



## DOES ADA (AMERICANS WITH DISABILITIES ACT) AFFECT YOUR RESIDENTIAL COMMUNITY?

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A topic which has become an increasing concern for community associations is whether the association is obligated to comply with ADA requirements.

The Equal Opportunity for Individuals with Disabilities Act, publicly referred to as the Americans with Disabilities Act ("ADA") is set forth in Title 42, United States Code, Sections 12101-12213. Subchapter III of the ADA regulates private entities which fall within the definition of a "public accommodation". Residential condominiums, cooperatives, and subdivisions are not classified as public accommodations under the ADA. However, a "residential" community may lose its classification as a residential facility and may be classified as a "place of lodging" which would be subject to the ADA. One way the community may lose its classification as a residential facility is through unit or parcel rentals.

While many associations do not specifically permit transient rentals, they also do not restrict them. When an association's documents do not restrict the duration of rentals, theoretically any unit owner would be legally entitled to rent their unit, even on an overnight basis. Accordingly, many associations passively permit unit owners to lease their units to "transient" individuals. Transient rentals are, in part, regulated as Public Lodging Establishments.



In Florida, Public Lodging Establishments are classified in Section 509.242(1) of the Florida Statutes, as a hotel, motel, resort condominium, non-transient apartment, transient's apartment, rooming house, bed and breakfast inn, or resort dwelling. "Resort condominium" is defined in Section 509.242(1)(c), Florida Statutes, as follows:

*A resort condominium is any unit or group of units in a condominium, cooperative, or timeshare plan which is rented more than three times in a calendar year for periods less than 30 days or one calendar month, whichever is less, or which is advertised or held out to the public as a place regularly rented for a period of less than 30 days or one calendar month, whichever is less.*

As you can see, resort condominiums are classified as Public Lodging Establishments in the State of Florida. As long as the condominium association does not manage or otherwise coordinate the rental of units in the association, the association would not be required to obtain a license (required for operators of Public Lodging Establishments). However, the association is only excused from obtaining a license. Accordingly, the remainder of the statutory requirements governing Public Lodging Establishments may still apply. The statute does, however, contain some exceptions.

Section 509.013(4)(b), Florida Statutes, (which specifically excludes certain leasing accommodations from classification as a "Public Lodging Establishment") excludes any place

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renting four rental units or less, unless the rental units are advertised or held out to the public as places that are regularly rented to transients. Further, any unit or group of units in a condominium, cooperative, or timeshare plan that is rented for periods of at least 30 days or one calendar month, whichever is less, and that is not advertised or held out to the public as a place regularly rented for periods of less than one calendar month, so long as no more than four rental units within a single complex of buildings are available for rent, are also excluded from Public Lodging Establishment classification.

*“... a ‘residential’ community may lose its classification as a residential facility and may be classified as a ‘place of lodging’ which would be subject to the ADA.”*

As a result, many associations, in an effort to avoid potential application of the ADA as well as Chapter 509 of the Florida Statutes, have initiated amendments to the governing documents which would prohibit unit owners from renting their units in a manner that would potentially classify the community as a “Public Lodging Establishment”.

In the condominium context, amendments which restrict rentals are impaired by Florida Statutes Section 718.110(13), which provides that amendments restricting unit owners’ rental rights apply only to unit owners who consent to the amendment and unit owners who purchased their units after the effective date of the amendment. An amendment increasing the minimum term of permissible rentals would likely be subject to this law.

To further complicate this issue, the Florida courts have yet to issue any binding decisions regarding whether or not a resort condominium is or may, at least in part, be classified as nonresidential, potentially subjecting the resort condominium to the ADA, which regulates “places of public accommodation”.

Subchapter III of the ADA defines a “place of public accommodation” as:

*An inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor...*

Accordingly, if a condominium is classified as a “resort condominium” under Florida law, it is a “Public Lodging Establishment”. As such, a Public Lodging Establishment may qualify as a “place of lodging” under the ADA, particularly if the resort condominium in question is classified as non-residential.

Only one court (a federal court) has addressed this issue in non-binding “dictum” (discussion unnecessary to the disposition of the case) contained within the court’s opinion.

(See *Thompson v. Sand Cliffs Owners Association, Inc.*, 1998 WL 35177067 (N.D.Fla.)). This case did not, however, account for the duration and number of leases or whether or not the units in question were held out or advertised as places regularly rented to transient guests. Accordingly, there is very little “one size fits all” guidance offered on this topic, and each case must be analyzed on an individual basis in order to determine the likelihood that the Public Lodging Establishment classification and/or the ADA may be applicable.

One thing is, however, relatively clear. Traditional residential condominium associations are not subject to the ADA. However, they are subject to the Fair Housing Amendments Act of 1988 (FHAA). (See, 42 USC § 3602, 1998). The FHAA prohibits condominium associations from discriminating against people on the basis of handicap, and requires condominium associations to permit disabled persons to make reasonable modifications to the condominium property, so as to enable the unit owner’s enjoyment of the premises. However, unlike the ADA, the FHAA provides that if modifications are to take place, the modifications are at the expense of the requesting owner. Further, the association can establish reasonable conditions regarding the modification. Unlike an association’s ability to “amend out” of the definition of a Public Lodging Establishment (discussed above) and consequent application of the ADA, associations cannot “amend out” of the FHAA.

*“... many associations... have initiated amendments... which would prohibit unit owners from renting their units in a manner that would potentially classify the community as a ‘Public Lodging Establishment’.”*

Even a community which prohibits rentals altogether is subject to the FHAA. However, the association is not obligated to grant every request made by a disabled unit owner. Every request for a “reasonable modification” depends upon the specific facts involved and must be addressed on a case by case basis. Accordingly, if your condominium association is faced with a request by a unit owner to make a “reasonable modification” you should consult with your association’s attorney to assess whether or not the association must accommodate the requesting owner.

Given the complexities of the application of the ADA, FHAA, and rules governing Public Lodging Establishments, the Board should consult with the association’s attorney to ensure the association is taking all of the necessary measures to avoid allegations of discrimination, as the cost of defending such allegations are considerable. ■

# MOLD ASSESSMENT SPECIALISTS AND MOLD REMEDIATORS REQUIRED TO BE LICENSED IN 2010

By: Bennett M. Miller, Esq.

Community Associations are often faced with hiring mold assessors and mold remediators in the aftermath of a hurricane or other casualty event that causes water intrusion, such as a pipe bursting or a fire sprinkler false alarm. As the Association scrambles to find a professional to respond to these urgent problems, they often fail to ask about the qualifications of the persons providing mold removal services. Many community association managers are surprised to learn that Florida law does not currently require a mold assessor or mold remediator to be licensed. However, a new law in Florida will require mold assessors and mold remediators to be licensed beginning July 1, 2010. The new law will also require new applicants for a mold assessor license or mold remediator license to be of good moral character.

The new law defines "mold assessment" as the process performed by a mold assessor that includes the physical sampling and detailed evaluation of data obtained from a building history and inspection to formulate an initial hypothesis



about the origin, identity, location and extent of amplification of mold growth of greater than ten square feet. The new law also provides that "mold remediation" means the removal, cleaning, sanitizing, demolition or other treatment including preventative activities of mold or mold contaminated matter of greater than ten square feet that was not purposely grown at that location. After July 1, 2010, these activities may not be performed without a license. Persons who perform these activities without a license after the effective date of this law may be subject to criminal penalties under certain circumstances.

Between now and the effective date of the new law, it appears that private trade associations will continue to be permitted to provide educational guidelines and educational programming necessary to be "certified" as a mold assessor or mold remediator. These trade groups do not issue licenses today, nor will trade associations issue licenses under the new law after the effective date of the law. These courses and certifications include certified indoor environmentalist, certified microbial remediator, certified microbial investigator, certified residential mold inspector, as well as other specialized certifications. However, these certifications are not approved by the State of Florida.

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As a result, community associations and their managers should continue to be wary of the qualifications and experience of mold assessors and mold remediators until licenses are issued by the State of Florida. “Buyer beware” definitely applies to this situation, where persons acting as mold inspectors may not have any training or experience. Many mold removal service companies are reputable, however it is possible that these mold assessors and remediators may not have been screened by their employer for a criminal background.

The new law creates a new Part XVI of Chapter 468, Florida Statutes. However, not all persons who assess or remediate mold problems are covered under the new law. There are several important exemptions to the new law, such as residential property owners who perform mold assessment and remediation on their own property. Under those circumstances, the owners do not need a license. In addition, a person who performs mold assessment or remediation on property owned or leased by that person, the person’s employer, or an affiliate of the employer, does not need a license as long as the persons are not engaging in the business of performing mold assessment for the public.

Thus, it would appear that a community association maintenance supervisor or maintenance employee performing routine maintenance of the structure and facilities of the community would not otherwise need a mold assessment or mold remediation license to inspect for the presence of mold. However, for reasons relating to insurance coverage and potential liability for damages to persons exposed by mold, community associations may find it inappropriate for maintenance workers to perform this task. In addition, certain types of professionals are not regulated by the new law, including Division I and Division II contractors, engineers, architects and interior designers, and pest control professionals.

Florida law does not currently require mold assessors and remediators to meet minimum educational standards. Under the new law, licensed mold assessors will be required to

possess at least a two-year degree in microbiology, engineering, architecture, industrial hygiene, occupational safety, or related field of science from an accredited institution. There are also additional field experience requirements for licensure.

For persons interested in hiring a mold removal professional, the new law requires in 2010 that all contracts to perform mold assessment or mold remediation services must be in writing or some other type of electronic record. Perhaps most importantly, the new law creates Section 468.8421, Florida Statutes, which requires licensed mold assessors and remediators to maintain general liability, and errors and omissions insurance coverage in an amount not less than one million dollars beginning in 2010. Also beginning in 2010, mold assessment and mold removal agreements must be signed by the parties or otherwise authenticated by the parties who are entering into the contract. Community associations and managers should be aware of the requirement for a written agreement beginning in 2010, because unlicensed individuals may attempt to offer or perform these services without a written contract.

The overall effect of this new law is to provide community associations with additional protections against unscrupulous vendors. However, the effective date of this law is still several years away. In the meantime, state regulators will attempt to establish guidelines for enforcement of this new law. Because of the inherent difficulties in establishing what constitutes “mold,” the exact nature of the regulations and the effect of this law is unknown at this time. As new information becomes available, *Community Update* will keep you posted on changes to this new law. ■

*Editor’s note: The Firm congratulates and wishes Bennett success in his new position as Deputy Director of the Division of Regulation for the Department of Business and Professional Regulation. Please contact your community association attorney if you have questions regarding licensing of mold assessment specialists and mold remediation companies.*

# HOW TO GET INVOLVED WITH LOCAL GOVERNMENT

By: Michael C. Gongora, Esq.  
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Many residents want to get involved with local government but don't know the best way to do so. This article will provide six simple ways to directly get involved and make a difference in your neighborhood.



**1. Vote.** Many people like to complain about local elected officials however they don't bother to take the time to learn who the candidates are and/or make the trip to their voting center on election day. Early voting and absentee voting have made it much easier to get out and vote so there's really no excuse for not letting your voice be heard. Find out where your local government has early voting centers set up and vote at your own convenience. Or, better yet, register for an absentee ballot so that you may vote by mail. Timely requesting an absentee ballot will allow you to vote from the comfort of your own home and you may even leisurely browse the internet and read up on the candidates. An informed decision is usually the best decision. In most local elections less than 30% of registered voters turn out to vote so a relatively small group of voters are able to have a big impact. Many municipalities, including the City of Miami Beach, have businesses participate in programs that give discounts to voters. Whether it's an elected official or an issue that may affect you, the only way to have a say is to vote.

**2. Attend public meetings.** Whether it's a public hearing or a community meeting, get involved. Attending public meetings is one of the best ways to meet people in the community with similar interests and to let your voice be heard in mass. Local government is required to publicly advertise public hearings to specifically allow for the public to attend and give their opinions regarding proposed issues. When projects request zoning variances, local government is required to allow for commentary by the neighbors as to the requested variances. Many cities also have citizens' academies or neighborhood leadership academies so that residents can learn how to get involved with local government.

**3. Be pro-active.** You may have great ideas for your local government but if you don't effectively communicate those ideas to your local elected officials they will have no way of knowing. Phone calls are a good start. Better yet, write your ideas down and either mail or e-mail your local officials. E-mail has made it easier and more efficient to submit a written idea to all of your elected officials simultaneously and without any cost to you. Written communication is generally more effective than verbal communication when dealing with government officials and gives you a record of what you have stated. Also, local officials are generally more inclined to respond to written inquires than to verbal inquiries. Most local elected officials

have staff – get to know them. Sometimes knowing a chief of staff, office aide or administrative assistant can help ensure your issue does not get neglected.

**4. Serve on a board or committee.** Almost all local governments have advisory boards and committees made up of residents to deal with particular issues or problems. In most cities, some of these boards wield great power and authority in determining issues. In particular, land use boards such as the zoning board, planning board and design review board are granted broad authority in determining the types of real estate projects that may be built in a community. Service on local government boards and committees demonstrates that you are committed to the quality of life in your area and gives you greater clout with your local officials as well as building relationships with people to help get things done.

**5. Join volunteer efforts.** Most local governments have groups such as the chambers of commerce that work with local government in joint ventures such as neighborhood clean-ups and other projects affecting the community. These volunteer efforts are generally well-attended by local officials and provide a good opportunity to speak one on one. For example, if your concern is safety then see if your local government has a program that allows residents to ride with police officers and see the issues being dealt with firsthand. If your local government doesn't have this type of program, then start one.

**6. Run for office.** The old saying goes that if you can't beat them, join them. If you are unable to effect change through communication with local officials sometimes it is better to run for office yourself and effect your own ideas as a local official. Many local governments have councilpersons and/or commissioners that consist of ordinary working people that want to make a difference. You may get involved with your local government through one or more of the recommended channels and ultimately decide that you can make more of a difference in your community through public service yourself. ■

*Editor's note: Michael Gongora is a City Commissioner in Miami Beach, FL.*



# REVIEW LOSS ASSESSMENT COVERAGE CAREFULLY

You may think your homeowners' insurance or insurance policy for your condominium unit provides coverage for assessments levied by your association for costs sustained as a result of damages due to a casualty. Many policies provide excellent protection, some as much as \$10,000! However, it is very important to review the exact language of the policy and discuss this issue with your insurance agent or have an attorney analyze it before deciding to purchase one policy over another. An owner of an Aventura condominium unit learned the hard way that his policy did not provide coverage for any assessments levied by the Association to repair damages from Hurricane Wilma.

The Admiral's Port Condominium levied an assessment in amount in excess of eight hundred thousand (\$800,000.00) dollars. When an owner applied for reimbursement for his portion of the assessment he learned that his Allstate Floridian policy would not pay for any portion of the assessment attributable to the master policy deductible. In fact, the owner was not entitled to any reimbursement because his percentage of the amount Allstate agreed to pay was less than his \$250 deductible. The case entitled *Grife v. Allstate Floridian Insurance Company*, 20 Fla.L.Weekly Fed. D899a, decided June 27, 2007 again demonstrates how important it is to review policy terms and conditions (both individual and the master policy) in detail before committing to the carrier. ■

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We look forward to providing you Community Update in the most expedient way possible. Please feel free to send suggestions for articles or topics you would like to see covered in future issues. ■

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