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CURRENT NEWS FOR COMMUNITY ASSOCIATIONS

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How to Determine If A **HANDICAP ACCOMMODATION** is Reasonable Under the FHA

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As has been reported in numerous issues of the Community Up-Date, condominium and homeowners' associations are considered "housing providers" for purposes of the Fair Housing Act ("FHA" or "the Act") and must make reasonable accommodations to its rules, practices, and policies, if necessary, to provide a handicapped person an equal opportunity to use and enjoy a dwelling (i.e., a unit or parcel).

The Fair Housing Act makes it unlawful to discriminate against any person in connection with the rental or sale of a dwelling because of a handicap. The Fair Housing Act is codified at 42 U.S.C. §§3601-3619. A handicap is defined in the FHA as a **"physical or mental impairment which substantially limits one or more of [a] person's major life activities, a record of having such an impairment, or being regarded as having such an impairment."** In addition, the Department of Housing and Urban Development ("HUD") has adopted rules dealing with claims of discrimination found at 24 C.F.R. §100.200, et seq.

Both under the Federal statutes and HUD rules, handicap discrimination includes a "refusal to make reasonable accommodation in rules, policies, practices or services, when such accommodations may be necessary to afford a handicapped person equal opportunity to use and enjoy a dwelling." A "reasonable accommodation" is one which would not impose undue hardship or burden upon the entity making the accommodation and would not undermine the basic purpose the accommodation seeks to achieve. Stated another way, reasonable accommodations must be made, but unreasonable accommodations are not required. Accommodations that permit handicapped persons to experience the full benefit of their dwelling must be made unless the accommodation imposes an undue financial or administrative burden on an Association or requires a fundamental alteration in the nature of its program.

The Department of Justice ("DOJ") and HUD are jointly responsible for enforcing the FHA. HUD and DOJ frequently respond to complaints alleging that housing providers have violated the Act by refusing reasonable accommodations to persons with disabilities. The DOJ and HUD recently published a "Joint Statement" regarding reasonable accommodations under the FHA. The Joint Statement consists of nineteen (19) Questions and Answers intended to provide technical assistance regarding the rights and obligations of persons with disabilities and

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TIDBITS Did You Know

FLOOD INSURANCE

- Flood Insurance is required to secure financing, from a federally regulated or federally insured lender, to buy, build, or improve structures in Special Flood Hazard Areas (SFHA's).
- The National Flood Insurance Program (NFIP) was created by Congress in 1968. The Federal Emergency Management Agency (FEMA) manages the NFIP, and oversees the floodplain management and mapping.
- If your property is higher than the Base Flood Elevation, then you may request a Letter of Map Amendment (LOMA) or a Letter of Map Revision (LOM-R) by submitting an elevation certificate to FEMA. If the redesignation is granted, your lender may choose not to require Flood Insurance.
- If you were required to get insurance by a lender and then your property is redesignated by FEMA, you may request a refund of the premium paid for flood insurance coverage.
- Lenders do not have to waive flood insurance requirements and may decide that flood insurance coverage is still required as a condition of the mortgage or other financing.
- The decision whether or not to carry Flood Insurance for an Association should only be made after a careful review and analysis of the governing documents and then consultation with your attorney and insurance advisors.

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HANDICAP cont.

housing providers under the FHA relating to reasonable accommodations. The full Joint Statement can be found at www.hud.gov/offices/fheo/library/huddojstatement.pdf. The following is a summary of some of the questions and answers found in the Joint Statement.

- (1) **What types of discrimination does the Act prohibit?** The Act prohibits discrimination against persons because of their disability or the disability of anyone associated with them (including buyers and renters without disabilities who live or are associated with individuals with disabilities.) Thus, the Act also prohibits denials of housing opportunities to persons because they have children, parents, friends, spouses, roommates, subtenants or other associates who have disabilities.
- (2) **Who must comply with the FHA's reasonable accommodation requirements?** The Joint Statement explains that the term "housing provider" includes homeowners' and condominium associations.
- (3) **Who qualifies as a person with a disability under the Act?** A person with a disability includes (1) individuals with a physical or mental impairment that substantially limits one or more major life activities; (2) individuals who are regarded as having such an impairment; and (3) individuals with a record of such an impairment. The term "physical or mental impairment" includes, but is not limited to, diseases and conditions such as orthopedic, visual, speech and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, HIV, mental retardation, emotional illness, drug addiction (other than addiction caused by current, illegal use of a controlled substance) and alcoholism. The term "substantially limits" means a limitation that is "significant" or "to a large degree." The term "major life activity" means those activities that are of central importance to daily life such as seeing, hearing, walking, breathing, performing manual tasks, caring for one's self, learning, and speaking. However, the Act does not protect juvenile offenders, by virtue of that status, sex offenders, persons who illegally use controlled substances, and persons with disabilities who pose a "direct threat" to others, unless the threat can be eliminated or significantly reduced by the reasonable accommodation. To determine whether a direct threat exists, the following must be considered: (1) the nature, duration, and severity of the risk of injury; (2) the probability that injury will actually occur; and (3) whether there are any reasonable accommodations that will eliminate the direct threat. In addition, a determination that someone poses a direct threat cannot be based upon fear, speculation or stereotype about a particular disability or persons with disabilities in general. Rather, there must be reliable, objective evidence (e.g., current conduct, or a recent history of overt acts) of the direct threat.
- (4) **What is a reasonable accommodation?** A reasonable accommodation is a change, exception, or adjustment to a rule, policy, practice or service that may be necessary for a person with a disability to have an equal opportunity to use and enjoy a dwelling, including public and common use

TIDBITS cont.

The individual owners may be required, by their mortgages, to purchase flood insurance in the event an Association drops its coverage (even after the property has been redesignated).

- Association leaders are cautioned against executing any documents or entering into any contractual relationships regarding flood insurance, without first seeking the advice of counsel and consulting with their insurance professionals.

spaces. To show that a requested accommodation is necessary, there must be an identifiable relationship, or nexus, between the requested accommodation and the individual's disability. The following examples are provided in the Joint Statement to explain "reasonable accommodation": (1) A provider must make an exception to its policy of not providing assigned parking spaces to accommodate a resident with a mobility impairment who is substantially limited in her ability to walk; (2) A provider must make an exception to its policy that all tenants must come to the rental office in person to pay their rent for a tenant who has a mental disability that makes her afraid to leave her unit; (3) A provider must make an exception to its "no pets" policy for a person who is deaf and whose dog will alert him to several sounds, including knocks at the door, sounding of the smoke detector, the telephone ringing, and cars coming into the driveway.

- (5) **When can a provider deny a request for a reasonable accommodation?** The request can be denied if the request was not made by or on behalf of a person with a disability or if there is no disability-related need for the accommodation. In addition, the request can be denied if the accommodation would impose an undue financial and administrative burden on the provider or it would fundamentally alter the nature of the provider's operations. In considering whether there is an "undue burden," the provider can consider the cost of the requested accommodation, the financial resources of the provider, the benefits that the accommodation would provide to the requester, and the availability of alternative accommodations that would effectively meet the requester's disability-related needs. The Joint Statement includes the following example to illustrate "undue burden": As a result of a disability, a tenant is unable to open the dumpster placed in the parking lot by his housing provider for trash collection. The provider does not have to grant a request that a maintenance staff person be sent to a unit on a daily basis to collect a disabled person's trash and take it to the dumpster, particularly where the housing development is a small operation with limited financial resources and maintenance staff is on site only a couple of days a week. However, the provider should discuss with the tenant whether reasonable accommodations could be provided to meet the disabled tenant's needs, such as placing an open trash collection can in

HANDICAP cont.

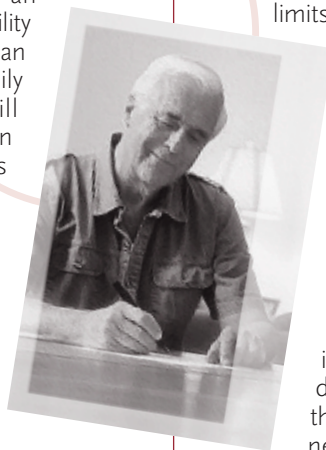
a location that is readily accessible to the tenant so the tenant can dispose of his own trash and the provider's maintenance staff person can then transfer the trash to the dumpster when they are on site.

- (6) **What happens if providing a requested accommodation involves some costs on the part of the housing provider?** The Act may require a housing provider to pay for the costs of the reasonable accommodation as long as it does not impose an undue financial or administrative burden. The financial resources of the provider, the cost of the reasonable accommodation, the benefits to the requester, and the availability of other, less expensive alternative accommodations that would effectively meet the applicant or resident's disability-related needs must be considered.
- (7) **Can the housing provider charge an extra fee or require a deposit as a condition of granting a reasonable accommodation?** No. For example, if a provider makes an exception to its "no motorized scooter" policy for an owner who is substantially limited in his ability to walk, the provider cannot condition the owner's use of the scooter on payment of a fee or deposit, or on a requirement that the owner obtain liability insurance relating to the use of the scooter. Likewise, a provider could not condition granting permission for an assistance animal on the applicant paying a fee or a security deposit. However, the provider can require the owner to pay for any damage caused by the scooter or animal.
- (8) **When and how should an individual request an accommodation?** The Fair Housing Act does not require that a request be made in a particular manner or at a particular time. Although it can be made orally, it should be made in writing to prevent misunderstandings regarding what is being requested, or whether the request was made. However, providers must consider reasonable accommodation requests even if the requester makes it orally or does not use the preferred forms or procedures. For example, if an owner has a physical disability that limits her ability to reach and bend and makes an oral request for an assigned mailbox in a location that can be easily accessed and reached, the provider must still consider the reasonable accommodation even though the owner would not use the provider's designated form.
- (9) **Must the housing provider adopt formal procedures for processing requests for a reasonable accommodation?** Formal procedures are not required, but are helpful to prevent future misunderstandings. However, the provider should be careful not to require information that is not necessary to evaluate the reasonable accommodation.
- (10) **What kinds of information, if any, can a provider request when someone who has an obvious or known disability is requesting a reasonable accommodation?** If a person's disability is obvious, or otherwise known to the provider, then the provider may not request any additional information about the requester's disability but can request information on the

disability-related need for the accommodation. For example, someone who uses a wheelchair advises that he wishes to keep an assistance dog even though there is a "no pets" policy. Although the disability is apparent, the need for an assistance animal is not obvious, and therefore, the housing provider may ask for additional information about the disability-related need for the dog.

- (11) **If the disability is not obvious, what kinds of information can be requested from the person with a disability in support of the requested accommodation?** A housing provider may request reliable disability-related information that (1) is necessary to verify that the person meets the Act's definition of disability (i.e., has a physical or mental impairment that substantially limits one or more major life activities); (2) describes the needed accommodation, and (3) shows the relationship between the person's disability and the need for the requested accommodation. Such information can be provided by the individual himself or herself or by a doctor or other medical professional, a peer support group, a non-medical service agency, or a reliable third party who is in a position to know about the individual's disability. In most cases, an individual's medical records should not be necessary to evaluate the disability. Such information must be kept confidential and not shared with others unless they need the information to make or assess a decision to grant or deny a reasonable accommodation request or unless disclosure is required by law. (Author's note: The Condominium Act and Homeowners' Association Act provide that medical records of unit owners are exempt from "official records inspection" and do not have to be disclosed to anyone, including unit or parcel owners.)

Although the Joint Statement is a good reference tool for an association that receives a reasonable accommodation request, the Joint Statement still leaves many questions unanswered. For instance, the Joint Statement does not give any examples to help explain whether a physical or mental impairment substantially limits a major life activity. Individuals will sometimes claim to be disabled because they suffer a physical or mental impairment, but a dispute will arise as to whether the impairment substantially limits a major life activity. In addition, although the Joint Statement does indicate that an individual must show the relationship between the person's disability and the need for the requested accommodation, it leaves some questions unanswered. For example, the Joint Statement indicates that an exception would have to be made to a "no pet" policy for a person who is deaf and whose dog will alert him to several sounds, including knocks at the door, sounding of the smoke detector, the telephone ringing, and cars coming into the driveway. This example suggests that the pet would need to have some discernable skills. However, the main area in contention in current law, and where differing opinions and case authorities exist, is whether "emotional support animals" must have discernable skills. Unfortunately, the Joint Statement did not provide guidance on that issue. Perhaps as this area of the law evolves, there will be additional Joint Statements issued.



CASENOTES

Rain, Rain GO AWAY

Florida Windstorm Underwriting Association (FWUA) v. Anil Gajwani 30 FLW D1213 (FL 3rd DCA, 2005)

This decision upheld FWUA's wind-driven rain exclusion.

Facts: Two houses located next to each other suffered "wind-driven rain" damage when Hurricane Irene struck South Florida. The evidence indicated that the rain entered the homes through window and sliding glass door openings, and by seeping through second floor patio tiles and cracks in the stucco. The homeowners could not offer evidence of entry through openings in the roof or walls. The Association's policy required that an opening in a roof or wall must cause the rain damage. Thus, the Association's insurance denied coverage, as did the FWUA, based on the wind-driven rain exclusion. The homeowners, the insureds, had the burden to prove an exception to the exclusion contained in the insurance policy. The homeowners could not meet this burden of proof.

This case first examined the cross-appeal. The court confirmed that a cross-appeal is appropriate if it seeks to review an order or judgment that is merged into or is an inherent part of the order or judgment properly under review by the main appeal. However, a cross-appeal is not appropriate if it seeks to review an order or judgment that is separate and distinct from the order or judgment under review by the main appeal. Based on this reasoning, the court found that the judgment against FWUA were two separate and distinct judgments, even though they were combined into one document. Thus, the court dismissed the cross appeal involving the Association's insurance for lack of jurisdiction, and only dealt with the judgment against FWUA.

In examining the lower courts judgment, the appellate court examined Florida Statute § 627.351(2) (2004), the section that created the Florida Windstorm Underwriting Association (FWUA). The court reasoned that nothing in the statutory language of Florida Statute § 627.351(2) (2004) suggests that the legislature intended or mandated Florida Windstorm Underwriting Association to include wind-driven rain coverage in policies it issues. The statutory language of Florida Statute § 627.351(2) (2004) also does not indicate that Florida, as a matter of public policy, requires seamless windstorm coverage for all types of windstorm caused losses. The court construed public policy as a narrow basis upon which to strike down an otherwise valid contract. Thus, the court stated that in the absence of a clear public policy directive in the statute, it is not the court's function to extend coverage for wind-driven rain damages to insurance policies excluding such coverage.

Therefore, the court held that FWUA's wind-driven rain exclusion is not void as against public policy. In so holding, the court also indicated that § 627.4025(2)(a) Florida Statutes (2004) seems to contemplate a wind-driven rain exclusion.

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