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But Our By-Laws Say…Homeowners' Associations And the Rise in Disability Claims

I. Living together in perfect harmony….

A typical Homeowners' Association (HOA) receives many requests and complaints. A HOA's Board of Directors routinely faces the dilemma as to how to address the many concerns raised by the owners, while complying with its by-laws and the law.

HOAs face many problems when addressing disabilities and requests for accommodations, and the requests are more unique than ever when it comes to service or therapy animals. This has resulted in a rise in claims and protracted and expensive litigation. Homeowners have sought to keep kangaroos, potbellied pigs, parrots and other animals as service or therapy animals. But, the by-laws for many HOAs do not permit pets or allow only certain types or sized pets. The other homeowners do not want to live with certain animals, such as a kangaroo. And, the Board may have concerns about liability that could arise from any harm that an animal may cause.

Homeowners may also request structural changes. But, once again, the homeowners may have strong objections to any changes on the premises. The requested changes may also be inconsistent with the land use restrictions.

The Board cannot, however, outright deny requests for a reasonable accommodation to keep a companion or therapy animal or for a structural change without addressing certain considerations. The Fair Housing Act and the American with Disabilities Act must be considered and so, too, must local and state laws.

II. Homeowners' Associations

Most people mistakenly believe that once they purchase a home that is part of a homeowners' association, it is theirs to do with as they please. After all, a man's home is his castle. Not so fast….

When a condominium, townhouse or other type of property is purchased in a planned development or a gated community, you are obligated to join a HOA. Some memberships are automatic upon purchasing of the property.

As part of the membership in a HOA, a member must pay monthly or annual HOA fees. Such fees are used for maintaining the common areas, including any common area buildings. A HOA is basically a legal entity created for the maintenance of the common areas.

A HOA also has the authority to enforce the restrictions that come with the deed. These restrictions vary greatly. They can range from what color your front door must be to whether or not any pets are allowed.

The HOA has governing documents which consist of conditions and restrictions, by-laws, articles of incorporation and rules and regulations which are adopted by the association's Board of Directors who are elected by the members of the HOA.

While the HOA can enforce its rules and regulations, it cannot do so in a discriminatory manner. HOAs must comply with the Americans with Disability Act and the Fair Housing Act. HOAs must also comply with their local and state anti-discrimination laws.

III. Americans with Disabilities Act (ADA) 42 USC § 12101, et seq.

Any policies or rules that are promulgated and enforced by a HOA must comply with the ADA. The HOA must comply with the laws affecting disabled persons or face actions by private individuals or the government.

The ADA is a federal civil rights law that prohibits discrimination against disabled persons regarding employment, public accommodations and transportation. *Bd. of Tr. Of Univ. of Ala. v. Garrett,* 531 U.S. 356, 372 (2001). The ADA's purpose is to ensure any member of the public that is disabled is provided with full and equal access and enjoyment in the work place, public areas and transportation. The ADA's public accommodations provision (Title III) does not apply to homeowner associations unless its facilities are open to the public. Public accommodations are defined by the ADA as facilities, "operated by a private entity, whose operations affect commerce. . . ." As such, the owners and management of places of public accommodations are required to make reasonable accommodations. Such accommodations may include the removal of physical barriers and the installation of ramps.

At first blush, the reaction may be that the ADA does not apply to HOAs because it applies to places of public accommodation and not private homes. However, a HOA can become subject to the ADA when it opens up its facilities to the public.

Some examples wherein HOAs are subject to ADA requirements occur when:

(1) a HOA allows members of the public to use the pool or other recreational facility by buying passes;

(2) when a HOA allows schools or clubs to use HOA facilities on a regular basis or leases the premises to them, and

(3) when a HOA maintains a rental office on the property and that office receives regular visits from the general public.

The issue does not only arise with respect to recreational areas such as a pool or tennis court which are often open to the public. A HOA may have a restaurant, beauty salon or ball room on its premises that is open to the general public to use. If a HOA's ball room, for example, is not open to the public, but instead, is open only to association members, then the ball room is probably not a place of public accommodation. The ball room does not affect commerce. If the HOA leases the ballroom to the public, then the ballroom will likely be found to be a place of public accommodation.

As another example, "an auditorium, convention center, lecture hall, or other place of public gathering" is considered a place of public accommodation even though it is a private entity. 42 USC § 12181(7)(D).[1] Most parking at a condominium is private parking for co-owners of the condominium; thus the ADA would not apply. The case of *Phillips v Perkiomen Crossing Homeowners' Association*, 12 ADD 713; 4 AD Cas 1759 (1995, ED Pa), held that a private parking lot for residents of the housing development is not a commercial facility and the Homeowners' Association is not a private entity that qualifies as a public accommodation under the ADA. Similarly, the District Court for the Northern District of California in *Independent Housing Services of San Francisco v. Fillmore Center Associates*, 840 F. Supp. N.D. Cal. 1328 (1993), specifically held that Title III of the ADA does not apply to condominiums because residential facilities like condominiums and apartments, do not constitute public accommodations. Notably, if public parking is provided, a HOA would be required to comply with the ADA.

In *Carolyn v. Orange Park Community Ass'n.* (2009) 177 Cal.App.4th 1090, a portion of a county-wide bridle trail was both open to the public and located on association common area. When a disabled person sought access to the trails by means of a reasonable accommodation under the ADA, the court rejected the notion that the trail system was "public." In so doing, it focused on several factors:

> "We agree with the premise that recreational common areas within common interest developments can be classified as public accommodations in appropriate circumstances. But we think it clear OPCA's trails would not be a public accommodation if OPCA actively excluded the general public from using the trails. Moreover, we do not think OPCA's private trails transform into public

[1] 42 USC § 12181(7)(D) provides a number of specific examples of public accommodations.

accommodations merely because OPCA does not actively exclude members of the public from using the trails. …

These areas are where HOAs often get themselves in trouble. For fiscal reasons a decision is made to lease the facility or allow the public access. However, now that facility may be considered a place of public accommodation and thus subject to the ADA.

A HOA must therefore take care not to perform acts which would create a place of public accommodation. Besides not opening up portions of the facility in exchange for money, the HOA may place signs on the premises clearly indicating that the use of the facilities is for its members only.

Otherwise, if a HOA has on its premises a place of public accommodation, it is required pursuant to the ADA to take certain actions with respect to providing a reasonable accommodation and this may include the removal of architectural barriers that may exist. The HOA would be in violation of the ADA if an "architectural barrier" is not removed and the removal of the barrier is readily achievable. 42 U.S.C.A. § 12182(b)(2)(A)(iv). This provision at least allows the HOA to argue that a barrier must remain if the costs of removal is overly burdensome.

For example, if the HOA has a beauty salon on its premises and no wheelchair ramp, it is in essence denying access to the salon by the disabled public. The HOA would have to argue that the costs of building the ramp are burdensome—an argument which in the end may actually be more costly than building the ramp. The HOA must thus analyze whether the building of the ramp or removal of another type of barrier is "readily achievable". The HOA may also consider whether the removal of the barrier would provide little benefit to the disabled person.

Whenever the HOA opens up its facility to the public and that event affects commerce, the HOA must consider the ADA. Will the disabled public have access to this event? Will more parking be necessary—golf carts or ramps? To ignore the ADA is to proceed with peril.

The HOA should also carefully review its policies and procedures. Reasonable modifications must also be made to policies if to do so would provide a reasonable accommodation. 42 U.S.C.A. § 12182(b)(2)(A)(ii).

IV. Federal Fair Housing Act (FFHA), 42 USC §§ 3601 – 3619

Congress enacted the FFHA in 1968. The FFHA makes it unlawful for housing providers to discriminate based on race, color, religion, sex and national origin. The FFHA was amended in 1988 to also prohibit discrimination based on familial status and disability. The purpose of the FFHA is to provide everyone with the fundamental right to fair housing regardless of race, color, religion, sex, national origin or disability. States have similar fair housing anti-discrimination laws.

The FFHA is similar to the ADA; however, the FFHA applies directly to housing facilities, including HOAs. Under the FFHA, a HOA may not legally refuse to make reasonable accommodations in its rules or policies when such accommodations may be necessary for a disabled owner to fully enjoy and use her unit. An example would include when a disabled owner requires the assistance of a service animal; a HOA would be obligated to grant a waiver from its "no pets" rule. The HOAs refusal to make such an accommodation (one that is reasonable and necessary to afford a disabled owner the full enjoyment and use of her unit) is deemed to be discrimination under the FFHA. The FFHA also requires HOAs to permit a disabled owner to make, at such owner's expense, reasonable modifications to the owner's unit and HOA common areas.

The FHA defines discrimination as including "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [a disabled] person equal opportunity to use and enjoy a dwelling." 42 U.S.C. §3604(f)(3) (B). The FFHA recognizes discriminatory treatment and disparate impact. Discriminatory treatment is more readily apparent and it is when an individual is expressly treated differently than others because of his/her protected class. Disparate impact occurs when a facially neutral rule or policy has the effect of discriminating against a protected group. The FFHA has been applied by the Courts to individuals, corporations, homeowners' associations and condominium associations and others who are involved in the promulgation and enforcement of policies.

Discrimination claims against community associations under the FHA are most often made under the following provisions:

> 42 U.S.C. § 3604(f)(3)(A) – which requires a community association to allow reasonable modifications to common elements, common area, units and/or lots to accommodate a disabled person;
>
> 42 U.S.C. § 3604(f)(3)(B) – which requires a community association to make a reasonable accommodation in its rules, policies, practices, or services to allow a disabled person equal opportunity to use and enjoy their home; and
>
> 42 U.S.C. § 3604(f)(2) – which prohibits a community association from discriminating against any of the protected classes in the provision of services or the use of its facilities.

The FFHA is enforced by the United States Department of Housing (HUD). In 2014, there were 4,606 disability discrimination complaints filed with HUD. The disability discrimination complaints comprised 54% of the total number of claims filed with HUD.

In a private action, the prevailing party in an action for violations of the FFHA is entitled to attorney's fees. 42 U.S.C. § 3613(c)(2). However, defendants and plaintiffs are not treated the same when it comes to attorney's fees for the prevailing party. Under the FFHA, only the prevailing plaintiff will be entitled to attorney's fees. *Bryant Woods*

Inn, Inc. v. Howard County, Md., 124 F.3d 597, 606 (4th Cir. 1997) (quoting *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412, 421 (1978)). Civil penalties may include fines up to $10,000 per violation. Punitive damages are also available.

As stated above, the FFHA (like the ADA) protects individuals with a disability from discrimination when it comes to housing. A HOA may not refuse to make a reasonable accommodation in its rules and policies when such an accommodation may be necessary for the disabled owner to fully enjoy the property or even have access to same.

Under the FFHA, the term "Disability" is termed as "handicapped" and is defined as:

1. a physical or mental impairment which substantially limits on or more major life activities;

2. a record of such 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 conditions 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. Some disabilities may be apparent. Others are not and that may be particularly true when the person is "regarded as being disabled." However, for the most part, the HOA may not inquire into the nature and extent of the disability. But, if the HOA receives a request for a reasonable accommodation or reasonable modification, and if the disability is not obvious, an association may request reliable disability-related information that is necessary to verify that the person meets the FFHA's definition of disability; that describes the needed accommodation, and shows the relationship between the person's disability and the need for the requested accommodation.

It thus follows that there is a relationship between the accommodation sought and the disability for the accommodation to be deemed necessary. The accommodation, of course, would require the HOA to make an exception, if not a change in its policies or rules so that the disabled person may fully enjoy the property. While most accommodations may be made without any costs, if there are any expenses they are to be borne by the association and not the individual.

A HOA may deny a request for an accommodation:

- 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; or
- If providing the accommodation would impose an undue financial and administrative burden on the association or it would fundamentally alter the nature of the association's operations.

HOAs are not without guidance in this area. The United States Department of Justice (DOJ) and HUD issued a joint statement which provides guidance on common reasonable accommodations:
http://www.hud.gov/offices/fheo/library/huddojstatement.pdf.

Commonly requested accommodations include parking spaces with closer proximity to the premises and modifications of the premises to expand entrances and add ramps. In *Gittleman v Woodhaven Condominium Association, Inc.*, 972 F. Supp. 894 (1997), an Association was required to accommodate the handicapped co-owner even though the Master Deed technically precluded the Association from granting the parking space. The Court said that the Association was "duty bound to (1) avoid enforcing provisions of the Master Deed that have discriminatory effects; and (2) regulate use of the common elements so as to comply with the requirements of the FHAA." *Id.* at 899. *Schroeder v De Bertolo*, 879 F. Supp. 173 (D.P.R. 1995) (discrimination in housing practices by a condominium under the FFHA where a disabled co-owner was denied use of the common areas.)

But, the area where HOAs face the most problems, and perhaps litigation, concerns service and therapy animals.

V. Animal Accommodations

Many HOAs have pet restrictions. HOAs often have rules that permit only certain pets of a certain type or size will be allowed. Some HOAs have a no pets rules. Undoubtedly, a request is made for an accommodation to permit a therapy or service animal to live on the premises. A HOA that does not amend its rules to allow for the animal may be found to be in violation of the FFHA and also the state equivalent laws. *Bronk v. Ineichen,* 54 F.3d 425, 429 (7th Cir. 1995).

The clear cases are easy. A HOA should not deny a blind person the right to have his or her seeing-eye dog. The disability is apparent and the nexus between the disability and the requested accommodation are also readily apparent. The problematic situations are where these two elements are not so readily apparent. Most often, this occurs when the request is for an emotional support or companion animal where the disability is not apparent (such as an insulin-dependent diabetic person).

At this point, it must be pointed out that there is a distinction between a service animal and a companion or emotional support animal. A service animal (a dog or

miniature pony) is trained to perform tasks that their disabled owners would otherwise have difficulty completing on their own. The owner/handler has a disability pursuant to federal law and the ADA. See, CFR, Section 36.202, *Nondiscrimination in Places of Public Accommodation*. Without the service animal, the person cannot perform certain tasks. The person needs the animal to function and in that regard, the animal must be permitted anywhere its handler goes. Some examples of a service animal as identified on the ADA's website include a person with diabetes who has a dog trained to alert her when her blood sugar reaches high or low levels. A person with depression may have a dog trained to remind him to take his medication or a person with epilepsy may have a dog trained to detect the onset of a seizure.

Emotional support, therapy, comfort or companion animals are not the same as service animals. These types of animals are not trained and licensed to perform a specific task and currently do not qualify as service animals under the ADA. (http://portal.hud.gov/hudportal/documents/huddoc?id=servanimals_ntcfheo2013-01 .pdf).

Instead, for a fee, a license can be procured that the animal qualifies as an emotional support animal. This can be easily done in a few minutes on the internet. See, http://www.esaregistration.org and http://esadoctors.com. Some local or State laws may allow people to take emotional support animals into public places. Therefore, a HOA must consider a request for a companion or emotional support animal under the FFHA and other state equivalents.

Emotional support or companion animals are often prescribed by doctors. Emotional support animals have been prescribed to provide therapeutic benefits to an individual designated with a mental, psychiatric or emotional disability. Such disabilities may include depression, bipolar disorder, panic attacks, arthritis or anxiety, all of which may not be apparent to the HOA.

This is where it gets complicated for a HOA. Emotional support animals can include cats, kangaroos, snakes, birds, pigs, and spiders. As long as the emotional support animal affects the disability of the owner and the owner has a verifiable disability, the accommodation should be granted and the restriction amended.

Accordingly, the individual requesting the accommodation must establish his or her disability and that the companion animal is necessary and reasonable to afford the individual with the disability equal opportunity to use and enjoy the dwelling. 42 USC Sec. 3604 (f)(3)(B**).** *Hawn v. Shoreline Towers Phase I Condominium Association, Inc*., 2009 WL 691378 (N.D. Fla. 2009), aff'd, 347 Fed.Appx. 464, 2009 WL 3004036 (2009) (Board did not discriminate when it denied request for companion animal where owner did not provide documentation requested to establish disability). The "reasonableness" requirement is designed to prevent an undue hardship on the HOA by causing excessive financial burdens or fundamentally altering the nature of the condominium project.

The association is also not without recourse if the animal is disruptive. The emotional service animal may not bother the other tenants of be disruptive. If it is, the landlord may deny the accommodation or seek eviction. *See, e.g.. Woodside Village v. Hertzmark*, 1993 WL 268293 (Conn. Super. Ct. 1993).

As with everything, there will be abuse. Florida thus took action recently and passed a law making it a misdemeanor to try and pass off a pet as a service dog. Penalties may include jail time and a fine. Florida Statute, 413.08, *et. seq*.

VI. Best Practices

Anyone who has dealt with HOAs either as an owner or attorney knows that it is difficult to have everyone "living in perfect harmony". The owners bought the property for the restrictions which the HOA has. Some owners do not welcome animals. Others do not want changes and want the residences and surrounding structures to remain as is.

But, the reality is that requests will be made for accommodations. Failure to consider each request on a case by case basis will result in expensive and perhaps protracted litigation. For example, in Tennessee, a HOA recently agreed to settle a disability lawsuit that was filed in 2012 for $156,000. The HOA refused to permit the building of a therapeutic sunroom for a child with Down Syndrome. After four years of litigation, a settlement was finally reached and as a consequence, the HOA dues will no doubt go up. In Davie Florida, after a 30 page scathing opinion by a federal judge, a condominium association agreed to settle a two year litigation for $300,000 when it refused to allow a woman with Muscular Sclerosis the right to keep her golden retriever who helped her perform certain tasks because the dog violated the associations' pet weight restrictions.

Therefore, upon receipt of a request for an accommodation, the HOA should embark on an analysis as to whether the request is reasonable. If the disability is not readily apparent, the HOA should request written documentation regarding the disability. The HOA should then analyze whether the requested accommodation is related to the claimed disability and the reasonableness of the requests.

The analysis as to whether a requested accommodation should have been made requires a fact specific analysis and determinations are made on a case by case basis. *United States v. California Mobile Home Park Mgmt. Co*., 29 F.3d 1413, 1418 (9th Cir. 1994). The HOA should treat the situation the same way. The HOA cannot simply refuse to honor a request for an accommodation without performing an analysis. To do so would be risky.

HOAs should be encouraged to read two summaries of frequently asked questions about the FHA which can be found on the internet: the "Joint Statement of HUD and DOJ on Reasonable Accommodations under the FHA" http://www.justice.gov/crt/about/hce/joint_statement_ra.pdf and the "Joint Statement of

HUD and DOJ on Reasonable Modifications under the FHA" http://www.justice.gov/crt/about/hce/documents/reasonable_modifications_mar08.pdf.

The HOA should also not selectively enforce covenants and rules. Rules should be applied consistently with exceptions made where necessary to provide a reasonable accommodation. Along those lines, inappropriate comments and justifications should NOT be made at Board meetings.

HOAs should also keep themselves well versed on local and federal laws. Many times, local laws expand who qualifies as being in a protected class. Also state housing laws may be more expansive.

The HOA can ill afford to go at this without proper guidance. The Board is often not equipped to keep up with the changing laws and the advice of counsel is always recommended.