

# JULY 2009

## Fair Housing Laws – Are You In Compliance?

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Whether meritorious or not, community associations are easy targets for fair housing claims. While associations have the authority to impose certain rules on their members within the scope of their governing documents, at times enforcement actions and application of certain rules must be modified to comply with fair housing laws. To that end, many of our clients are being asked to make accommodations for members of “protected classes” or alter enforcement protocols in response to fair housing laws. This memorandum will provide you with general information regarding the Federal Fair Housing Act and identify areas of potential liability for associations under the Act.<sup>1</sup>

### **What Housing is Covered?**

Most residential housing communities are governed by the FHA. Exempt entities generally are limited to owner occupied buildings with no more than four units, housing that is sold or rented without the use of a broker/realtor and housing organizations and private clubs that limit occupancy to members. In most cases, community associations are not exempt from compliance with the FHA.

### **What is Prohibited?**

A housing provider, including an association may not take the following actions based on handicap, race, color, national origin, religion, sex, and familial status/age:

- Deny housing
- Deny reasonable accommodations or modifications
- Set different terms, conditions or privileges for sale or rental of a dwelling
- Designate different housing services or facilities
- Persuade protected classes of owners to sell (“Blockbusting”)

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<sup>1</sup> Please note that the Commonwealth of Virginia, as well as D.C. and Maryland and many localities in Virginia and Maryland have adopted local fair housing law that may be broader than the Federal Act.

- Threaten, coerce, intimidate or interfere with anyone exercising a housing right or assist others who exercise that right
- Advertise or make any statement that indicates a limitation based on handicap, race, color, national origin, religion, sex, and familial status/age.

### **Handicaps**

A handicap under the Act is defined as the impairment of an essential life function, which includes a variety of disabilities such as: hearing, sight, mobility impairments, mental illness, mental retardation, AIDS, as well as chronic alcoholism. The use of illegal drugs is not considered a handicap.

If a member identifies that they qualify as having one of these handicaps, they may not be refused an accommodation or a request to make reasonable modification to their dwelling or common use areas so long as such modification or accommodation is necessary for the resident's use of the housing. While reasonable accommodations must be made at the association's own expense, the association may require a resident to pay the expense of reasonable modifications (structural alterations necessary to assist the handicap); however, reasonable "de minimis" costs of any modification may be borne by the Association.

**Example:** A building with a "no pets" policy must allow a visually impaired person to keep a guide dog.

**Example:** A complex that offers unassigned parking must honor the request of a mobility impaired person to reserve a space for easier access to their dwelling.

The association can require information from a treating physician stating whether the resident is disabled as defined under the Act and that the requested accommodation is needed in order to substantiate that the resident has a disability.

If the request would create such a financial burden such as requiring a major structural change, the association may determine this request as being unreasonable. That being said, the association may ask the resident to pay for a modification and to restore the premises back to its original condition if the resident chooses to move out of the community. If the resident agrees to restore the premises, the association may not prohibit the modification.

### **Disparate Treatment/Impact**

Issues regarding disparate treatment or impact within the community association context most often come into play when dealing with Boards and restrictions placed on the use of swimming pools. Every Board ought to be wary of placing restrictions of pool use based on age. Most courts have stricken such rules stating that swimming capabilities have no correlation with age. Unless an association is going to test everyone, it cannot restrict testing to a certain age group. Additionally while most courts do agree that adult supervision is viewed as reasonable for the safety of children under 12 years old, courts have generally found that required adult supervision for children 13 years or older is unreasonable and a violation of the FHA.

### **Covenants**

Note that while neither Virginia nor the District of Columbia have provisions in their Homeowners or Condominium Acts related to fair housing laws (other than prohibitions on restraints on alienation that violate fair housing laws), Section 11B-113.3 of the Maryland Homeowners Association Act does have a provision which allows for the deletion of ownership restrictions which are included in an association's governing documents and are based on race, religion or national origin. Such restrictions however, may only be deleted if at least 85% of the lot owners in the development agree to the deletion. That being said, even if such approval for deletion is not received, the association may not enforce the restrictive provision if doing so would violate the Act.

### **Conclusion**

While even the most cautious community association may be exposed to a fair housing claim, the recognition of fair housing issues will go a long way towards minimizing the association's liability exposure. If your association has become subject to a Fair Housing claim or would like further guidance on the matter, please do not hesitate to contact one of our community association lawyers directly.