



# Community Association Management Insider®

Helping You Run Your Condo or Homeowners Association Legally and Efficiently

**JUNE 2016**

**FEATURE**

*Follow four tips to avoid discriminating against families with children.*

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## Review Association Rules to Avoid Family Discrimination Lawsuit

For an association, its board of directors, or manager, there is never a good time for a lawsuit. If the association has been forced to sue a member due to chronic rule violations or unpaid assessments, it can lead to expensive and protracted litigation. And if the association is being sued, it faces those same problems. But in the case of a discrimination claim by a member, statutory fines and governmental involvement also pile on. A discrimination lawsuit additionally carries with it the potential to damage your community’s reputation. It may scare away potential buyers, especially those who fit into the class that the association is being accused of discriminating against.

Discrimination against families increasingly has been in the news, so it’s a good time for associations to review with board members and staff what types of behavior to avoid, and to review the community’s rules and eliminate any issues that pose a discrimination lawsuit risk. Letting things slide just because you haven’t been accused of discrimination yet isn’t the answer. Instead, consider these tips when drafting or reviewing your community’s rules.

### Fair Housing Cautionary Tales

One way that associations become entangled in family discrimination lawsuits is from unfairly singling out children when setting and enforcing rules. While your community may set reasonable rules to protect the safety of your members’ children and respect other members’ right to enjoy their property, they shouldn’t be overly restrictive.

There are protections from such rule restrictions in place for families. The federal Fair Housing Act (FHA) prohibits discrimination in housing based on race, color, religion, national origin, sex, disability, and familial status, which generally refers to minor children. And the U.S. Department of Housing and Urban Development (HUD) works to create inclusive communities, free of discrimination.

Unfortunately, recent cases have shown that that doesn’t always stop communities from placing unwarranted restrictions on families.

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## Family Discrimination Lawsuit

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Recently, a Texas complex was accused of illegally restricting children. According to HUD, it violated fair housing law by imposing overly restrictive rules on children under 16 who lived there. Specifically, the community's rules discriminated against families by prohibiting children under the age of 16 from being in their home without an adult, using the laundry facilities without an adult present, using the pool without an adult present, or using their scooters or bikes on the street and parking lots without an adult present.

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**PRACTICAL POINTER:** If you manage an age-restricted community, you're probably under the impression that you don't need to be concerned with restrictions on children. But make sure that the exemption to the requirement that families must be treated in the same manner as nonfamily association members applies to you before you refuse to allow families to buy units or homes in your community. A Las Vegas association learned the hard way that it hadn't taken the proper steps to make the community's age restriction legal. HUD charged the association and its property management company with discrimination against families with children by restricting its housing to persons who are 55 and older.

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### Tip #1: Ban Bad Behavior—Not Children

Communities have a legitimate reason to adopt rules governing behavior in common areas such as hallways and parking lots and while using amenities such as pools and fitness centers. Such rules generally are necessary to prevent damage, protect safety, and minimize potential liability for injuries suffered by residents and guests using your community's facilities. And rules regulating conduct in the

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## **Family Discrimination Lawsuit**

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common areas within buildings are a legitimate way to prevent disturbances that interfere with residents' quiet enjoyment of their units.

However, you may not adopt rules that unduly interfere with the ability of families with minor children to use and enjoy the community's facilities. Various association rules that have led to discrimination claims in the past include inexplicably limiting the number of hours that children could use the community's pool, prohibiting children from playing alone at any time on their front lawns and park-like areas in the community, and restricting use of common areas by age for no apparent reason.

For the most part, it's best to adopt rules that focus on dangerous or disruptive behavior in your common areas and facilities—instead of on the age of the person who engages in that behavior.

### **Tip #2: Make Sure Child-Targeted Rules Are Reasonable and Necessary**

Your community may establish rules targeting children's use of your facilities, such as your pool or fitness center, as long as the rules are reasonable and necessary to protect their safety.

For example, you have legitimate concerns about children's safety if you have a pool at your community. While it may allay your fears to ban children from using the pool under any circumstances, adopting such an unreasonable rule would amount to discrimination "in the terms, conditions, or privileges" of rental units, based on familial status.

But it would be lawful to impose conditions that are both reasonable and necessary to protect children's safety when using your pool, such as requiring adult supervision for children under a certain age. Having an objective source, such as state and local law, will help prove that any child-targeted rules are reasonable and necessary.

### **Tip #3: Enforce Rules Consistently Among Children and Adults**

Don't adopt community rules that specifically ban children from doing things you don't want adults to do either. Even if your rules don't unfairly single out children, you have to ensure that you don't enforce your rules in a discriminatory manner.

It would be a violation of fair housing law if, for example, you enforced rules against disruptive behavior in hallways only against children playing in the hallways. Adults who are a nuisance in hallways should be subject to the rules, too. Consistent application of your rules is the key to protecting your community from discrimination complaints from families with children.

### **Tip #4: Watch Your Language**

Post signs in and around common areas and amenities to let everyone know your community rules. But the language you use on signs and in written rules can

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## Family Discrimination Lawsuit

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make all the difference in warding off accusations of discrimination by families with minor children.

Make sure that signs outlawing dangerous behavior in common areas apply to everyone, not just children. If you are concerned about injuries caused by children riding bicycles on the sidewalk, for example, make the signs forbid anyone—not just children—from doing so.

By the same token, signs simply stating “adults only” or “no children allowed” are a sure way to raise eyebrows. As much as possible, avoid use of the word “children” in favor of generic terms like “anyone” or “persons under a particular age.” And indicate the reason for the rule by using the key phrase “for your protection.” So, for example, a sign posted in your fitness center might read, “For your protection, persons under age 14 must be accompanied by an adult.”

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**PRACTICAL POINTER:** Signs need to be clear, and visible to anyone in the vicinity. Make sure signs are posted low enough for someone in a wheelchair to read them. And be careful about putting signs on the backs of doors, where they can't be seen when the door is open. ♦

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## IN THE NEWS

### Results Are In: CAI Initiative Reveals Key Management Information

Four new Community Associations Institute (CAI) white papers report the findings of a year-long, comprehensive review that explored the future of community associations, professional community management, public policy trends, and external influences that could impact the nation's almost 340,000 common-interest communities.

The Community Next: 2020 and Beyond initiative was undertaken to uncover what associations should anticipate as time marches on. More than 50 experts who are members of CAI and external stakeholders participated in four panels, which met throughout 2015 to explore the nature of community association living, governance, and management in the years ahead. (The findings were formally reported in early May during CAI's Annual Conference and Exposition held in Florida.)

The 2015 CAI president, Julie M. Howard, Esq., has noted that while it's human nature to focus on current and near-term needs, the collective success depends in large measure on how well associations plan for the future. She says it's essential to “try to understand the challenges and opportunities that await all of us” and to cut back on items that pose surprises.

In a press release, CAI Chief Executive Officer Thomas Skiba, CAE, pointed out that the more association organizations can anticipate and imagine the future, the more they can ensure a successful and stable future for community

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associations. (Almost 70 million people live in some type of association-operated community.) Skiba said that was the fundamental goal of the initiative that led to the informative white papers.

Along with discussing other key issues today's associations face, the white papers provide helpful information for managers. They examine how association governance and management are likely to change over time and how these changes will influence the community management profession. The four white papers can be accessed at [www.caionline.org/AboutCommunityAssociations/Pages/CommunityNext.aspx](http://www.caionline.org/AboutCommunityAssociations/Pages/CommunityNext.aspx). ♦

**Q&A*****Is Required Use of Less Convenient, but Accessible Elevator Discriminatory?***

**Q** A unit owner at the condominium building I manage hasn't paid assessments in several months. Under our governing documents, the association may revoke her right to use amenities like the pool, sports courts, and common areas. The member typically uses an elevator that's located in a common area to access her unit, but there are other elevators that also lead to her unit and aren't part of a common area that she's restricted from using. The member, who has a disability for which she uses a wheelchair, claims that she needs to use the specific common area elevator because of the disability. But there seems to be no reason why her disability requires that particular elevator; while the other elevators are slightly farther away from her unit, they are still easily reachable by wheelchair and, in fact, other disabled members of the community use them. Now the member is contemplating suing the association for allegedly not making a reasonable accommodation by allowing her access to the common area elevator. Can prohibiting her from using the "best" elevator backfire?

**A** As with all accusations of discrimination against your association, you should consult your attorney. But a California association that was recently taken to court in a similar case wasn't required to provide access to the "best" elevator, when two less conveniently located but usable elevators were available to a member. In that case, a wheelchair-bound member whose assessments were past due was told she would have to use two elevators that were less conveniently located to her unit because the most conveniently located elevator to her unit was in an area of the property that wasn't available to members who didn't pay assessments.

***Revoking Right to Amenities***

After the association—due to the member's late assessment payments—deactivated her common area keycard, which was necessary to gain access to her preferred elevator, she accused it of using her handicap to coerce her to pay the assessments. The member said that, by deactivating her key card, the

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association refused to allow her the use of an elevator that directly accessed her unit; instead, the association forced her to engage in supposed “additional physical exertion” by taking more than one elevator to go from the parking garage to her unit.

When the association was confronted with the member’s discrimination accusation, it ultimately allowed her to access the common area elevator. But the member then sued the association for “disparate treatment” and a failure to reasonably accommodate her.

**Failure to Prove Elements of Claims**

A California court determined that the member hadn’t provided enough evidence to support her claims. First, although the member alleged that she suffered from an “advanced arthritic condition,” she failed to allege that this condition affected her mobility such that the requirement that she take two elevators made it difficult for her to enter her condominium, the court noted.

The court also didn’t agree with the member’s other claims. She asserted that the association’s deactivation of her access key (which prohibited her access to the condominium common areas) because she failed to pay her assessment fees denied her the use of the elevator that directly accessed her unit. According to the member, she instead was forced to engage in additional physical exertion and take more than one elevator simply to go from the garage to her unit and vice versa. But the court said that those allegations were insufficient to establish either disparate treatment or disparate impact claims under the federal Fair Housing Act. That was because the member failed to sufficiently show that: (1) she was a member of a protected class; (2) others similarly situated to her were treated differently; or (3) the policy suspending access to the common areas for nonpayment of homeowner fees singled out a protected group and applied different rules to them because of their protected trait. The court also pointed out that the member hadn’t alleged that the association had practices or policies that, although outwardly neutral, had a significantly adverse impact on the disabled.

The court said that, with respect to the reasonable accommodation claim, the member hadn’t provided proof that: (1) she had informed the association of the difficulty she was having; and (2) then the association refused to make a reasonable accommodation for her disability. In fact, to the contrary, there was evidence that when the association was confronted with the problem that the member claimed she was having with taking two elevators and with the member’s accusation of discrimination, it allowed her full access to the more convenient elevator—despite her continued failure to pay past due assessments [Smith v. Cityfront Terrace Homeowners Association, April 2016]. ♦

## RECENT COURT RULINGS

### ► Subsequent Notices Not Required to Specify Rule Violation

**FACTS:** Homeowners in a planned community installed a lattice attached to the top of a fence in their backyard to provide additional privacy. The association sent the homeowners a violation notice demanding that they remove the lattice. The homeowners were advised by an association representative that they were not entitled to a hearing concerning the violation. They removed the lattice and installed a privacy screen that, according to the homeowners, was built in accordance with specifications given to them by the association representative. The homeowners received a second violation notice, which required that they remove the privacy screen and pay a fine, and they later received a third violation notice, which imposed a fine.

The homeowners sued the association, asking a trial court to declare that the notices of violation issued by the association were defective because they failed to comply with a certain Texas property code section requiring such notices to include the specific provision of the deed restrictions that were violated. Because the hearing was based on allegedly defective notices, it was therefore invalid, so fines could not be imposed.

The homeowners and the association each asked the trial court for a judgment in its favor without a trial.

The trial court ruled in favor of the association. The homeowners appealed.

**DECISION:** A Texas appeals court upheld the trial court's decision.

**REASONING:** The appeals court disagreed with the homeowners that the violation notices were defective, making the hearing invalid. It pointed out that three notices had been sent to the homeowners. The first notice had specifically stated the reason for the notice: construction of a fence addition without obtaining the required approval and extension of the fence height above the maximum allowed height.

The appeals court determined that the next two notices didn't have to specify precisely which rule or deed restriction the association claimed the homeowners had violated. It was true that, under Texas law, before a homeowners association may take enforcement action it must give written notice to the homeowner, said the appeals court. The notice must "describe the violation or property damage that is the basis for the suspension, action, charge, or fine." The appeals court concluded that it's not necessary for every notice beyond the first to specify which rule was violated. However, in this case, the second notice of violation actually did inform the homeowners that "the lattice work on the fence is noncompliant." "Because the homeowners have presented no evidence that the first violation was defective, they have failed to conclusively establish that the association did not provide them with sufficient notice of their violation," said the appeals court.

- Spears v. Falcon Pointe Community Homeowner's Association, May 2016

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## Recent Court Rulings

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### ► Trial Necessary to Determine Whether Parking Easement Includes Wall

**FACTS:** A partition wall separated from a common walkway a grouping of three parking spaces in the parking lot of a condominium building. This created an enclosed garage space separate and distinct from the other parking spaces within the common garage.

Two members who owned a unit in the building held an easement for the exclusive use of the parking spaces enclosed by the wall.

The association informed the members that it would demolish the wall. The members asked a trial court to declare that their easement for use of the parking spaces goes along with the ownership of their unit; they asked the court to recognize that due to the easement they also have the right to maintain the wall adjacent to their spaces.

They asked the trial court for a temporary restraining order to enjoin any alterations to or demolition of the wall. The court denied the motion for injunctive relief. The association subsequently removed the wall.

The members sued the association. They asked the trial court for a judgment in their favor without a trial.

**DECISION:** A Massachusetts trial court denied the request and ordered a trial.

**REASONING:** The trial court ordered that a trial be held because there were material facts that remained in dispute and must be determined at trial.

Several condominium documents do not show or make reference to the wall. But the wall had been built and was conveyed to the members when they purchased their unit from the previous owner. This created a controversy as to whether the wall was intended to be included in the easement with the actual parking spaces. The members claimed that the wall was “an essential element of the parking space easement,” which gave them rights to the wall. They asserted that, alternatively, they have acquired a “prescriptive easement” to the wall because of the length of time they had used and maintained it.

While the association argued that the easement grants the members the exclusive use of the three parking spaces for their own vehicles, it does not grant any ownership interest in the wall itself. The trial court said that the evidence was clear that the wall is physically located within the boundaries of the parking space easement, but the issue that needed to be resolved at a trial was whether the wall itself constitutes part of the easement. ♦

- Stewart v. Bankler, et al., as Trustees of the Suntaug Estates Condominium Trust, April 2016

## RISK MANAGEMENT

### Set Rules to Minimize Hot Tub Risks

Despite some recent concerns over the safety of hot tubs, this amenity continues to be popular in many communities. The high temperatures that hot tub water can reach pose risks to some members, namely, pregnant women or people with high blood pressure. And hot tubs are unsafe for children both because of the heat and as drowning hazards. But that doesn't mean that members whose health won't be compromised by hot tubs can't enjoy them.

Make your community's hot tub fun—by setting hot tub rules to lower the association's liability and make sure that it's used appropriately by members. Like our *Model Rules: Prevent Hot Tub Injuries and Lawsuits*, yours should be posted in a conspicuous place. Here are the risks you need to take into account. Remember to ask your attorney if there are additional items to consider.

#### Why Set Rules?

As with any other common amenities, misuse can put members in danger and expose the association to legal action. Here are the risks commonly associated with hot tub use, and corresponding rules to mitigate those risks.

**Rule #1: Set hours.** While you don't have to post a lifeguard at your hot tub, it's important to have an employee monitor its use. To reduce the risk of injury and drowning, set hours for your hot tub so you know when to supervise its use, and include the hours in the introduction to your rules [Rules, intro.]

**Rule #2: Require children to be accompanied by an adult.** The age you choose is up to you, but a good place to look for guidance is the hot tub manufacturer's recommendations. You should also consult a medical professional. A common minimum age requirement for hot tub use is 14 [Rules, #1].

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**PRACTICAL POINTER:** Make it clear that you are limiting children's use for "health and safety reasons." Otherwise you may appear to be arbitrarily limiting children's use of the hot tub and could face a discrimination lawsuit.

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**Rule #3: Advise people of risks.** Make your rules say that people with heart disease, diabetes, high blood pressure, or any serious illness should consult a doctor before entering the hot tub. Pregnant women should also be advised to speak with their doctor before using the hot tub [Rules, #2]. This can head off lawsuits for the association later.

**Rule #4: No substance use.** Your rules should warn members not to use the hot tub while or after taking drugs or drinking alcohol [Rules, #3]. Don't forget that this includes prescription drugs, the side effects of which can be increased by hot water.

**Rule #5: No infections or sores.** Because of the possibility of spreading infection, your rules should ban people with skin, ear, or other body infections, including open sores or wounds, from using the hot tub [Rules, #4].

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## Risk Management

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**Rule #6: Require showering with soap and water before use.** This rule will keep the water cleaner because showering washes away many common skin bacteria, along with personal care product residue that can reduce the effectiveness of disinfecting chemicals and lessen the filter's efficiency [Rules, #5].

**Rule #7: Ban electrical appliances nearby.** Electrocution from appliances is a real danger [Rules #6].

**Rule #8: Ban playing near hot tub.** Ban running, pushing, ball playing, and roughhousing near the hot tub. This rule can help to avoid injuries and potential lawsuits [Rules #7].

**Rule #9: Ban glass containers.** Glass can break and the fragments are invisible in the water [Rules, #8].

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### MODEL RULES

## Prevent Hot Tub Injuries and Lawsuits

Ask your attorney to adapt the following hot tub rules for use at your community. Then, be sure to post them in a prominent place.

### HOT TUB RULES

Welcome to our hot tub. For your protection, we ask that you observe the following rules.

**THE HOT TUB WILL BE OPEN FROM [insert hours, e.g., 10 a.m. to 5 p.m.] DAILY.**

- 1.** For health and safety reasons, all children under the age of 14 must be accompanied by an adult.
- 2.** People with heart disease, diabetes, high blood pressure, or any serious illness, and women who are pregnant or who think they might be pregnant, should not enter the hot tub without prior consultation with their doctor.
- 3.** No one shall use the hot tub while or after using alcohol or drugs. Check with your doctor about whether you should use the hot tub after taking prescription medications.
- 4.** No one with skin, ear, genital, or other body infections, open sores, or wounds shall use the hot tub, because of the possibility of spreading infection.
- 5.** Everyone using the hot tub must shower with soap and water before soaking.
- 6.** No electrical appliances are allowed near the hot tub.
- 7.** No running, pushing, ball playing, or roughhousing is allowed near the hot tub.
- 8.** No glass containers are allowed near or in the hot tub.
- 9.** Do not soak for more than 15 minutes at a time. Long periods of soaking may lead to nausea, dizziness, or fainting.
- 10.** Exercise caution when exiting and entering the hot tub. Remember that hot water soaking may cause dizziness and lightheadedness.
- 11.** Management reserves the right to prohibit anyone from using the hot tub for failing to comply with normal precautions and these rules.
- 12. PERSONS USING THE HOT TUB DO SO AT THEIR OWN RISK.**

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## Risk Management

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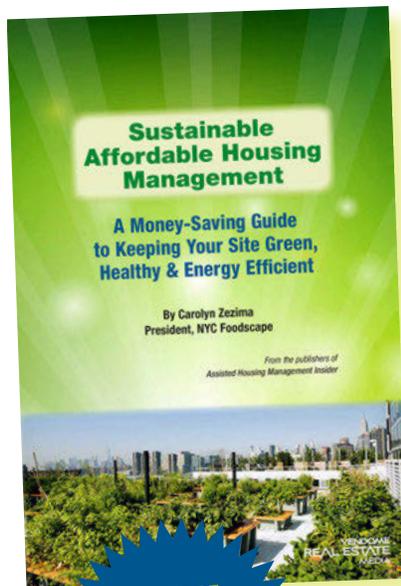
**Rule #10: Limit soaking time to 15 minutes.** Long periods of soaking can lead to dizziness or fainting [Rules, #9].

**Rule #11: Warn people to be careful about entering and exiting.** Getting in and out of the hot tub can be hazardous with slick tiles underfoot [Rules, #10].

**Rule #12: Reserve right to stop use.** Reserve the right to stop anyone from using the hot tub if he doesn't follow normal precautions and your rules. This gives you some clout to enforce them [Rules #11].

**Rule #13: Say use is at own risk.** Tell everyone that they are using the hot tub at their own risk. Put this rule in all caps and boldface on your sign so that it's clear [Rules, #12]. ♦

## Create & Implement Sustainability Plans



### SUSTAINABLE AFFORDABLE HOUSING MANAGEMENT

#### A Money-Saving Guide to Keeping Your Site Green, Healthy & Energy Efficient

By Carolyn Zezima, President, NYC Foodscape

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