MULCAHY
Community Association
Cheat Sheet
BRINGING ANSWERS TO COMMUNITY ASSOCIATIONS

Federal Laws for Community Associations

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 requirements 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 on the following page).

This publication discusses significant points of law as they apply to community associations and is not intended to offer specific legal advice or responses to individual circumstances or problems.
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"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 the "modification" 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-emotional support. To comply with the Fair Housing Act, the association can require the resident to 1) provide proof of the claimed disability from a physician (unless the disability is obvious, apparent or already known to the association), 2) require a physician's statement that the animal is necessary for the resident's disability (unless the disability and necessity of the animal are obvious, apparent or already known to the association), and 3) require the resident to follow policies for the cleanup 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 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 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 residence 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% (not less restrictive, but can be 100% 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%. 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.