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Community Associations

- “Community associations” include condo associations and other planned communities that are subject to recorded covenants, conditions and restrictions.
- Associations, their Boards and managers are considered “housing providers” subject to fair housing laws
 - Board of Directors
 - Volunteer owners elected by the Association members
 - Board responsible with enforcing governing documents
- NOTE: If your association is a place of public accommodation, ADA also applies




Governing Documents and Laws Applicable to HOAs

- Federal Law:
 - Fair Housing Act,
 - ADA, OTARD,
 - Flag Act
- State Law
- Municipal/County Law
- The Governing Documents:
 - Declaration/CC&Rs & Plat Map
 - Bylaws
 - Rules and Regulations/Policies



The diagram is a pyramid titled "Hierarchy of Governing Documents". It is divided into three horizontal layers. The top layer is labeled "CC&Rs & Plat". The middle layer is labeled "Bylaws". The bottom layer is labeled "Rules/Resolutions/Policies". To the left of the pyramid is a vertical arrow pointing upwards, labeled "Authority". To the right of the pyramid is a vertical arrow pointing downwards, labeled "Difficulty to Amend".



CC&Rs (Covenants, Conditions, and Restrictions)

- Inherited Documents
 - Drafted by developer "grantor"
 - Recorded against Property
- Often outdated
 - Potential conflicts with state and federal law
- Difficult to Amend
 - Typically requires a supermajority of all members, sometimes up to 100%
 - Foreclosures and bank owned properties



- Fair Housing complaints against community associations are a growing trend
- Fair Housing trumps any contract or agreement, including your CC&Rs.
- Archaic covenants + general lack of board awareness and familiarity with fair housing laws → associations are susceptible



Disparate Treatment v. Disparate Impact

- Two types of discrimination
- Disparate treatment: alleges intentional bias
 - Unequal enforcement of CC&Rs and policies based on bias
 - Outright discriminatory CC&Rs and covenants
 - Reasonable accommodations/modifications for disability
- Disparate impact: discriminatory effect
 - No intent to discriminate required
 - Neutral policy/covenant with disproportionately negative impact on a protected class.
 - Claims of this nature are on the rise
 - * Supreme Court case pending on disparate impact



Disparate Treatment

- Age Based Discrimination Exception
 - 100% of units/homes occupied by persons 62 or older; OR
 - 80% or more of units/homes occupied by at least one person who is 55 or older; AND
 - Community adheres to a policy that demonstrates an intent to house older persons; AND
 - The community complies with rules established by HUD for verifying occupancy.





Reasonable Accommodation

v.

Reasonable Modification

- **Accommodation** = Change in rules, policies, practices or services when necessary to afford an equal opportunity to use and enjoy a dwelling;
- **Modification** = Change in physical structure of home, unit, common property.



Reasonable Accommodation/Modification

- Must have handicap (disability) that substantially limits a major life function
- Request must be necessary to enjoy equal use and access of dwelling
- Must be a relationship (“nexus”) between requested accommodation or modification and handicap
- Must be requested by owner/tenant
- Modifications at requester’s expense
- Limited exceptions for denying requests for accommodation or modification



Service Animals, Emotional Support/Companion Animals, Assistance Animals, Therapy Animals, etc.)



Parking



Ramps



Group Homes



Group home for the care of 8 or fewer persons with disabilities or elderly persons



Disparate Impact

- Disparate impact (discriminatory effect)
- 2013 HUD Publication: "Implementation of the Fair Housing Act's Discriminatory Effects standard"



FHA Violation Claim

- The enforcers: HUD and DOJ
 - Administrative Agency (broad discretion)
- Complainant
 - An Owner
 - Any Owner can file a claim requiring HOA response
 - Purpose of investigation to determine merit of claim
 - Intermountain Fair Housing Council
 - Reviews documents for potential violations



Process

- Complaint filed (may be amended)
- HOA response
- HUD Investigation (interviews, cite visit)
- Conciliation
 - Facilitated by HUD; Follow up
- If no conciliation → HUD makes determination
 - Reasonable cause?
- Determination of Reasonable Cause → Administrative Agency or Federal District Court



Damages

- Administrative Hearing
 - Injunctive relief
 - Actual damages
 - Out of pocket expenses
 - Emotional distress
 - Fees and costs
 - Fines/penalties per statute
- Court Action
 - Same as above plus punitive damages
- Insurance may or may not pay a judgment or cover attorney fees



Proactive Approach

- Board and association manager training
- Have an attorney, one familiar with fair housing, review your CC&Rs and governing documents (including all rules and regulations/policies)
- Amend documents: if CC&Rs violate fair housing laws, even if you are not enforcing, you should amend out the discriminatory language
- Spending a couple hundred now could save you thousands in the long haul
- Confer with counsel on enforcement matters



- Adopt standard procedures, approved by legal counsel
 - For addressing accommodation requests
 - For any variances or ACC requests
 - Promotes consistency
 - Guides Board action
- Enforce covenants and policies consistently
- Keep good records
 - Of policies, any communication with members, all covenant violations and rule enforcement actions, ACC requests and approval/denials
- Be professional and civil
- Try to be as inclusive as possible
 - organize community events that include children
- Choose locations for your board meetings that are physically accessible
- If you are relying on HOPA, insure you qualify and maintain your status



- ## Responding to Requests
- Carefully review owner requests for variances- could be considered a request for accommodation/modification requests
 - Be careful of how you respond – confer with counsel
 - **Seek legal counsel immediately, prior to denying an accommodation or modification or handling any issue that may lead to a fair housing claim**
 - Have counsel assist in timely responding to any such requests; earlier involvement will save you \$.
 - Engage in interactive dialogue with the party requesting an accommodation



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