SHAW & LINES, LLC
HOA & CONDO LAWYERS

Attorneys
Augustus H. Shaw IV*†
Mark E. Lines**†
Patrick J. Whelan***
*Also Licensed in Nebraska
**Also Licensed in Utah
***Also Licensed in Florida
† Member, College of Community Association Lawyers

Address
4523 E. Broadway Rd.
Phoenix, Arizona 85040

Phone/Fax/Web
p 480-456-1500
f 480-456-1515
www.shawlines.com

Recent Developments Regarding The Fair Housing Act

Authored and presented by
Augustus H. Shaw IV, Esq., CCAL
Shaw & Lines, LLC
Email ashaw@shawlines.com
Web site www.shawlines.com

This course is approved by Community Association Managers International Certification Board (CAMICB) to fulfill continuing education requirements for the CMCA® certification. www. Camicb.org.

LEGAL SERVICES

GENERAL CORPORATE COUNSEL

Advising developers and community associations on forming corporations, funding reserves, compliance issues, and other general counsel matters.

COLLECTING ASSESSMENTS

Applying efficient, fair and effective collection strategies proven to recoup unpaid assessments, including collection demand letters, litigation, overseeing payment agreements, recording liens, wage and bank garnishments and foreclosures.

ENFORCING RESTRICTIONS

Employing tactical approaches to remedy violations and enforce restrictions, including mediation efforts and enforcement litigation.

DRAFTING, INTERPRETING AND AMENDING DOCUMENTS

Our attorneys are experienced in drafting and amending association documents that are easy to read, understand and apply. We also assist you in analyzing and interpreting provisions of association documents to help you better understand their meaning and application.

LITIGATION AND BANKRUPTCY

Providing competent and assertive representation for community associations in court on matters typically involving assessment collection, enforcing restrictions, foreclosure, defending community associations in lawsuits and protecting rights in bankruptcy.

CONTRACT NEGOTIATION AND REVIEW

We help review, interpret and negotiate contracts between vendors.

PROPERTY TAXATION

Assisting planned community associations in reducing tax liability for common area property tax liens.

CONSTRUCTION AND LAND DEVELOPMENT

Advising developers of community associations concerning applicable city ordinances, planning restrictions and similar land use issues.

GENERAL REAL ESTATE LAW

A multifaceted real estate practice offering clients a wide range of services for issues pertaining to zoning regulations, ordinance violations, land use and other general real estate and legal matters.

INSURANCE DEFENSE

Representing Insurance Companies in defending claims against their insured.

EDUCATING COMMUNITIES

Offering the Lunch & Learn Lecture Series and the Community Association Desk Reference Set for community association professionals to “be in the know” concerning changes in the law and effectively managing community associations.

SHAW & LINES, LLC
HOA & CONDO LAWYERS

Recent Development Regarding The Fair Housing Act

This course is approved by Community Association Managers International Certification Board(CAMICB) to fulfill continuing education requirements for the CMCA® certification. www.Camicb.org.

Issues to be Covered:
Overview of the Fair Housing Act (FHA)

- Who is Covered under the FHA?
- Who Must Comply with the FHA?
- What is a *Reasonable Accommodation*?
- What is a *Reasonable Modification*?

SHAW & LINES, LLC
HOA & CONDO LAWYERS

Legal Services: General Corporate Counsel – Collecting Assessments – Enforcing Restrictions Drafting, Interpreting and Amending Documents – Insurance Defense – Property Taxation Contract Negotiation and Review – General Real Estate Law – Litigation – Educating Communities Drafting Annual Meeting Materials – Construction and Land Development – Bankruptcy.
www.shawlines.com

Issues to be Covered:
Overview of the Fair Housing Act (FHA)

- **HARASSMENT ISSUES.**
- **DISPARATE IMPACT DISCRIMINATION.**
- **PET POLICY ISSUES.**
- **HOW TO AVOID A FAIR HOUSING LAWSUIT.**

Overview of the Fair Housing Act (FHA).

- **Who is Covered Under the FHA?**
  - Protected Classes - Race, Color, National Origin, Religion, Sex, Familial Status, and Disability.
- **Who Must Comply with the FHA?**
  - Direct providers of housing; Entities and Associations that set terms and conditions for housing; and Entities and Associations that provide services or facilities in connection with housing.

SHAW & LINES, LLC
HOA & CONDO LAWYERS

Legal Services: General Corporate Counsel – Collecting Assessments – Enforcing Restrictions Drafting, Interpreting and Amending Documents – Insurance Defense – Property Taxation Contract Negotiation and Review – General Real Estate Law – Litigation – Educating Communities Drafting Annual Meeting Materials – Construction and Land Development – Bankruptcy.
www.shawlines.com

Overview of the Fair Housing Act (FHA).

Under the Federal Fair Housing Act ("FHA") (42 U.S. Code §3604(f)) and the Arizona Fair Housing Act ("AFFA") (A.R.S. § 41-1491.19) , Associations may not discriminate against any person in connection with a dwelling because of a handicap of:

- A buyer or renter;
- A person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or
- Any person associated with that buyer or renter.

Overview of the Fair Housing Act (FHA).

"**Discrimination**" includes (FHA - 42 U.S. Code § 3604(f)(3) – AFFA - A.R.S. § 41-1491.19(E):

- A refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied, or to be occupied, by such person if such modifications may be necessary to afford such person full enjoyment of the premises.
- A refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling.

Overview of the Fair Housing Act (FHA).

Under the FHA - 42 U.S. Code § 3602(h) and the AFFA – A.R.S. §41-1491(5), a person is "handicapped" or "disabled" if the person suffers from:

- a physical or mental impairment which substantially limits one or more of such person's major life activities;
- a record of having such an impairment; or
- being regarded as having such an impairment.

*But, such term **does not include** current, illegal use of or addiction to a controlled substance.

Overview of the Fair Housing Act (FHA).

A Handicap is **Established** by:

1. An open and obvious disability (a wheelchair or walker);
2. Receiving disability/social security benefits; and/or
3. Written documentation from a medical professional.

SHAW & LINES, LLC
HOA & CONDO LAWYERS

Legal Services: General Corporate Counsel – Collecting Assessments – Enforcing Restrictions Drafting, Interpreting and Amending Documents – Insurance Defense – Property Taxation Contract Negotiation and Review – General Real Estate Law – Litigation – Educating Communities Drafting Annual Meeting Materials – Construction and Land Development – Bankruptcy.
www.shawlines.com

Overview of the Fair Housing Act (FHA).

If a Disability is **Visible, Open or Obvious**, then the Housing Provider is NOT permitted to request additional information.

Overview of the Fair Housing Act (FHA).

- If a disability is NOT visible, open or obvious (*e.g.*, NOT apparent), then the Housing Provider may request additional information, such as:

1. A letter from a doctor stating that the person is disabled; and/or
2. A letter from a doctor stating that the requested accommodation would aid the disabled person's health and enjoyment of the property.

SHAW & LINES, LLC
HOA & CONDO LAWYERS

Legal Services: General Corporate Counsel – Collecting Assessments – Enforcing Restrictions Drafting, Interpreting and Amending Documents – Insurance Defense – Property Taxation Contract Negotiation and Review – General Real Estate Law – Litigation – Educating Communities Drafting Annual Meeting Materials – Construction and Land Development – Bankruptcy.
www.shawlines.com

Overview of the Fair Housing Act (FHA).

Types of Requests Provided by Fair Housing Laws:

1. Request to Modify the Structure of a Dwelling or Association Common Area (***Modification***);
2. Request for a Variance in Enforcing a Rule or Restriction (***Accommodation***).

Overview of the Fair Housing Act (FHA).

- HOAs must provide owners/residents with a reasonable accommodation concerning the enforcement of certain rules and regulations **to allow the disabled person to use and enjoy the property or the common property**.
- To prove that a reasonable accommodation is necessary, the person must show that, but for the reasonable accommodation, he or she will be denied an opportunity to enjoy the property.
- There must also be an identifiable relationship between the reasonable accommodation and the individual's disability.

SHAW & LINES, LLC
HOA & CONDO LAWYERS

Legal Services: General Corporate Counsel – Collecting Assessments – Enforcing Restrictions Drafting, Interpreting and Amending Documents – Insurance Defense – Property Taxation Contract Negotiation and Review – General Real Estate Law – Litigation – Educating Communities Drafting Annual Meeting Materials – Construction and Land Development – Bankruptcy.
www.shawlines.com

Overview of the Fair Housing Act (FHA).

A Reasonable Accommodation **May Be Denied If**:

- "an individual whose tenancy would constitute a **direct threat** to the health or safety of other individuals."

*Therefore, a request involving an "inherently dangerous" animal may be denied (*e.g.,* "wild animals" – animals that are predisposed to attack or have attacked before).

Overview of the Fair Housing Act (FHA).

- Reasonable Modifications are requests to alter the structure of a person's property or HOA common property, provided that **the modification(s) may be necessary to afford the person full enjoyment of the premises**.
- Reasonable Modifications are generally paid for by the requesting individual.

SHAW & LINES, LLC
HOA & CONDO LAWYERS

Legal Services: General Corporate Counsel – Collecting Assessments – Enforcing Restrictions Drafting, Interpreting and Amending Documents – Insurance Defense – Property Taxation Contract Negotiation and Review – General Real Estate Law – Litigation – Educating Communities Drafting Annual Meeting Materials – Construction and Land Development – Bankruptcy.
www.shawlines.com

Recent Developments Concerning the FHA
HARASSMENT ISSUES

- Emphasis has been placed on instances that create an untenable living environment… by demanding *quid pro quo* favors or by creating a hostile environment.
- An Association and/or property manager could be liable if it is determined that (i) tenant-on-tenant harassment was known and (ii) no subsequent remedial action was taken.
- An Association's inaction after it was notified of an employee's possible harassment **may justify an award of punitive damage**s.

Recent Developments Concerning the FHA
PET ISSUES

- Emotional Care Animals are allowed as a reasonable accommodations.
- Training of said animals may not be required.
- Any animal that is not "inherently dangerous" may be considered for a reasonable accommodation.
- It is important to request an opinion from the doctor stating how the animal aids the owner's disability.

SHAW & LINES, LLC
HOA & CONDO LAWYERS

Legal Services: General Corporate Counsel – Collecting Assessments – Enforcing Restrictions Drafting, Interpreting and Amending Documents – Insurance Defense – Property Taxation Contract Negotiation and Review – General Real Estate Law – Litigation – Educating Communities Drafting Annual Meeting Materials – Construction and Land Development – Bankruptcy.
www.shawlines.com

Recent Developments Concerning the FHA
PET ISSUES

- Emotional Care Animals are allowed as a reasonable accommodations.
- Training of said animals may not be required.
- Any animal that is not "inherently dangerous" may be considered for a reasonable accommodation.
- So-called "Dog Breed Bans" are preempted by the FHA.

HOW TO AVOID A FAIR HOUSING LAWSUIT

FHA Training for Managers and Members of the Board.

Implementing a Reasonable Accommodation/Modification Policy that provides the Association with a step-by-step procedure on how to properly address and process Accommodation/Modification Requests.

SHAW & LINES, LLC
HOA & CONDO LAWYERS

Legal Services: General Corporate Counsel – Collecting Assessments – Enforcing Restrictions Drafting, Interpreting and Amending Documents – Insurance Defense – Property Taxation Contract Negotiation and Review – General Real Estate Law – Litigation – Educating Communities Drafting Annual Meeting Materials – Construction and Land Development – Bankruptcy.
www.shawlines.com

HOW TO AVOID A FAIR HOUSING LAWSUIT

Draft and implement a Reasonable Accommodation/Modification Policy that <u>provides owners and residents with information specifying</u>:

- Who to contact in order to obtain a Reasonable Accommodation/Modification;
- The process and procedures required in order to obtain a Reasonable Accommodation/Modification; and
- What Information may be required in order to obtain a Reasonable Accommodation/Modification.

HOW TO AVOID A FAIR HOUSING LAWSUIT

- The Reasonable Accommodation/Modification Policy **should be posted and/or mailed to all owners and residents.**
- The Reasonable Accommodation/Modification Policy **should be included in all resale and disclosure requests.**

SHAW & LINES, LLC
HOA & CONDO LAWYERS

Legal Services: General Corporate Counsel – Collecting Assessments – Enforcing Restrictions Drafting, Interpreting and Amending Documents – Insurance Defense – Property Taxation Contract Negotiation and Review – General Real Estate Law – Litigation – Educating Communities Drafting Annual Meeting Materials – Construction and Land Development – Bankruptcy.
www.shawlines.com

SHAW & LINES, LLC
HOA & CONDO LAWYERS

Questions?

AUGUSTUS H. SHAW IV, ESQ.
ashaw@shawlines.com

SHAW & LINES, LLC
4523 E. Broadway Rd.
Phoenix, Arizona 85040
(480) 456-1500
www.shawlines.com

Navigating the Nuances of the Federal Fair Housing Act (the "FHA") 42 U.S.C. §§3601 – 3631.

BACKGROUND/HISTORY

Title VIII of the Civil Rights Act of 1968 is commonly known as the Fair Housing Act (FHA). Title VIII discrimination against individuals on the basis of race, color, national origin, religion, or sex to ensure equal access to housing opportunities.[1] Congress passed it as a follow-up to the Civil Rights Act of 1964 in the wake of Rev. Dr. Martin Luther King, Jr.'s assassination.[2] Congress later significantly amended the law in 1988 (to strengthen enforcement and prohibit discrimination based on handicap/disability or familial status)[3] and again in 1995 (to exempt certain senior communities from its provisions[4]).[5]

I. Who is protected by the FHA?

The Fair Housing Act prohibits a broad range of practices that discriminate against individuals on the basis of race, color, national origin, religion, sex, familial status, and disability ("protected status"). The FHA defines familial status[6] to include: (i) someone with one or more minor children who is domiciled with the person; (ii) a pregnant woman; or (iii) someone in the process of securing legal custody of a minor (includes adoption, foster care, and/or guardianship).

Pursuant to Congress's 1988 amendment, the FHA provides additional guidance as to what constitutes a disabled/handicap[7] person to include individuals: (i) with a physical or mental impairment that substantially limits one or more of a person's major life activities; or (ii) with a record of having such an impairment; or (iii) who are regarded as having such an impairment.[8] A physical or mental impairment includes – but is not limited to – such diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, Human Immunodeficiency Virus infection (HIV), mental retardation, emotional illness, alcoholism, and recovering drug addiction.

It should be noted that the FHA protects persons that are recovering from substance abuse, ***not*** persons who are currently engaging in illegal drug use.[9] Similarly, juvenile offenders and sex offenders, by virtue of that status, are ***not*** persons with disabilities protected by the FHA.

---

[1] *See, Texas Department of Housing and Community Affairs, et al. v. The Inclusive Communities Project, Inc., et al.,* 135 S. Ct. 2507 (2015).
[2] *Id.*
[3] 42 U.S.C. §3602(h); §3602(k).
[4] 42 U.S.C. §3603(b)(2); 42 U.S.C. §3607(a), (b).
[5] *Texas Dept. of Hous. & Commty. Affairs v. Inclusive Communities Project, Inc., supra*
[6] 42 U.S.C. §3602(k); *see also, Gorski v. Troy*, 929 F.2d 1183 (7th Cir. 1991).
[7] 42 U.S.C. §3602(h); *see also, 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").
[8] 42 U.S.C. §3602(h); *see also, Rodriguez v. Village Green Realty, Inc*., 788 F.3d 31 (2nd Cir. 2015).
[9] *See, United States v. Southern Management Corp*., 955 F.2d 914, 919 (4th Cir. 1992) (discussing exclusion in 42 U.S.C. §3602(h) for "current, illegal use of or addiction to a controlled substance.").

Recent Ruling Regarding Survival of FHA Claim After Death of Claimant:

- According to the 3rd Circuit in *Revock v. Cowpet Bay W. Condo. Ass'n.*, 853 F.3d 96 (3rd Cir. 2017), because FHA claims are remedial, FHA claims survive the death of a party. 42 U.S.C. §1988(a) – the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil and criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern. . . "whether failing to grant or deny request is a refusal." The plain language of §1988(a) does not apply to the FHA because the FHA was enacted afterwards and was never codified in the Titles governed by §1988(a) (13, 24, 70). Congress has repeatedly amended §1988(b), but not 1988(a) therefore, it does not apply to FHA claims. Thus, because the FHA is a federal statute, federal law must govern. Survival claims are generally subject to the federal common law. FHA claims are to provide fair housing throughout U.S., which warrants displacement of state law. Remedial claims survive, but penal claims do not.

II. Who Must Comply?

The FHA prohibits any housing-related discrimination based on a person's protected status and applies to (i) direct providers of housing; (ii) entities and associations that set terms and conditions for housing; and (iii) entities and associations that provide services or facilities in connection with housing. Accordingly, the FHA will generally apply to community associations, as well as individuals, corporations, municipalities, and anyone involved in the provision of housing and residential lending (*e.g.*, real estate agents and companies, housing managers, banks and lenders, and association's insurance companies).[10]

III. The "Federal Floor"

The FHA sets a minimum threshold for fair housing protections, but many States and localities have adopted more expansive fair housing regulations and requirements. Such examples include shifting the burden of paying for modifications to the association and adding additional categories of classes protected against discrimination in housing (such as age, marital status, sexual preference, students and source of income). States have also imposed more stringent design and construction standards for new multifamily housing.

COMMON FHA ISSUES FOR COMMUNITY ASSOCIATIONS

Generally, the FHA prohibits housing-related discrimination against housing applicants or residents because of their protected status or the protected status of anyone associated with them. Specifically, the FHA makes it unlawful for any person or entity to refuse "to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford… person(s) [with disabilities] equal opportunity to use and enjoy a dwelling."[11]

---

[10] *See, Baltimore Neighborhoods Inc. v. Rommel Builders, Inc.*, 3 F.2d 661 (D.Md. 1998).

[11] 42 U.S.C. §3604(f)(3)(B). For HUD regulations pertaining to reasonable accommodations, see 24 C.F.R. §100.204; *see also, Wisconsin Community Services, Inc. v. City of Milwaukee*, 465 F.3d 737 (7th Cir. 2006)(finding that the failure to accommodate is an independent basis for liability under the FHA); Joint Statement of the Department of

Usually (and hopefully), the issues that community associations run into, do not arise from adopted discriminatory rules, but instead transpire as requests to create an accommodation to a non-discriminatory rule, policy, practice or service to allow a disabled person equal access to the association's facilities and services.

I. What is a Reasonable Accommodation?

A reasonable accommodation means a change (variance, exception, allowance, adjustment, etc.) in enforcing the rules, policies, practices, or services so that a person with a disability will have an equal opportunity to use and enjoy a dwelling unit or common space.[12] A person with a disability may need either a reasonable accommodation or a reasonable modification, or both, in order to have an equal opportunity to use and enjoy a dwelling, including public and common use spaces.[13]

II. What is a Reasonable Modification?

Under the Fair Housing Act, a reasonable modification involves a request to make structural changes to an individual's property or to make structural changes to the community association's common property in order to allow the individual to fully use and enjoy the property in which they reside or the community association's common property. [14]

III. Who is Responsible for the Costs of the Request?

Generally, the association will be responsible for the costs associated with a reasonable accommodation unless it is an undue financial and administrative burden.[15]

The FHA provides that while the association must permit a reasonable modification, the applicant is responsible for the costs associated with the modification (including the upkeep and maintenance of the modification that is used exclusively by the applicant).[16]

Generally, an association has no responsibility to maintain a modification to a common area that's not normally maintained by the association.[17] However, an association is responsible for the upkeep and maintenance of a modification to a common area that is normally maintained by the association.[18]

Housing and Urban Development (HUD) and the Department of Justice: "Reasonable Accommodations under the Fair Housing Act" (Washington D.C.: May 17, 2004) and "Reasonable Modifications under the Fair Housing Act" (Washington, D.C.: March 5, 2008).

[12] Joint Statement of the Department of Housing and Urban Development (HUD) and the Department of Justice: "Reasonable Accommodations under the Fair Housing Act" (Washington D.C.: May 17, 2004).

[13] *Id.;* Joint Statement of the Department of Housing and Urban Development (HUD) and the Department of Justice: "Reasonable Modifications under the Fair Housing Act" (Washington, D.C.: March 5, 2008).

[14] 42 U.S.C. §3604(f)(3)(A); §3604(f)(3)(C).

[15] *See, Southeastern Comm. College v. Davis*, 442 U.S. 397 (1979); *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977); *Salute v. Stratford Greens Garden Apartments*, 136 F.3d 293, 300 (2nd Cir. 1998).

[16] 42 U.S.C. §3604(f)(3)(A); *HUD v. Ocean Sands, Inc.*, FH-FL Rptr. ¶¶22,055, 25,056, 25,061 (HUD ALJ 1993), 25,070 (HUD ALJ 1994) (condo association required to allow tenant to install a ramp or wheelchair lift).

[17] 42 U.S.C. §3604(f)(3)(A).

[18] *Id.*

One notable exception to the above regarding parking spaces.[19] While it would make sense that providing a parking space would be a reasonable accommodation, Courts have treated requests for parking spaces as requests for an accommodation and have placed the responsibility for providing the parking space on the association, even if provision of an accessible or assigned parking space results in some cost to the association.

Courts have also required an association to provide an assigned space even though the community may have a policy of **not** assigning parking spaces or may have a waiting list for available parking. Providing a parking accommodation can include creating signage, repainting markings, redistributing spaces, or creating curb cuts. And, associations may not require persons with disabilities to pay extra fees as a condition of receiving accessible parking spaces. Some recent rulings concerning parking spaces are listed below:

- On October 28, 2016, the District Court entered a consent order in *United States v. Nistler* (D.Mont. Case No. 6:2016-CV-00094-SEH) (*Nistler II*). The complaint, which was filed on September 30, 2016, alleges that the defendants designed and constructed 31 properties in the Helena area, for a total of 64 covered units, without the required accessible features. The consent order requires the defendants to pay $20,000 to establish a settlement fund, as well as make substantial retrofits, including replacing excessively sloped portions of sidewalks, installing properly sloped curb walkways to allow persons with disabilities to access units from sidewalks and parking areas, replacing cabinets in kitchens and toilets in bathrooms to provide sufficient room for wheelchair users, and reducing door threshold heights. The settlement also requires the defendants to construct 16 "super-accessible" units in Helena, Montana.
- On October 12, 2017, the United States Attorney General's office filed a complaint in *United States v. Fairfax Manor Group, LLC* (W.D.Tenn. Case No. 2:2017-CV-02751), alleging that the defendants denied the complainants' requests to remove a concrete parking bumper and assign an accessible parking space. The complaint also alleged that after the complainants reiterated their requests for a modification and an accommodation in writing with a copy to the U.S. Attorney's Office, the defendants retaliated by giving them a notice to vacate the property. Finally, the complaint alleges that after complainants filed a fair housing complaint, the defendants retaliated by filing an eviction action.

[19] *See*, *Hubbard v. Samson Management Corp*., 994 F.Supp. 187 (S.D.N.Y. 1998) (An apartment complex normally charged reserved parking spaces for a fee, but disabled tenant requested a reserved space for free. None of the available reserved spaces were near her apartment. The complex offered to designate some handicapped spaces, but none near tenant's apartment. The court ruled that the complex would not have been unduly burdened by reserving a previously unreserved space for the tenant's use without charge, as a reasonable accommodation under the FHA.); *see also*, *Shapiro v. Cadman Towers, Inc*., 51 F.3d 328 (2nd Cir. 1995); *Dinapoli v. DPA Wallace Ave. II*, 2009 WL 755354 (S.D.N.Y. Mar. 23, 2009); *United States v. Country Club Garden Owners Ass'n.*, 159 F.R.D. 400 (E.D.N.Y. 1995).

HOW TO HANDLE A REQUEST FOR AN ACCOMMODATION.

Reasonable accommodations may be necessary at all stages of the housing process, including application, tenancy or ownership, or to prevent eviction. Requests for accommodations (made by or on behalf of the disabled person) must be made before any obligation by the association exists, even if the words "reasonable accommodation" are not specifically used.[20]

Requests for accommodations must be reasonable and necessary, meaning there is an identifiable relationship or nexus between the requested accommodation and the disability.[21] An association can deny a request for a reasonable accommodation 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.[22]

Associations should do everything in their power to assist with a request, to the extent that the requested changes do not fundamentally alter their character or create an undue financial and administrative burden.[23] An association may not be required to grant an accommodation request if it imposes an undue financial and administrative burden or expense; or the requested accommodation fundamentally alters the essential nature of the operations.[24]

Recent Ruling:

- On July 20, 2017, the Southern District Court of New York entered a stipulation and order of settlement and dismissal based on a settlement agreement resolving *United States v. 505 Central Ave. Corp.; West-Ex Associates, Inc.* (S.D.N.Y. Case No. 7:2017-CV-00351-NSR). The lawsuit, filed by the U.S. Attorney's Office in January of 2017, involved a housing cooperative and management company that discriminated against a man with disabilities when it refused a reasonable accommodation to allow him to purchase a coop unit at Thompkins Manor using a special needs trust. Under the settlement agreement, the defendants must pay a total of $125,000, including compensatory damages and attorney's fees to the complainant and civil penalties to the United States.

I. Determining the Reasonableness of a Request for Accommodation.

Whether a particular accommodation is reasonable depends on the facts, and must be decided on a case-by-case basis.[25] What is reasonable in one circumstance may not be reasonable

---

[20] *See, Schwarz v. City of Treasure Island*, 544 F.3d 1201 (11th Cir. 2008); *Prindable v. Association of Apartment Owners of 2987 Kalakaua*, 304 F.2d 1245 (D.Hi. 2003).
[21] *See, Hawn v. Shoreline Towers Phase I Condominium Ass'n., Inc.*, 347 F. App'x. 464 (11th Cir. 2009).
[22] Joint Statement of the Department of Housing and Urban Development (HUD) and the Department of Justice: "Reasonable Accommodations under the Fair Housing Act" (Washington D.C.: May 17, 2004).
[23] *See, Bryant Woods Inn, Inc. v. Howard County, Md.*, 124 F.3d 597 (4th Cir. 1997); *Alexander v. Choate*, 469 U.S. 287 (1983).
[24] *See, Rodriguez v. 551 West 157th Owners Corp*., 992 F.Supp. 385 (S.D.N.Y. 1998).
[25] *See, Association of Apartment Owners of Liliuokalani Gardens at Waikiki v. Taylor*, 892 F.2d 1268 (D.Hi. 2012).

in another. In determining whether a request for accommodation is reasonable, an association may consider (i) safety issues[26] , and (ii) existence of other cost-efficient alternatives.[27]

The FHA does not afford protection to an otherwise disabled individual whose tenancy would constitute: (i) a "direct threat" to the health or safety of other individuals; or (ii) result in substantial physical damage to the property of others, unless the threat can be eliminated or significantly reduced.[28] This does not allow for exclusion based upon fear, speculation, or stereotype about a particular disability or persons with disabilities in general.[29]

A determination that an individual poses a direct threat must rely on an individualized assessment that is based on reliable objective evidence (*e.g.*, current conduct, a recent history of overt acts, etc.). The assessment must consider (a) the nature, duration, and severity of the risk of injury; (ii) the probability that injury will actually occur; and (iii) whether there are any reasonable accommodations that will eliminate the direct threat.[30]

Recent Rulings:

- In *United States v. NALS Apartment Homes, LLC, et al.* (D.Utah Case No. 2:2016-CV-01005-BSJ), the District Court entered a consent order against Defendants, who required certain tenants with disabilities who sought to live with assistance animals to have a healthcare provider complete a "prescription form" suggesting that the healthcare provider may be held responsible for any property damage or physical injury that the assistance animal may cause. The Defendants did not require tenants without disabilities who had pets to have a third party assume liability for their animals. Under the consent order, the defendants are required to pay $20,000 to a former tenant and her seven-year-old son with autism who were denied permission to keep the child's assistance animal after the child's doctor refused to sign a form suggesting he could be liable for damages caused by the animal. The defendants are also required to establish a $25,000 settlement fund to compensate any additional individuals who were harmed by their conduct.[31]
- On February 24, 2017, the Southern District Court of New York entered a consent decree in *United States v. Friedman Residence, LLC, Breaking Ground, et al.* (S.D.N.Y. Case No. 1:2017-CV-00366-PKC). The complaint by the US Attorney's Office alleged that a supportive shared housing residence for senior citizens, working professionals and persons living with HIV/AIDS in New York City violated the FHA on the basis of disability by refusing to allow a resident with a

[26] *See, Loren v. Sasser*, 309 F.3d 1296 (11th Cir. 2002).
[27] *Scoggins v. Lee's Crossing Homeowners Ass'n.*, 2011 WL 4578409 (E.D.Va. 2011) (unpublished), *and see Scoggins v. Lee's Crossing Homeowners Ass'n., et al.* 718 F.3d 262 (4th Cir. 2013).
[28] Joint Statement of the Department of Housing and Urban Development (HUD) and the Department of Justice: "Reasonable Accommodations under the Fair Housing Act" (Washington D.C.: May 17, 2004).
[29] *See, Wirtz Realty Corp. v. Freund*, 721 N.E.2d 589, 597 (Ill. App. 1999); *In re J.W.*, 672 A.2d 199 (N.J. App. 1996); *Bangerter v. Orem City Corp.*, 46 F.3d 1491 (10th Cir. 1995).
[30] Joint Statement of the Department of Housing and Urban Development (HUD) and the Department of Justice: "Reasonable Accommodations under the Fair Housing Act" (Washington D.C.: May 17, 2004).
[31] The case was referred to the Division after the Department of Housing and Urban Development (HUD) received complaints from both former tenants and Utah's Disability Law Center (DLC), conducted an investigation, and issued a charge of discrimination.

psychiatric disability to live with an emotional support dog in his unit. The consent decree requires the defendants to pay $20,000 in damages to the HUD complainant and to allow him to keep his assistance animal. It also requires the adoption of new reasonable accommodation policies.[32]

In determining whether a requested accommodation poses an undue financial and administrative burden, an association must consider[33] (i) the financial resources of the association; (ii) the cost of the reasonable accommodation; (iii) the benefits to the applicant of the requested accommodation; and (iv) the availability of other less expensive alternatives that would effectively meet the applicant's disability-related needs.[34]

An association cannot insist that a tenant move to or buy a different unit in lieu of allowing the individual to make a modification that complies with the requirements for reasonable modifications.[35] Further, an association cannot insist on an alternative modification or design (*e.g.*, alternative is more aesthetically pleasing) if the individual complies with the requirements for reasonable modifications.[36]

Recent Ruling:

- On November 10, 2016, the U.S. Attorney's Office filed a complaint in *United States v. Park City Communities (f.k.a. Bridgeport Housing Authority*) (D.Conn. Case No. 3:2016-CV-01851-JCH) in the District Court of Connecticut, alleging that the Housing Authority violated the FHA on the basis of disability by refusing to grant the HUD complainant's request for a reasonable accommodation to be transferred to a different unit because of her disability.

If the request involves a modification to the interior of the unit and must be restored to its original condition when the tenant moves out, the association cannot require that its design be used instead of the tenant's design.[37] However, if the modification is to a common area or an aspect of the interior of the unit that would not have to be restored because it would not be reasonable to do so, and if the association's proposed design imposes no additional costs and still meets the applicant's needs, then the modification can be done in accordance with the alternative design.[38]

---

[32] The case was referred to the Division after the Department of Housing and Urban Development (HUD) received a complaint, conducted an investigation and issued a charge of discrimination.

[33] *See, Scoggins v. Lee's Crossing Homeowners Ass'n.*, 2011 WL 4578409 (E.D.Va. 2011) (unpublished); *Scoggins v. Lee's Crossing Homeowners Ass'n., et al.*, 718 F.3d 262 (4th Cir. 2013).

[34] *See, Shapiro v. Cadman Towers Inc*., 51 F.3d 328 (2nd Cir. 1995).

[35] *See, Manor Park Apts. v. Garrison*, 2005 Ohio 1891 (Ohio 2005); *Bentley v. Peace and Quest Realty 2, LLC*, 367 F.2d 341 (E.D.N.Y. 2005).

[36] *See, Bryant Woods Inn, Inc. v. Howard County, Md.*, 124 F.3d 597 (4th Cir. 1997); *Alexander v. Choate*, 469 U.S. 287 (1983).

[37] 42 U.S.C. §3604(f)(3)(A).

[38] *Id.; Solodar v. Village Of Kings Creek Condominium Ass'n., Inc.*, 390 F.2d 877 (11th Cir. 2010).

II. Investigating a Disability in Support of a Requested Accommodation

In general, an association can obtain information that is needed to evaluate if a requested accommodation is necessary.[39] However, if a person's disability is obvious or otherwise known, and the need for the requested accommodation is also readily apparent or clear, then an association **cannot** request any additional information about the nature or severity of the disability or the disability-related need for the accommodation.[40]

An association **can** request reliable disability-related information that:

a. is necessary to verify that the person meets the definition of disabled (*i.e.,* has a physical or mental impairment that substantially limits one or more major life activities),

b. describes the needed accommodation, **and**

c. indicates the relationship or nexus between the person's disability and the need for the requested accommodation.[41]

Generally, a doctor or 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 may provide verification of a disability.[42]

Recent Rulings:

- On September 28, 2016, the District Court of Utah entered a consent order in *United States v. NALS Apartment Homes, LLC* (D.Utah Case No. 2:2016-CV-01005-BSJ). The Defendants required certain tenants with disabilities who sought to live with assistance animals to have a healthcare provider complete a "prescription form" suggesting that the healthcare provider may be held responsible for any property damage or physical injury that the assistance animal may cause. The defendants did not require tenants without disabilities who had pets to have a third party assume liability for their animals. Under the consent order, the defendants are required to pay $20,000 to a former tenant and her seven-year-old son with autism who were denied permission to keep the child's assistance animal after the child's doctor refused to sign a form suggesting he could be liable for damages caused by the animal. The defendants are also required to establish a $25,000 settlement fund to compensate any additional individuals who were harmed by their conduct.[43]
- *Gomez v. Quicken Loans,* 629 F. App'x. 79 (9th Cir. 2015). The Court of Appeals ruled that the district court erred in dismissing plaintiff's disparate treatment claim under the FHA. SSDI letters that do not contain expiration dates sufficiently establish that the disability benefits would likely continue and lenders may not require SSDI

[39] *See, Bhogaita v. Altamonte Heights Condominium Ass'n., Inc.*, 765 F.3d 1277 (11th Cir. 2014).
[40] *See, Robards v. Cotton Mill Associates*, 713 A.2d 952 (Me. 1998).
[41] *Id.; Hawn v. Shoreline Towers Phase I Condominium Ass'n., Inc.*, 347 F. App'x. 464 (11th Cir. 2009).
[42] *Id.*
[43] The case was referred to the Division after the Department of Housing and Urban Development (HUD) received complaints from both former tenants and Utah's Disability Law Center (DLC), conducted an investigation, and issued a charge of discrimination.

recipients to provide medical documentation as additional proof that the disability benefits would continue.

Thus, in response to a request for accommodation, an association has a duty to investigate and obtain written verification from a medical professional or appropriate third-party stating that (i) the person is disabled (if the disability is not visible); and the requested accommodation would aid the disabled person's health and enjoyment of the property (if the request is not readily apparent).[44]

An association also has a duty to be diligent and prompt in responding to an applicant's request, regardless of whether a disability is obvious, known, or not. Any undue delay in responding to a request may be deemed to be a failure to provide a reasonable accommodation.[45]

HARASSMENT ISSUES

In recent years, there has been numerous claims of sex discrimination based on harassment in housing.[46] Enforcement has been aimed at instances that create an untenable living environment by demanding sexual favors or by creating a hostile environment.[47]

For whatever reason, the law of sex discrimination and harassment in housing developed slower than its "protected class" counterparts. Prior to recent happenings, courts interpreting sexual harassment under the FHA, often relied on, and consequently restricted, sexual harassment to the legal protection provided under Title VII (of the Civil Rights Act of 1964, 42 U.S.C. 2000(e), *et seq.*), "because the conduct at issue in the housing setting is similar to that in the working environment and similar interests are subject to legal protection under both acts". *See, Butler v. Carrero*, 1:12-CV-2743-WSD, 2013 WL 5200539, at *7 (N.D.Ga. 2013); *see also, West v. DJ Mortg., LLC*, 164 F.3d 1393 (N.D.Ga. 2016) (court relied on Title VII law to sustain a post-acquisition sexual harassment claim under 42 U.S.C. §3604(b) and stating that "[s]exual harassment qualifies as sexual discrimination under the FHA if that harassment alters the terms or conditions of rental of the property for the tenant."); *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1245 (11th Cir. 1999).

However, it should be noted that the FHA contains an additional provision – 42 U.S.C. §3604(c) – that bans sexually discriminatory statements in a way that goes well beyond its Title VII colleague. Notably, 42 U.S.C. §3604(c) prohibits even isolated discriminatory housing "notices, statements, and advertising"; and 42 U.S.C. §3617 **outlaws coercion, intimidation, threats, and interference with the rights guaranteed by 42 U.S.C. §§3604-3606**.

---

[44] *See, Hawn v. Shoreline Towers Phase I Condominium Ass'n., supra.*

[45] *Id.; Bhogaita v. Altamonte Heights Condominium Ass'n., Inc., supra.*

[46] The United States Supreme Court first recognized that sexual harassment was a form of discrimination under Title VII of the 1964 Civil Rights Act, which prohibits discrimination in employment, in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

[47] *See, Beliveau v. Caras*, 873 F.Supp. 1393 (C.D.Cal. 1995) (where the court denied the defendant's contention that a single incident cannot be so severe or pervasive as to alter the conditions of the tenant's housing environment).

Accordingly, certain courts have been critical of the reliance on Title VII employment cases, arguing that a person's expectations of privacy and security in his/her home differs from those expectations in the workplace. *See, Quigley v. Winter*, 584 F.2d 1153 (D.Iowa 2008) ("The Court is not persuaded that sexual harassment at work is akin to sexual harassment in one's own home by one's own landlord who just so happens to also have a key to the house.").

Further, a property manager or association could be liable if it is determined that tenant-on-tenant harassment was known and the manager or association did not take remedial action. *See, Reeves v. Carrolsburg Condominium Unit Owners Ass'n*., 1997 U.S. Dist. LEXIS 21762 (D.D.C. Dec. 18, 1997) (court held that a tenant stated a claim against a condominium owners association where the association was aware that another tenant had repeatedly shouted sexist epithets at her and threatened to assault/kill her.); *see also, Glover v. Jones*, 522 F.2d 496 (W.D.N.Y. 2007) (court rejected a property owner's argument that the manager was acting outside the scope of his employment (in subjecting tenant to a hostile environment where the manager repeatedly verbally assaulted the tenant, and inappropriately touched her (*e.g.*, put his arm around her, hugged her without her consent, etc.) and that the owner was therefore not vicariously liable for the manager's conduct. The court found that the manager's position as the owner's agent aided in his perpetration of the unlawful conduct. For example, his position as manager gave him the opportunity to visit the tenant's unit whenever he wanted.).

Recent Rulings:

- *Reed v. Peñasquitos Casablanca Owner's Ass'n.*, 381 F.App'x. 674 (9th Cir. 2011), dealt with harassment that occurs after the initial rental or purchase of housing. The Court of Appeals overruled the district court in holding that plaintiffs harmed by the harassment of another can never state a claim under the FHA. Accordingly, there is no requirement that a victim endure or witness overtly sexual behavior in order to recover in a case involving harassment on the basis of sex. **The Court further ruled that a homeowner's association's inaction after it was notified of an employee's possible harassment may justify an award of punitive damages.**
    - Amicus brief argued that the district court improperly granted judgment as a matter of law on punitive damages, in part arguing that punitive damages, like supervisory liability, was necessary to ensuring adequate enforcement of civil rights laws. The DOJ drew a useful comparison between punitive damages and supervisory liability and adopted a standard for supervisory liability that is far broader courts had recognized before. And, the Ninth Circuit ultimately agreed with the United States' position, holding that a defendant's reckless indifference was sufficient to entitle a plaintiff to punitive damages, and that a plaintiff could show such indifference by demonstrating that the defendant knew of unlawful conduct by subordinates and failed to take any action.
- In November of 2016, the U.S. Attorney's Office filed a complaint in the District Court of South Dakota in *United States v. Kelly* (D.S.D. Case No. 5:2016-CV-05099-JLV), alleging that the owner of a three-unit residential property in Rapid City, South Dakota violated the Fair Housing Act on the basis of sex and familial status by refusing to rent a unit to a woman and her 17-year old daughter because she would be concerned about any woman being alone there and she had "always rented to

bachelors." The case was referred to the Division after the Department of Housing and Urban Development (HUD) received a complaint, conducted an investigation, and issued a charge of discrimination.

- On August 31, 2016, the United States Attorney General filed a complaint in *United States v. Webb* (E.D.Mo. FHEO Case No. 07-13-0454-8), alleging that the defendants violated the FHA when Hezekiah Webb made sexually explicit comments to a tenant, propositioned her in exchange for reduced rent, attempted to touch her without her consent, and ultimately evicted her after she rebuffed his sexual advances, claiming that she gambled and made too much noise at the six-unit apartment. The complaint also alleged that Webb sexually harassed other tenants in a similar fashion.
- On August 12, 2016, the court entered a consent order in *United States v. Encore Management Company, Inc.* (S.D.W.Va. Case No. 2:2014-CV-28101). The complaint, which was filed on November 14, 2014, alleges sexual harassment of tenants at Perkins Parke Apartments in Cross Lanes, West Virginia. The consent order requires the payment of $110,000 to seven adult and four minor victims and a $10,000 civil penalty.
- On March 21, 2016, the court approved the distribution of the $1,000,000 settlement fund to 71 aggrieved persons in *United States v. Southeastern Community and Family Services, Inc*. (*Wesley*) (M.D.N.C. Case No. 1:2014-CV-01032). The complaint, filed on December 10, 2014, alleged that Southeastern Community and Family Services, Inc., a public housing agency that administers the Section 8 Voucher Program in Scotland County, NC, and two of its employees sexually harassed female participants and applicants of the Voucher Program in violation of the FHA. The case was consolidated with a previously-filed private action (*Sellers v. Southeastern Community and Family Services, Inc.* (M.D.N.C.)). The consent decree, which was entered by the court on July 2, 2015, required the defendants to pay $2.7 million in damages to victims of their discriminatory conduct, including fees and costs, and more than $25,000 in civil penalties. It also barred the individual defendants from participating in the management of any Section 8 Voucher Program and any residential rental properties in the future. It requires the agency to establish non-discrimination policies, require employees to attend training, and hire an independent manager to oversee the agency's Section 8 Voucher Program.

DISPARATE IMPACT DISCRIMINATION

In 2015, the U.S. Supreme Court ruled in a 5-4 decision that disparate impacts were sufficient cause to find a FHA violation.[48] Policies can be deemed illegal, even without evidence of discriminatory intent or motivation, if the effects of the policy are shown to disproportionately harm groups protected by the FHA.[49] Disparate impact discrimination ("discrimination in operation") occurs when a neutral rule unnecessarily and disproportionately impacts a protected class.

[48] *See, Texas Dept. of Hous. & Commty. Affairs v. Inclusive Communities Project, Inc., supra*; *Township of Mt. Holly v. Mt. Holly Gardens Citizens in Action, Inc*., 134 S. Ct. 636 (2013); *Huntington v. Huntington Branch, NAACP*, 488 U.S. 15 (1988) (*per curiam*).

[49] *See, Hollis v. Chestnut Bend Homeowners Ass'n.*, 760 F.3d 531 (6th Cir. 2014).

In order to be successful in a disparate impact claim, one must establish that adopted practices have a disproportionately adverse effect on a protected class without a legitimate rationale or justification.[50] A neutral rule is one that does not appear to target a particular class, but when applied, it adversely impacts one class more than the general public.

Whether a rule's disparate impact results in illegal discrimination depends on whether: (i) the rule-maker can show some substantial or legitimate interest in using the rule; and (ii) a less discriminatory alternative to the rule exists. Identifying statistical disparities is not enough though; rather, it should be evident that particular policies caused the disparity in question.

Recent Rulings:

- As stated above, disparate impact claims are cognizable under Sections 804(a) and 805(a) of the FHA, 42 U.S.C. §3601, *et seq. Texas Dept. of Hous. & Commty. Affairs v. Inclusive Communities Project, Inc., supra*; *See also, Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mt. Holly*, 658 F.3d 375 (3rd Cir. 2011) ("The Fair Housing Act does encompass disparate-impact liability, noting that all 11 circuits to have decided the issue have permitted such claims. HUD, consistent with its longstanding position, promulgated a regulation providing for disparate-impact liability. Because the regulation lays out a burden-shifting analysis for deciding such claims, the Court need not review any circuit split on the appropriate burdens of proof.").
- In October of 2016, the United States filed a statement of interest in *Fortune Society, Inc. v. Sandcastle Towers Housing Development Fund Corp., et al* (E.D.N.Y. Case No. 1:2014-CV-6410-VMS) in the Eastern District Court of New York, in a determined effort to assist an organization that helps formerly incarcerated individuals find housing is challenging the practices of an affordable rental apartment complex with 917 units in Far Rockaway, Queens. The statement of interest aims to assist the court in evaluating whether a housing provider's policy that considers criminal records in an application process produces unlawful discriminatory effects, in violation of the FHA. Although the FHA does not forbid housing providers from considering applicants' criminal records, the brief explains that "categorical prohibitions that do not consider when the conviction occurred, what the underlying conduct entailed, or what the convicted person has done since then run a substantial risk of having a disparate impact based on race or national origin." The brief also explains that when a housing provider has a criminal record check policy with a disparate impact, the housing provider must "prove with evidence – and not just by invoking generalized concerns about safety – that the ban is necessary." Even then, the policy will still violate the FHA if there is a less discriminatory alternative.

[50]*See, Resident Advisory Board v. Rizzo*, 564 F.2d 126, 146 (3rd Cir. 1977); *Smith v. Clarkton*, 682 F.2d 1055, 1065 (4th Cir. 1982); *Hanson v. Veterans Administration*, 800 F.2d 1381, 1386 (5th Cir. 1986); *Arthur v. Toledo*, 782 F.2d 565, 574–575 (6th Cir. 1986); *Metropolitan Housing Development Corp. v. Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977); *United States v. City of Black Jack, Mo.*, 508 F.2d 1179, 1184–1185 (8th Cir. 1974); *Halet v. Wend Investment Co.*, 672 F.2d 1305, 1311 (9th Cir. 1982); *United States v. Marengo Cty. Commission*, 731 F.2d 1546, 1559, n. 20 (11th Cir. 1984).

PET POLICY ISSUES

Common issues involving the FHA that community associations regularly deal with include support and service animals and disability accommodation request.[51] Assistance and emotional care animals are almost always allowed as a reasonable accommodation.[52] And such accommodations may apply to such animals even without special training.[53] It is generally allowable for an association to request an opinion from the doctor stating how the animal aids the individual's disability. There are mixed state opinions but generally any animal that is not "inherently dangerous" may be considered for a reasonable accommodation.

Recent Rulings:

- *Arnal v. Aspen View Condo. Ass'n., et al.* (D.Colo. Case No. 1:2015-CV-01044-WYD-STV) involved a lawsuit alleging discrimination on the basis of disability and retaliation under the FHA. The plaintiff, the owner of a condominium unit, alleged that his condominium association improperly denied a reasonable accommodation to its **"**no dogs" policy to allow his tenant to keep a service dog that assisted her with her epilepsy, and that the condo association retaliated against him for allowing the tenant to keep the dog by issuing fines. On July 15, 2016, the United States had filed a statement of interest, arguing that a plaintiff may maintain a retaliation claim even in the absence of an underlying discrimination claim and that evidence that defendants imposed fines on a unit owner for allowing a tenant the requested accommodation supported a prima facie case of retaliation under the FHA. The court ruled, consistent with the statement of interest, that plaintiff's retaliation claim was not dependent upon his reasonable accommodation claim and that a reasonable jury could conclude that the fines were imposed in retaliation for allowing his tenant to live in the condo unit with her dog and assisting his tenant in exercising her fair housing rights.
- On July 18, 2017, the U.S. Attorney's Office entered into a settlement agreement resolving *United States v. Trump Village Section IV Inc.* (E.D.N.Y. Case No. 1:2015-CV-7306). The complaint alleged that a housing cooperative in Brooklyn refused to allow three (3) residents, including an Army combat veteran with PTSD, to live with their emotional support dogs, and then retaliated against them for exercising their fair

[51] *E.g.,* permitting a blind tenant to have a guide dog even if building has a "no pet" policy. *See, DuBois v. Association of Apartment Owners of 2987 Kalakaua*, 453 F.3d 1175, 1179 (9th Cir. 2006); *Bronk v. Ineichen*, 54 F.3d 425, 429 (7th Cir. 1995); *see also*, *Fulciniti v. Village of Shadyside Condo. Ass'n.*, 1998 U.S. Dist. LEXIS 23450 (W.D.Pa. Nov. 20, 1998) (unpublished) (Tenant with multiple sclerosis obtained a puppy to train as a service dog, violating the rules of the condominium association. The dog was trained to provide emotional support for Linda and to alert others when she was in need of assistance. The court found that prohibiting Linda from keeping the dog as a service animal was a violation of the FHA for failing to provide reasonable accommodation.).

[52] *E.g*., granting a request from applicant with a mental disability for an emotional support animal even if apartment building/complex, cooperative, or condominium board has a "no pet" policy, a maximum dog weight requirement, or required animals to be trained to provide services to disabled persons. *See*, *Overlook Mutual Homes, Inc. v. Spencer*, 415 F. App'x. 617 (6th Cir. 2011); *Fair Housing of the Dakotas v. Goldmark Property Management*, 778 F.2d 1028 (D.N.D. 2011); *Bhogaita v. Altamonte Heights Condominium Ass'n.*, *supra*; *Falin v. Condominium Association of La Mer Estates*, 2012 WL 1910021 (S.D.Fla. 2012).

[53] *See*, *Overlook Mutual Homes, Inc. v. Spencer*, *supra*.

housing rights. The settlement agreement provides a total of $40,000 to the three families and a $10,000 civil penalty.

- On May 17, 2017, after a six-day jury trial, the jury returned a verdict in favor of the United States *in United States v. Katz and All Real Estate Services in Montana, LLC* (D.Mont. Case No. 2:2014-CV-00068-SEH). The jury awarded a total of $37,000 in damages, consisting of approximately $31,000 in compensatory and punitive damages to the former tenant and approximately $6,000 in compensatory damages to the fair housing group that assisted her with her HUD complaint. The complaint alleged that defendants charged a $1,000 pet deposit for a service animal owned by a tenant with traumatic brain injury, despite being requested to waive the deposit as a reasonable accommodation pursuant to Section 804(f) of the FHA. The complaint also alleged that defendant Katz threatened to evict the tenant after she sought the return of the deposit in violation of Section 818 of the FHA.
- On January 18, 2017, the U.S. Attorney's Office filed a complaint in *United States v. Kips Bay Towers Condominium, Inc.* (S.D.N.Y. Case No. 1:2017-CV-00361), alleging that a condominium board in New York City violated the FHA on the basis of disability by refusing to allow several residents with psychiatric disabilities to live with emotional support dogs in their units.
- The District Court in *Warren v. Delvista Towers Condo. Ass'n., Inc.*, 49 F.3d 1082 (S.D.Fla. 2014) (internal citations omitted) dealt with a Miami-Dade County city ordinance that placed breed bans on pit bulls. The Court discussed an unreasonable request for accommodation and whether the FHA preempts city ordinance. The accommodation request stems from PTSD symptoms, the symptoms the animal ameliorates are mental and emotional, rather than physical, so no training required. The Court first noted that an accommodation is *unreasonable* if (1) it would impose an undue financial and administrative burden on the housing provider; or (2) it would fundamentally alter the nature of the provider's operations. Denial is allowed if the specific animal (1) poses a direct threat to the health or safety of others that cannot be mitigated or eliminated or (2) would cause substantial physical damage to the property of others that cannot be mitigated or eliminated. As to whether the specific breed banning ordinance makes an accommodation *per se* unreasonable (*i.e.,* whether the county ordinance is preempted by FHA?), the Court detailed the "clear and manifest purpose of Congress" was to provide disabled individuals with equal use and enjoyment of their dwelling by enacting FHA … and thus, it intended to preempt any laws that prevent FHA from achieving its purpose of providing equal housing opportunities to disabled individuals. Accordingly, a breed ban is preempted by the FHA because it "stands as an obstacle" to the objectives of Congress in enacting the FHA.

HOW TO AVOID A FAIR HOUSING LAWSUIT

The FHA covers a wide variety of activity that can be prosecuted by (i) the Federal government, (ii) nonprofit fair housing organizations (that meet standing requirements), and (iii) private individuals. Costs incurred in FHA cases can be significant – a first offense FHA violation can be up to $16,000, aside from civil compensatory and punitive damages. It should also be noted

that there is limited case law guidance as to defense and indemnity obligations under common housing providers' insurance policies with regard to FHA discriminatory violations.

I. Complaint and Enforcement Process.

A person who thinks they have been discriminated against in violation of the FHA may file a private civil lawsuit (which may include punitive damages) or file a complaint with the U.S. Department of Housing and Urban Development (HUD).[54] HUD and the Department of Justice (DOJ) are jointly responsible for administering and enforcing the FHA.[55]

Under the FHA, the DOJ may also bring a lawsuit if there is reason to believe that a person or entity is engaged in a "pattern or practice" of discrimination or where a denial of rights to a group of persons raises an issue of general public importance.[56] In FHA cases, the DOJ can obtain injunctive relief, including affirmative requirements for training and policy changes, monetary damages and, in pattern or practice cases, civil penalties.[57]

II. Tips To Ensure FHA Compliance.

Courts have held that associations, like landlords, are responsible for maintaining the common areas and enforcing the regulations of the association for the benefit of the residents. *See, Gittleman v. Woodhaven Condo. Association, Inc.*, 972 F.Supp. 894 (D.N.J. 1997) (condo association is duty bound to regulate use of common elements so as to comply with FHA); *see also, Frances v. Village Green Owners Ass'n.*, 229 Cal.Rptr. 456, 42 Cal.3d 490, 723 P.2d 573 (Cal.1986) ("The association is, for all practical purposes, the [complex's] landlord"). As such, an association should make sure to adopt rules and regulations that are not facially discriminatory as drafted. The rules and regulations should also serve a legitimate health or safety concern (*i.e.*, use of common area elements), and as such, should be directly correlated to address a specific concern.

With regard to enforcing the rules and regulations, it is important to enforce in a neutral, consistent and even-handed manner. Associations should not single out protected groups (either favorably or dis-favorably) with respect to the enactment and enforcement of rules and regulations. As such, board members should not selectively apply or provide unfitting justifications when enforcing the rules and regulations. If the association does not intend to enforce a rule or regulation, they should just get rid of it.

Illustration:

- The Association allows a Christian religious group to use the community chapel facility but not non-Christian religious groups.
- The Association waives the fee for the Girl Scouts of America to use the community meeting room to sell their cookies, but charges the Boy Scouts of America for their meetings there.

[54] 42 U.S.C. §3612(a); 42 U.S.C. §3613(a).
[55] 42 U.S.C. §3608(a); 42 U.S.C. §3612.
[56] 42 U.S.C. §3614.
[57] 42 U.S.C. §3610; 42 U.S.C. §3614(d); 42 U.S.C. §3614(d)(1)(C); 42 U.S.C. §3631.

- Requiring "adult swim" time at a community pool.
- The Association's golf course restricts women from playing golf on Friday mornings.

Although not required under the FHA, an association should also adopt formal procedures for accommodation requests. This will aid individuals with disabilities in making requests for reasonable accommodations, and will also help providers in assessing those requests so that there are no misunderstandings as to the nature of the request, and, in the event of later disputes, provide records to show that the requests received proper consideration.

CONCLUSION

Compliance with Federal, state and local fair housing laws can seem like a never-ending daunting task for community association board members and managers. Especially considering the potential costs and penalties associated with violations. What community associations should be cognizant of is that most FHA claims do not involve initial acts of discrimination, but they are seemingly neutral rules, policies or practices, that when enforced, end up having a disparate impact on a protected status individual.

The FHA is comprehensive and far-reaching, in that the protection afforded, not only applies to individuals with disabilities, but also others without disabilities who live or are associated with individuals with disabilities (includes not only discrimination against the primary purchaser or named lessee, but also to applicants because they have children, parents, friends, spouses, roommates, patients, subtenants or other associates who have disabilities).[58] Even advertising or marketing the association as "a quiet community" can attract state fair housing authorities to initiate an investigation into an association's policies.

Accordingly, an association should adopt formal procedures for processing reasonable accommodation requests. In adopting such procedures, an association should make sure that the procedures, including any forms used, do not seek information that is not needed to evaluate if a reasonable accommodation is necessary or not. Further, an association may not refuse a request because the individual making the request did not follow any formal procedures that the association has adopted.

In establishing whether a disability exists or not, an association may make certain reasonable inquiries, provided these inquiries are not overly intrusive. This might include a reasonable inquiry to determine if an applicant is a current illegal abuser or addict of a controlled substance; or a reasonable inquiry to determine if of the requested accommodation has an identifiable nexus to the stated disability.

---

[58] 42 U.S.C. §3604(f)(1)(B), §3604(f)(1)(C), §3604(f)(2)(B), §3604(f)(2)(C). *See also,* H.R. Rep. 100-711 - 24 (reprinted in 1988 U.S.C.A.N. 2173, 2184-85) ("The Committee intends these provisions to prohibit not only discrimination against the primary purchaser or named lessee, but also to prohibit denials of housing opportunities to applicants because they have children, parents, friends, spouses, roommates, patients, subtenants or other associates who have disabilities."). *Accord*: Preamble to Proposed HUD Rules Implementing the Fair Housing Act, 53 Fed. Reg. 45001 (Nov. 7, 1988) (citing House Report); *see also*, *Trafficante v. Metropolitan Life Insurance Co*., 409 U.S. 205 (1972) (Supreme Court allowed white tenants in a building that excluded minorities to sue to enforce the FHA on the ground that the management of the housing project affected "the very quality of their daily lives".).

Most importantly, an association's policy should be that it never denies a request for an accommodation or modification until it has carefully and thoughtfully evaluated the request with their counsel.

RESOLUTION OF THE BOARD OF DIRECTORS
_____ OWNERS ASSOCIATION

REASONABLE ACCOMMODATION/MODIFICATION POLICY

Adopted _____, 2018

At a duly called and noticed meeting of the Board of Directors on _____, 2018, the Board resolved as follows:

It is the intent of the _____ Association (hereafter, the "Association") to ensure that those owners and residents of the Association who wish to petition the Association to obtain a reasonable accommodation/modification under the Arizona Fair Housing Act and the Federal Fair Housing Act understand the process of obtaining a reasonable accommodation/modification. It is also the intent of the Association to make the acquisition of a reasonable accommodation/modification as easy as possible. Therefore, the Association hereby establishes this Reasonable Accommodation/Modification Policy:

1. Any Owner or Resident within the Association may petition the Association for a reasonable accommodation/modification;

2. Should an Owner or Resident desire to obtain a reasonable accommodation/modification, the Owner or Resident should submit said request in writing to the Association as follows:

    a. Via U.S. Mail:

    _____

    _____

    _____

    b. Via Facsimile:

    _____

    c. Via E-mail:

    _____

    d. Via Personal Delivery:

    _____

    _____

3. In order to aid the Association in providing a swift decision regarding a reasonable accommodation/modification request, the Owner or Resident may provide the following information:

    a. A letter detailing the reasonable accommodation/modification desired and how the reasonable accommodation/modification will aid the Owner or Resident in his/her or their use and enjoying the residence and a letter from a doctor or other healthcare professional regarding same; or

    b. A letter from a doctor or other healthcare professional detailing the reasonable accommodation/modification and how the reasonable accommodation/modification will aid the Owner or Resident in his/her or their use and enjoying the residence.

2. Upon receipt of the reasonable accommodation/modification request and all required information, the Association will act on the request within 45 days of receipt.

3. The Board of Directors shall not unreasonably withhold approval of a reasonable accommodation/modification request.

4. Owners and Residents have the right to directly petition the Association's Board of Directors regarding their reasonable accommodation/modification request.

5. Owners and Residents should understand that if a reasonable modification request involves modification or alteration of the common property, Arizona Law states that the Owner or Resident making said request is responsible for all costs concerning said request.

BE IT ALSO RESOLVED, that this resolution is included in the books and records of Association and that a copy of this resolution is sent to all Owners and residents of the Association.

_____ Director _____ Director

_____ Director _____ Director

_____ Director

Shaw & Lines, LLC
Counselors to Community Associations

"Doing better what is already being done."

Shaw & Lines, LLC is an award winning law firm that focuses its practice to Homeowner Association Law, General Real Estate Law, Bankruptcy, Fair Housing and General Business Law. The Firm was founded and continues to operate on the goal of promising and providing efficient, competent and quality legal services to its clients. Shaw & Lines, LLC distinguishes itself by efficiently and effectively "doing better what is already being done."

- Advising Boards
- Collecting Assessments
- Enforcing Restrictions
- Drafting Documents
- Negotiating Contracts
- Educating Managers
- Guiding Development
- Leading the Industry

Attorneys

Augustus H. Shaw IV, Esq., CCAL
Member, Board of Governors,
College of Community Association Lawyers
ashaw@shawlines.com

Mark E. Lines, Esq., CCAL
Member, College of Community
Association Lawyers
mlines@shawlines.com

Patrick J. Whelan, Esq.
pwhelan@shawlines.com

Shaw & Lines, LLC
HOA & CONDO LAWYERS

4523 E. Broadway Road | Phoenix, Arizona 85040
480.456.1500 p. | 480.456.1515 f.
www.shawlines.com

SHAW & LINES, LLC

HOA & CONDO LAWYERS

THIS IS TO CERTIFY THAT

[Student Name]

_____

has successfully completed

Recent Development Regarding The Fair Housing Act

held on _____

for 1 (one) Hour of continuing education for CMCA® recertification.

This course is approved by the Community Association Managers International Certification Board (CAMICB) to fulfill continuing education requirements for the CMCA® certification. www.camicb.org