahy, Esq. at 602.241.1093 or bmulcahy@mulcahylawfirm.com.

Finally, don't forget to "like" and follow Mulcahy Law Firm, P.C. on [Facebook](#) so you don't miss any of our important updates on Arizona community association law.



Sincerely,
Beth Mulcahy, Founder and Senior Partner
Mulcahy Law Firm, P.C.



Federal Laws for Community Associations *By: Beth Mulcahy, Esq.*

In addition to state laws, a community association must also comply with federal laws pertaining to community associations. Set forth below is a summary of important federal laws for community associations.

Americans With Disabilities Act (42 U.S.C. 12101 ET. SEQ.) ("ADA")

The ADA is a civil rights law that prohibits discrimination in places of public accommodation based on disability. Typically, community associations are governed by federal and state fair housing laws and not the ADA unless the association is a place of public accommodation (e.g. such as a club house or restaurant which grants public access).

Federal Fair Housing Act (42 U.S.C. 3601 ET. SEQ.) ("FHA")

The Civil Rights Act of 1968 along with additional revisions and the Fair Housing Amendments Act of 1988 collectively are known as the Fair Housing Act. The Federal Fair Housing Act (FHA) prohibits discrimination based upon a person's race or color, religion, sex (including sexual harassment), national origin, familial status (families with children), or disability (includes persons with mental and physical impairments that substantially limit one or more major life activities - blindness, hearing impairment, mobility impairment, HIV, mental retardation, alcoholism, drug addiction, chronic fatigue, learning disability, head injury, mental illness and group homes).

Many aspects of the fair housing law apply to community associations; therefore, boards should be aware of the association's requirement to follow the law.

Disability: An individual with a disability is defined as a person who has a physical or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such impairment, or a person who is perceived by others as having such impairment.

Discrimination is the treatment of an individual based on their membership in a certain group or category. It involves excluding or restricting members of one group from opportunities that are available to other

groups. Discrimination can occur when the community association fails to allow an "accommodation" to the community governing documents or "reasonable modification" to the community's common elements.

"Reasonable Accommodation" is an alteration to or variance of the association's covenants, rules, regulations, policies, and services to provide the disabled equal use and enjoyment of his/her home. For example, a community association that has a no-pet policy may be limited in its enforcement if the Fair Housing Act would require the association to grant a "reasonable accommodation" request for a disabled individual with the need of an assistance animal, despite "no pet" restrictions. (See assistance animals-following page).

"Reasonable Modification" is a modification/alteration to the building, common elements or limited common elements to afford the disabled equal use and enjoyment of his/her home. The fair housing laws require the association to allow the modification to the common elements so the disabled individual can use the facility. For example, a person confined to a wheelchair may request that a ramp be installed in the association's gym so he/she can use it for exercise.

Who pays? An association bears the cost of "accommodations," unless it would impose an undue financial or administrative burden on the association. The cost of "modifications" to residential premises occupied by a disabled resident must be paid by the disabled resident. Associations should proceed with caution regarding requests for accommodations and/or modifications to common areas and seek the advice of the association's attorney.

Assistance Animals

Even if a community association has a no-pet policy, an occupant may be permitted to keep an animal as a "reasonable accommodation." To be protected by the Fair Housing Act with regard to "assistance animals", the following factors must be met: 1. the person must have a disability; 2. the assistance animal must serve a function related to the person's disability; and 3. the request to have the assistance animal must be reasonable. Disabled residents can request an accommodation for most types of animals for non-specific illnesses with the animals having ill-defined uses or unknown training. Typical requests include: depression, anxiety or emotional support. To comply, the association may: 1. require the resident to provide proof of the claimed handicap/illness from a physician; however, the physician will not be required to disclose the details of the disability or provide his/her medical history; 2. require a physician's statement that the animal is necessary for the resident's handicap/illness; 3. require the resident to follow set policies for clean-up of animal waste, leash requirements, etc. It is important to note that the Fair Housing allowances for "assistance animals" is separate and distinct from the ADA's requirements for a more highly trained, specific "service animal." The FHA does not require an assistance animal to have any specific training.

Group Homes

The Federal Fair Housing Act Amendments of 1988 expanded protections for individuals with all types of disabilities, thus banning the prohibition of "group homes" (a group of unrelated disabled individuals living together in a dwelling) in community associations. The association should request documentation from the "group home" operator that verifies the existence of the disability-related need for the variance. Not all "group homes" are protected under the Fair Housing laws. It is important to separate the

illegitimate group homes from the legitimate: 1. current addicts; 2. current substance abusers; 3. current alcoholics; 4. criminals; 5. those with bad credit; and 6. sex offenders are *not* considered having a disability under the Fair Housing laws. A legitimate "group home" that serves the disabled *cannot* be prohibited. The association has a right to enforce the same rules and restrictions asked of all residents such as: 1. maintenance of the buildings; 2. maintenance of landscaping; 3. pre-approval of architectural modifications; 4. adherence to parking restrictions; and 5. adherence to noise or other nuisance policies, thus, treating a "group home" like the other residents in the association.

Housing for Older Persons Act of 1995 (42 U.S.C. 3607) (HOPA)

This amendment is an exemption to the Fair Housing Act allowing communities to restrict based on age "55+" or "age-restricted," provided certain requirements are followed. The amendment requires that a "55+" community must: 1. maintain at least 80 percent (not less restrictive, but can be 100 percent restrictive) of the occupied units with at least one person who is 55 years of age or older living in that unit; 2. publicize and adhere to policies that demonstrate intent to be housing for older persons; and 3. comply with the rules for verification of occupancy in accordance with the Act's requirements. Associations must survey residents for age verification every two years. Failure to survey could jeopardize the association's "55+" status. An age-restricted community may allow people under the age minimum to visit and stay on a limited basis and may have covenants that allow underage persons to reside in the community temporarily, providing the occupancy remains within the restrictive minimum of 80 percent. It is important to note that the "55+" occupancy requirement is related to "occupancy" and not "ownership" of the unit.

Community Association Liability for Harassment

In 2016, Fair Housing laws were amended to document a community association's potential liability for harassment on the basis of race, color, religion, national origin, sex, familial status and disability (collectively "Protected Classes") in three instances: (1) quid pro quo harassment; (2) hostile environment harassment; and (3) third party harassment. Quid pro quo harassment and hostile environment harassment are forms of direct harassment by a community association board member, officer, employee, manager, etc. The portions of the amendments regarding quid pro quo and hostile environment harassment essentially formalize what was already likely actionable conduct.

The more concerning portion of the amendment relates to third party harassment, which requires the board to proactively investigate and take action to prohibit harassment by a third party. Pursuant to 24 CFR Section 100.7(iii), a community association can be held "directly liable for... [f]ailing to take prompt action to correct and end a discriminatory housing practice by a third-party, where the person knew or should have known of the discriminatory conduct and had the power to correct it. The power to take prompt action to correct and end a discriminatory housing practice by a third-party depends upon the extent of the person's control or any other legal responsibility the person may have with respect to the conduct of such third-party."

The impact of this law on community associations is that many issues, which may have previously been considered "neighbor to neighbor" disputes, will now require proactive action by the board of directors if

(a) discrimination/harassment is based on a Protected Class, as defined above; (b) the board knew or should have known of the conduct; and (c) the board has the power to correct the conduct. Whether the discrimination/harassment is based on a Protected Class will depend upon the factual circumstances surrounding the matter. Whether the board "knew" or the conduct will typically depend upon whether it is reported to or observed by the board (it is less clear under what circumstances a board "should have known" of the conduct). Whether the board has the power to correct the conduct will typically depend upon whether the conduct is, or could be interpreted as, a violation of the Governing Documents. Since the board has the authority to enforce the Governing Documents, if the conduct violates the Governing Documents, then the board will likely be considered to have the power to correct the conduct.

To access our very popular cheat sheet on this topic, please follow the link below:

[FEDERAL LAWS FOR COMMUNITY ASSOCIATIONS](#)

If you have questions and need answers on this topic, please contact Beth Mulcahy, Esq. at 602.241.1093 or bmulcahy@mulcahylawfirm.com.