

FAIR HOUSING COMPLIANCE

REASONABLY ACCOMMODATING DISABLED HOMEOWNERS AND AVOIDING RETALIATION

by Laura Alaniz, Esq. and Justin Markel, Esq.

EDITOR'S NOTE: This is part one of a two-part series. In this issue, the authors give an insightful overview of the obligations of the Fair Housing Act. In the May 2013 issue, they will discuss the considerations necessary in making reasonable accommodations and then, should you receive a fair housing complaint, how to respond.

Today, community associations face several challenges in providing services to all of its members. One of the most difficult areas is accommodating the needs of disabled members. The Fair Housing Act requires associations to make “reasonable accommodations” for members with disabilities. These laws aim to make it possible for a disabled person to live within the community by granting and maintaining an exception to the rules of the association. Community associations may find themselves in the middle of a fair housing discrimination investigation if they do not handle these accommodation requests properly. This part of the article will discuss community associations’ obligation to provide disabled members reasonable accommodations.



FAIR HOUSING OBLIGATIONS GENERALLY

To properly understand how to make an accommodation, it is important to review the purpose of the Fair Housing Act. The Fair Housing Amendments Act of 1988¹ (the “FHA”), prohibits discrimination in housing on the basis of race, color, religion, sex, national origin, familial status, and disability.² Texas fair housing laws are substantially similar to the FHA³.

¹ 42 U.S.C. §§ 3601 *et seq.*

² The FHA uses the term “handicap” instead of the term “disability.” Both terms have the same legal meaning. See *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998) (noting that the definition of “disability” in the Americans with Disabilities Act is drawn almost verbatim “from the definition of ‘handicap’ contained in the Fair Housing Amendments Act of 1988”). This article uses the term “disability,” which is more generally accepted.

³ *Meadowbriar Home for Children v. Gunn*, 81 F.3d 521, 531 n.8 (5th Cir. 1996). Because the Texas Fair Housing Act is so similar to the FHA, Texas courts often look to federal law interpreting the FHA when evaluating claims under the Texas Fair Housing Act. Thus, for the purposes of this article, we will address laws interpreting the FHA with the understanding that similar reasoning likely applies when interpreting the Texas act.

The FHA greatly affects the ability of associations to enforce certain restrictions. It has been broadly applied to reach all practices which have the effect of interfering with the exercise of rights under the federal fair housing laws. In *U.S. v. Wagner*, the court found that when Congress enacted the FHA, it specifically intended to “prohibit the application of special requirements through ... restrictive covenants ... that have the effect of limiting the ability of [disabled persons] to live in the residence of their choice in the community.”⁴ The FHA requires associations to make reasonable accommodations so that disabled persons can use or enjoy their homes. This includes allowing reasonable modifications to their dwellings or the common areas so that they can use or enjoy them. Reasonable accommodations may include a change, exception or adjustment to a rule, policy, practice or service that is necessary for a person with a disability to have an equal opportunity to use and enjoy a dwelling. In short, the FHA has the effect of being a deed restriction amendment without the owners’ consent.

Oftentimes, a community association will be presented with a request for an accommodation seeking a variance or modification to a member’s property. This request may seek a modification to the property which is not permitted by the deed restrictions, and the deed restrictions may not give the association the authority to grant a variance. The mistake that many associations make is that they will review the request and deny it because the deed restrictions do not permit the requested modification. Taking this type of approach may lead to a fair housing complaint.

Take for example the Gittleman case filed in New Jersey.⁵ Mr. Gittleman was a disabled unit owner in the Woodhaven Condominium regime. Because of his disability, and to shorten the distance to his home, Mr. Gittleman requested a reserved parking space near his unit. The condominium’s Master Deed provided that the parking spaces are common elements for the non-exclusive use of the unit owners.⁶ Based on this provision, the condominium association took the position that to assign Mr. Gittleman an exclusive parking space would alter the other tenants’ rights to use the common areas and would diminish the proportionate undivided interest each unit owner held in the common elements. The association argued that because this represented a material amendment to the Master Deed, satisfying Mr. Gittleman’s request would require approval by at least two-thirds of the unit owners. The association subsequently placed a resolution before the whole membership to amend the Master Deed to allow for assigned parking on an exclusive basis. The resolution did not carry the requisite two-thirds vote, and the association refused Mr. Gittleman’s request.

The case is complicated by the fact that the parking spaces were owned by the condominium unit owners as tenants in common. The association argued that it lacked the power to provide Mr. Gittleman with an exclusive parking spot. The court agreed with the association that the Master Deed expressly provided that parking spaces were common elements for the non-exclusive use of unit owners and that the association was precluded by the Master Deed from granting an

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⁵ *Gittleman v. Woodhaven Condo. Ass’n, Inc.*, 972 F. Supp. 894 (D.C.N.J., 1997).

⁶ *Id.* at 899.

⁴ *U.S. v. Wagner*, 940 F. Supp. 972, 979 (N.D. Tex. 1996) (citation omitted).

PREVENTING FRAUD AND EMBEZZLEMENT

by Craig Huntington

WHAT IS FRAUD?

Deceit, trickery; intentional perversion of the truth in order to induce another to part with something of value or to surrender a legal right.

WHAT IS EMBEZZLEMENT?

To appropriate (as property entrusted to one’s care) for one’s own use.

HOW BAD IS IT?

- Over 1.2 million worthless checks enter the banking system each day.
- Check fraud losses are over \$20 billion per year
- Check fraud is growing at a rate of approximately 25% per year.
- Average loss for small business was \$127,500. For large business \$97,000.

KEY FACTORS.

- Smaller organizations often lack basic accounting controls.
- Having a single employee who writes and signs checks, reconciles the bank statement and keeps the company books makes it easy to commit and conceal fraud.
- The level of trust that tends to exist between co-workers makes them less alert to the possibility of dishonesty.

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exclusive parking space to a disabled unit owner without the prior approval of at least two-thirds of the unit owners' votes. However, the court reasoned that the association was not powerless to bring the use of common elements into compliance with federal law.

As manager of the common elements, the association was charged with enforcing the Master Deed. The court held that the provisions of the Master Deed that prevented accommodating Mr. Gittleman's request are on their face unlawful and the association's enforcement of them, therefore, subjects it to liability under the FHA. The court held that the association is duty bound to avoid enforcing provisions in the Master Deed that do not comply with the requirements of the FHA. The court declined to read the Condominium Act, the association's by-laws or its Master Deed as prohibiting the association from ensuring that the use of the condominium's common elements complies with federal housing law. The opinion concludes as follows:

As condominium associations assume more of the powers traditionally associated with the state it is only fair that they assume more of the obligations for ensuring that the rights of the unit owners they represent are protected.⁷

While this court held the association liable, it could have possibly also found the manager or management company liable by relying on the Shapiro case.⁸ The Shapiro case held that it is a violation of the FHA for the owner or manager to refuse to make a similar accommodation. The Shapiro court reasoned that the accommodation was necessary to afford the tenant an

⁷ *Id.* at 904 (citations omitted).

⁸ *Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328 (2d Cir. 1995).

equal opportunity to use and enjoy a dwelling, and held the accommodation to be reasonable because it was feasible and practical under the circumstances.

In sum, community associations should be mindful of the FHA's requirement that reasonable accommodations be provided to disabled members. If a community association is found liable for violating the FHA, the penalties can be quite high. The first violation of the FHA carries a fine of not more than \$50,000 and for subsequent violations a fine of not more than \$100,000. These fines are in addition to civil money damages, possible injunctions and reasonable attorney's fees and costs.⁹

⁹ See *Rogers v. Windmill Pointe Village Club Ass'n, Inc.*, 967 F.2d 525 (11th Cir. 1992).

(EDITOR'S NOTE: This article will be concluded with Part II in the May issue where the authors will discuss the considerations necessary in making reasonable accommodations and then, should you receive a fair housing complaint, how to respond).

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- Notify your bank immediately when someone who is authorized to transact business with the bank leaves and remove that person's access to all bank accounts and electronic access.
- Use bank services such as Positive Pay or Check filtering to reduce the chance for fraud.

PROPER CHECK ISSUING PROCEDURE

- Never sign a check that has no payee.
- Checks used for transferring money between accounts should be made payable to the name of the account to which they are being deposited.

PRUDENT PERSONNEL PRACTICE

- Verify references and last place of employment of any new employee.
- Telephone previous employers to confirm all relevant information supplied by the applicant.
- Be alert to major changes in someone's spending patterns or financial circumstances.
- Enforce mandatory vacation policies especially for those with access to financial records or computer access.

COMPUTER SYSTEM PROTECTION

- Change passwords periodically.
- Never share passwords.
- Computer systems should create an audit trail of all changes to the master file records including who made the changes.
- Immediately delete the computer access of individuals no longer authorized.

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