Community Association Management Insider®

Helping You Run Your Condo or Homeowners Association Legally and Efficiently

OCTOBER 2018

FEATURE

Improper handling of ADA and FHA issues often leads to expensive litigation.

IN THIS ISSUE

PRODUCED IN CONSULTATION WITH
community ASSOCIATIONS INSTITUTE

How to Handle Disability-Related Requests for Modifications

The Americans with Disabilities Act (ADA) became law in 1990, and the Fair Housing Act (FHA) was amended in 1988 to add protections for individuals with disabilities. But despite the length of time that these laws have been around, there's still misinformation and confusion about how they apply to associations and their members, versus public spaces or private spaces that are accessible by members of the public. In general, the ADA applies to public spaces, and the Fair Housing Act applies to private spaces, such the interiors of members' units.

Don't let improper handling of ADA and FHA issues in your community lead to problematic scenarios—namely, liability and protracted or expensive litigation if your actions don't comport with the law. Here's how managers and boards can comply with these laws.

Understand Specifics of ADA, FHA

ADA applies to public buildings, such as schools, stores, restaurants, government buildings, and any place that's routinely accessible to the general public. That means it doesn't apply to community association facilities, as long as the facilities are for use only by members, renters, and their guests. If the association advertises bingo games open to the public, or if there's a golf course, restaurant, or store in the community open to the public, or if the high school swim team uses the pool, the facilities being used by the public are governed by the ADA. The ADA requires retrofitting for handicap accessibility at the expense of the property owners, and includes substantial handicap parking space requirements, among other things. If the property is governed by the ADA, the modifications are mandatory.

The Fair Housing Act applies to every part of the community, including dwellings and common elements/common areas. Any modifications to accommodate a disability are at the expense of the individual requesting the modification, not the association. The association isn't obligated to make any changes, just to work with the owner in allowing her to do so.

(continued on p. 2)

Requests for Modifications

(continued from p. 1)

It's key for managers and boards to understand that, says Seattle community association management expert and educator Paul D. Grucza. Florida community association attorney Ellen Hirsch de Haan adds that the association should consult with its attorney when processing these types of requests.

Properly Evaluate Requests for Modification

Inevitably, you'll be faced with a request for a modification under the FHA from a member. So what should happen next? "When a board is presented with a request, it's not a done deal," says Grucza. The association has no obligation to make a modification. However, when evaluating a request you should first verify that: (1) the member has a disability; and (2) the modification is necessary to accommodate the member's disability. In the case of a member who uses a wheelchair and is requesting to build a ramp into her unit, the disability is obvious, and the need for the modification is obvious. Therefore, there's no need to ask for medical documentation from the member; in fact, doing so is prohibited by the law and may be seen as an attempt to stall or otherwise deny the request—and that could lead to a discrimination lawsuit.

If the member's need for the modification isn't apparent, you are permitted to request additional information to evaluate the modification request. A heart condition, inability to grasp a door knob, balance issues, asthma, or diabetes-related issues, among others, are examples of non-obvious disabilities. Obvious disabilities are blindness, hearing aids, or use of a wheelchair, cane, or walker. HUD guidelines allow communities to request reliable disability-related information that:

(continued on p. 3)

Editor: Elizabeth Purcell, J.D. **Executive Editor:** Heather L. Stone **Director of Marketing:** Peggy Mullaney

COMMUNITY ASSOCIATION MANAGEMENT INSIDER [ISSN 1537-1093 (PRINT), 1938-3088 (ONLINE)] is published by Vendome Group, LLC, 237 West 35th St., 16th Fl., New York, NY 10001.

Volume 18, Issue 3

SUBSCRIPTIONS/CUSTOMER SERVICE: To subscribe or for assistance with your subscription, call 1-800-519-3692 or go to our website, *www.CommunityAssociationManagementInsider.com*. Subscription rate: $370 for 12 issues. **TO CONTACT THE EDITOR:** Email: *epurcell@vendomegrp.com*. Call: Elizabeth Purcell at (212) 812-8434. Fax: (212) 228-1308. **TO PLACE AN ADVERTISEMENT:** Please contact Heather Ogilvie Stone at *hstone@vendomegrp.com* or call (212) 812-8436.

Requests for Modifications

(continued from p. 2)

- Is necessary to verify that she meets the FHA's definition of "disability" (that is, has a physical or mental impairment that substantially limits a major life activity);
- Describes the needed modification; and
- Shows the relationship between the person's disability and the need for the requested modification.

A significant issue is also that the modification can't create a dangerous condition, for example, a ramp sticking out and blocking the hallway.

The type and source of documentation that may be required to verify disability depends on the circumstances. Verification may come from the resident himself, for example, with proof that an individual under age 65 receives Supplemental Security Income or Social Security Disability benefits or "a credible statement by the individual," according to federal guidelines. A doctor or a medical professional, peer support group, or reliable third party in a position to know about the individual's disability may also provide verification of a disability. In most cases, the guidelines state that an individual's medical records or detailed information about the nature of a person's disability are not necessary to verify a disability.

Once it has been established that the applicant meets the FHA's definition of "disability," the community may seek information necessary to evaluate whether the requested modification is needed because of that disability. The information must be kept confidential and may not be shared with others (absent disclosure required by law) unless they need it to evaluate the modification request.

Consider Four Factors to Determine 'Reasonableness'

Assuming the member's need for a modification is obvious or has been verified, the next step is to determine if the specific modification requested is reasonable. There are a number of factors to consider:

Factor #1: Building change. A large part of the decision regarding any changes that are requested by a member—whether under ADA, FHA, or neither—will be the nature of the change. Managers and boards must think about the effect a change will have on the property. Is it major, such as structural work, or minor, such as a handrail being installed?

Factor #2: Insurance implications. Insurance for an association takes into account the risk management that's part and parcel of running the association, says Grucza. Insurance is put into place based on assets and common factors in a planned community and the issue of a change that can impede access or create a hazard has to be taken into account, he adds. "Introducing an element that wasn't there before brings new potential risk to association," Grucza explains. The modification might impact areas that other owners use. The insurer will have to be given information about the change so it knows that a new risk exists.

It's not legal to require a resident to insure the modification; once it is made to the common area/common elements, it becomes the association's responsibility

(continued on p. 4)

Requests for Modifications

(continued from p. 3)

to insure, says Hirsch de Haan. That's why it's so important to check with the association's insurance professional on this, she stresses.

Factor #3: Maintenance. Associations should know and specifically indicate to the owner requesting a modification that she will be responsible for maintenance and upkeep of any approved modification in her unit granted by the board. This falls under the caveat that the association didn't install or pay for the change and because it's not located on a common area, there should be no additional costs to the association. A good way to push costs to the owner is in a waiver she should be required to sign.

If the modification is made to a common area—for example, the installation of a ramp or handrail in a lobby, laundry room, or gym—it falls under the FHA. Once it is installed in the common areas or elements, it belongs to the association, even though the association didn't pay for it to be installed.

Factor #4: Aesthetics. Because uniformity of appearance is of key importance in planned communities, a request for a modification that interferes with the aesthetics of the area will be examined closely. For example, a handicap ramp installed on the outside of a home will have a very different visual impact than one that's installed inside the home. An association can't deny a handicap ramp if it's truly needed, just because it's not attractive. However, the association can work with the resident on the appearance within reason. The association's requested changes in appearance can't unreasonably increase the cost, though.

PRACTICAL POINTER: Be sure to follow any specifications for ramps dictated by local laws.

Prepare for Pushback After Denial of Request

As with many types of requests that community members make that don't involve the FHA or ADA, some will be granted and some won't, which can lead to animosity. Especially in the case of modifications that are requested simply

(continued on p. 5)

➤ Board Training Is Key Component

FHA requests for reasonable accommodations and modifications aren't constant. As with any non-routine issues in an association, it's always a good idea to educate board members. "Reviewing the basics and the nuances of things that aren't rank-and-file issues, like the ADA and FHA's application to associations, is a smart idea," says Seattle community association expert and educator Paul D. Grucza.

He notes that, when boards change, there's a fresh opportunity for engagement and education with the association that managers should capitalize on. Board members might assume some things about these laws. It behooves managers to have a command of ADA and FHA requirements within private communities and to drill down on this with board members and staff.

Grucza has run "board bootcamps" in the past, which cover many issues including a consideration of the ADA and FHA and how that weaves into their association. An overarching philosophy that he says is helpful for managers and boards to subscribe to is "be mindful." It can help everyone take a step back and evaluate all aspects of community life.

Requests for Modifications

(continued from p. 4)

so a member can live in or enjoy his unit or common areas, a member might be incredulous that the change isn't greenlighted as a matter of course. Sometimes, there are arguments about fairness. But courts have supported associations' rights to evaluate and deny requests based on the above factors, rather than automatically moving forward with a change.

Grucza knows of one case where a disabled member who used a wheelchair couldn't use a door that was too narrow for her equipment. She asked to change the entrance to her unit so it would be wider, and the board said no, because doing so would cause a structural problem. In that case, there was a happy ending: The member was able to use a different wheelchair that fit through the original doorway. But the safety factors that the board had to take into account informed its decision.

With many complaints raised by members, an association should be concerned about lawsuits or other legal action. FHA issues are no different. A board should be prepared for pushback if a request is denied.

There are two typical scenarios that play out. An owner whose modification request is denied by the board speaks with a local official and makes a claim that the association is being discriminatory, which opens up an examination of the reasons and rational behind the disapproval. Or, the owner's attorney writes to the association in a more mediation-driven way, asking to sit down and discuss why the owner needs the modification, Grucza explains. Be aware that the association can always be sued, so before denying any request for a modification, consult with the association's attorney.

Ensure Application Process Goes Smoothly

When you receive a member's request for a modification, don't delay in responding to it. Any delay could be perceived by the member as a denial of his request—and a denial of his rights under the FHA. Courts have ruled against communities that have dragged their heels in responding to modification requests.

You can ask the member to submit his proposal to the association's architectural review committee (ARC) for review. Grucza notes that an association's ARC guidelines will include the association's rules for assessing the visual impact of a change, the materials used for a suggested alteration, who will be required to do the work, the insurance requirements involved, and the right of the association to waive any liability regarding the installation of a modification.

Managers should be well aware of what information a member must submit with a request and have a copy of a checklist for necessary items. Managers should make sure that everything that will impact a modification is in place before they present a request to the board. "Realistically, the board has to have all necessary pieces to make a reasonable determination, so the manager's role here is important," says Grucza. And keep in mind that the owner should pay the costs of preparing the paperwork necessary for the association to sign off on.

EDITOR'S NOTE: Sometimes when a board approves a member's modification, not all the neighbors will be happy about it or understand the need for it. In such cases,

(continued on p. 6)

Requests for Modifications

(continued from p. 5)

being able to show that you followed procedures for reviewing requests for reasonable modifications will help you defeat any claims that the board acted improperly. For a case in point, *see "Neighbor Objects When Family Allowed to Install Fence Around Their Yard," in this issue.* ♦

Insider Sources

Paul D. Grucza, CMCA, AMS, PCAM: Director of Education & Client Engagement, CWD Group, Inc., 2800 Thorndyke Ave., West Seattle, WA 98199; (206) 706-8000; *www.cwdgroup.com.*

Ellen Hirsch de Haan, Esq.: Partner, Wetherington Hamilton, 1010 N. Florida Ave., Tampa, FL 33602; *www.whhlaw.com.*

RECENT COURT RULINGS

➤ Association Not Liable for 'Open and Obvious' Sidewalk Defect

FACTS: A townhouse-style condominium resident who was living with the owner of the unit, his mother, tripped and fell on the sidewalk in front of the townhouse. He claimed that the fall was due to the sidewalk being "uneven." He sued the association in a premises liability lawsuit, asserting that it had been the HOA's responsibility to fix the sidewalk. The association asked a trial court for a judgment in its favor without a trial. The trial court ruled in favor of the association. The resident appealed.

DECISION: An Ohio appeals court affirmed the decision of the lower court.

REASONING: The appeals court noted that the issue in this case was whether the association was negligent. In order to establish a claim for negligence, the resident would have to show: (1) a duty on the part of the association to protect him from injury; (2) a breach of that duty; and (3) an injury proximately resulting from the breach.

The appeals court acknowledged that there was no dispute between the resident and association that on the date of the accident, the resident was an "invitee"—that is, a person who rightfully enters and remains on the premises of another at the express or implied invitation of the owner, here, the resident's mother. It pointed out that the owner or occupier of the premises—here, the association—owes the invitee—here, the resident—"a duty to exercise ordinary care to maintain its premises in a reasonably safe condition, such that its invitees will not unreasonably or unnecessarily be exposed to danger." A premises owner must warn its invitees of latent or concealed dangers if the owner knows or has reason to know of the hidden dangers, the appeals court said. However, a premises owner is not "an insurer of its invitees' safety against all forms of accident that may happen. Rather, invitees are expected to take reasonable precautions to avoid dangers that are patent or obvious."

But the fact that a particular injured person himself was not aware of the hazard is not the real test, said the appeals court. An objective, reasonable person must

(continued on p. 7)

Recent Court Rulings

(continued from p. 6)

find the danger is not obvious or apparent. The determinative issue is whether the condition is "observable," said the appeals court.

The trial court found, and the appeals court agreed, that the condition of the sidewalk was open and obvious. During the resident's deposition, he testified that he was not carrying anything or otherwise distracted when he fell. He further testified that he had walked on the same sidewalk when going from his car to the condo and did not have any problems and that he noticed the uneven sidewalk after he fell.

The trial court also found that the resident's claim was barred by the so-called "two-inch rule." The Ohio Supreme Court has declined to hold property owners and occupiers liable as a matter of law for injuries due to minor or trivial imperfections that were not unreasonably dangerous, are commonly encountered, and to be expected, explained the appeals court. A height variation in pavement levels less than two inches—such as the case here—is a slight defect that precludes a finding of negligence, the appeals court concluded.

- Gatschet v. West Manor Dev. Grp., LLC, August 2018

➤ Neighbor Objects When Family Allowed to Install Fence Around Their Yard

FACTS: An Ohio homeowner's association fended off a lawsuit from a resident who objected to its handling of a reasonable accommodation that allowed her next-door neighbors to fence their yard to protect their young daughter from a water hazard.

Both families lived in single-family homes with backyards that abutted a lake. Community rules banned residents from putting up fences, plantings, or enclosures in backyards without prior written consent of the architectural committee.

One family, parents of a toddler and newborn, requested permission to put up a four-foot black wrought-iron fence along the backyard to protect the children's safety. They later offered to make it only three feet, but the request was denied.

A year later, the family submitted a second request, this time for a fence around their yard, referencing their older daughter's "well-documented disability," and citing federal fair housing law.

Upon receipt of the request, the HOA president (who was also on the architectural committee) requested documentation about the daughter's disability. In response, the family submitted letters from four of the daughter's healthcare providers, including her doctor, who said that the two-and-half-year-old girl had limited reasoning skills and severe motor and language delays. Because of her impairments, the doctor said that the girl needed a safe environment because she had limited understanding of physical dangers and difficulty with motor skills to avoid such dangers.

At a meeting, the HOA discussed and approved placement of a perimeter fence upon the condition that the family would remove the fence if they moved, the

(continued on p. 8)

Recent Court Rulings

(continued from p. 7)

fence was no longer medically necessary, or the daughter turned 18. In addition, the family had to submit annual documentation of the daughter's continuing disability.

After the family installed a three-foot wrought iron fence around their yard, their next-door neighbor contacted the association manager to make sure the board addressed what she believed to be a clear violation of the rules against backyard fences. The HOA president responded by informing her that the family had been granted permission to install the fence in response to a request for accommodation under fair housing law.

Displeased, the neighbor condemned the board's failure to notify her before allowing the family to put up the fence. She invited the board to see the "unsightly" view created by the fence and demanded copies of the medical documentation provided by the family to the board. The board refused.

The neighbor sued the family, individual board members, and the HOA for breaching its fiduciary duties by granting an accommodation in conflict with the HOA's rules against backyard fences.

In each of the next two years, the family submitted annual documentation of the daughter's continuing disability—letters from her pediatrician attesting to the girl's developmental delays, which caused great difficulty in reasoning (making her unable to recognize dangers), and poor motor control, which made it more difficult to avoid dangers. In both letters, the doctor said the girl continued to need a safe environment; the second letter specifically referenced the need for a fence as a barrier to the lake.

After a hearing, the court granted judgment to the HOA and other defendants, ruling that the board did not breach its fiduciary duty by granting the family's reasonable accommodation to build the fence. The neighbor appealed.

DECISION: The appeals court upheld the lower court's ruling.

REASONING: The HOA didn't violate its fiduciary duty under state law by granting the family's request for an exception to its rules against fencing to accommodate the daughter's disability.

The court rejected the neighbor's claims that the board violated its own rules because it failed to notify her before granting the family's request. Neither the HOA's own rules nor fair housing law required the HOA to inform the family's next-door neighbors that it was considering a request for a reasonable accommodation under fair housing law.

The court also rejected the neighbor's claims that the board breached its fiduciary duties by failing to investigate possible alternatives to allowing the family to put up the fence. The HOA argued that it abided by the law, but the neighbor said it did nothing more than to accept the family's claims at face value.

To meet its fiduciary duties to its members, the board was required, when considering the requested accommodation, to balance the interests of and benefits to the disabled individual against the interests of and burdens to the HOA. The

(continued on p. 9)

Recent Court Rulings

(continued from p. 8)

board was under no affirmative duty to consider alternatives to the family's request for a perimeter fence.

Undoubtedly, there might be alternatives more reasonable to the HOA (and more palatable to the family's next-door neighbor). It was also possible that a family determined to protect its disabled child would cause the HOA great expense in defending its decision to deny the requested accommodation and enforce its rules against the fence.

In this case, the board considered the accommodation request in good faith and conditioned its approval to allow installation of a temporary perimeter fence, subject to conditions beneficial to the HOA. Contrary to the neighbor's argument, the board didn't simply accept the family's demand.

The board didn't violate its fiduciary obligations to its members by failing to enforce the community's rules. In fact, the evidence showed that the board performed its duties in responding to a request for a reasonable accommodation under fair housing law in good faith, in a manner that it reasonably believed to be in the best interests of the community and with the care that an ordinary prudent person would use under similar circumstances. ♦

- Ray v. Hidden Harbour Association, January 2018

Q&A

Paying Workers' Comp for Fair Share of Physical Injuries at Community

Q An on-site employee in the community I manage was injured. The employee had issues from an injury he suffered before working for the association. The association is required to pay workers' compensation benefits for his current injury, but it seems unfair that we are potentially footing the bill for more damage than this accident in our community actually caused. What are the benefits of finding out about any new on-site employees' preexisting injuries? And how would we get this information?

A Knowing about preexisting injuries is important because it can help the association financially if the employee has an accident at some point later on. After you make a conditional offer of employment to someone for an on-site position—for example, on your maintenance staff—but before he starts work, make an effort to find out about any preexisting injuries he might have.

Note that the existence of an earlier injury won't exempt you from paying workers' compensation benefits through your insurance company, but it will help establish a baseline for the insurance company to measure your obligations to the employee—avoiding the current situation you are in where you might be paying for physical injuries not caused while the employee was working for you. For example, if you hire someone with only a 50 percent range of motion in his

(continued on p. 10)

Q&A
(continued from p. 9)

shoulder and he reinjures that shoulder, you're required to cover his medical expenses only until he returns to a 50 percent range of motion in the shoulder.

You can find out about preexisting injuries by requiring all conditional on-site employees to get a physical exam before they begin work. Give the physician a description of the job requirements and ask her to determine whether the individual is able to do the work and to note any preexisting injuries. This can be used later when your insurance company is evaluating any injuries that have taken place while the employee was working in your community. Keep a record of the physician's report or make sure that the physician's office is willing to provide it if necessary. ♦

IN THE NEWS

Unhappy Trails for HOA and Local Equestrian at Land Use Impasse

A Santa Fe homeowners association hopes that mediation will lead to a settlement that would exclude horse riders from using the association's network of trails. A local ranch owner who has used the trails for 25 years—long before the community was built—is arguing that a so-called "word of mouth" prescriptive easement from a county official allowed her to ride in the area regardless of future development. Now, the association's permaculture committee, charged with protecting the landscape and habitat of the subdivision, said horses have damaged the area.

The committee says that board members have been discussing horse use for nearly a decade and began a project last year to restore and repair all the damage done by horses of riders allegedly "illegally riding across the land." The committee names the ranch owner as one such rider.

In addition to the verbal permission given by the county, the ranch owner has produced a copy of a covenant created between a previous developer and the county stating the land that is now the subdivision was "for equestrian, pedestrian and bicycle use." The community's 500 residential homes have sprung up since that time.

The committee has pointed out that when the association purchased the property, the board intended it to be private open space for residents only, excluding areas with "express easements." Additionally, an equestrian easement was created, which specifically prohibited horseback riders, including association homeowners, to ride trails that adjoin private property.

Adding to the unpleasantness of the dispute is the accusation by the ranch owner that after a committee member threatened to hang barbed wire on the trails, riders found it sprawled there. For his part, the member denies using barbed

(continued on p. 11)

In the News

(continued from p. 10)

wire; he claims the obstacle has been on the trails for years, but did admit that he was granted permission last year by the board to create obstacles to keep horses inside a 25-foot-wide designated area for horses as stated in the equestrian easement.

The association, board, and committee assert that they are committed to preserving the natural habitat of the area, which they say horses destroy by disturbing wildlife and damaging the ecosystem. The ranch owner disputes allegations of damage to the land or wildlife, and said she met in April with members of the board to discuss trail usage. Both sides thought the mediation had resulted in an agreement, but now the association says she is not adhering to the resolution. Both sides say a settlement is in progress, with the ranch owner committing to fighting the ban on trail riding no matter how many resources it takes, including persuading homeowners to stand up to the prohibition. ♦