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Client Alert: Consideration of Disability-Related Requests for Modification of Premises Under State and Federal Law

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The Federal Fair Housing Act (FHA), as well as the substantially similar Florida Fair Housing Act (FFHA), prohibits discrimination in housing based on a person's disability. As "housing providers," homeowners associations and condominium associations (community associations or associations) are subject to the restrictions contained in both the FHA and the FFHA and are required to make reasonable accommodations in their rules, policies, practices, or services when doing so is necessary to afford a person with a disability an equal opportunity to the use of a dwelling and common areas. For instance, a disabled unit owner's request to keep an assistance animal in his or her condominium unit, notwithstanding an association's "no animals" policy, is a request for reasonable accommodation and should be carefully considered and approved if appropriate.

Less often implicated, however, are the obligations similarly imposed on housing providers by the FHA and the FFHA to allow *reasonable modifications of the premises*, to the extent the modification is necessary to afford a person with a disability an equal opportunity to use and enjoy a dwelling. More specifically, Chapter 42 U.S.C.A. § 3604 (f)(3)(A) of the FHA provides that an association discriminates when it refuses to make certain reasonable modifications to afford a person with a disability the full access and enjoyment of the premises, including, but not limited to, the common areas:

(3) For purposes of this subsection, discrimination includes:

(A) 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 except that, in the case of a rental, the landlord may where it is reasonable to do so condition permission for a modification on the renter agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted.

Reviewing Requests for Reasonable Modifications

Unlike requests for an accommodation, requests for modification involve a physical or structural change to the existing premises, whether to the interior or exterior of a dwelling, or to the common areas. A quintessential example of a request for reasonable modification is a request for the installation of a ramp to allow the use of premises by a wheelchair-bound resident. *Weiss v. 2100 Condo. Ass'n*, 941 F.Supp.2d 1337 (S.D.Fla.2013) (holding, in part, that a request for the construction of a wheelchair ramp and other adjustments or improvements to existing structures is a modification under § 3604(f)(3)(A) and not an accommodation under § 3604(f)(3)(B)).

In reviewing such a request for a reasonable modification, an association must consider whether 1) the individual is disabled or handicapped under the FHA, 2) the individual requested a modification of the premises, 3) the modification is reasonable, 4) the modification is necessary to afford the individual full enjoyment of the premises, and 5) the modification will be made at the individual's expense. Insofar as the above criteria have been met by the individual requesting a modification, an association should approve the request.

In some circumstances where the individual's disability is neither known nor obvious, and where there is no clear nexus between the disability and the requested modification, an association may need certain additional information or documentation to supplement the initial request for modification in order to make an informed decision. See May 2008 Joint Statement issued by the Department of Housing and Urban Development (HUD) and the Department of Justice (DOJ), entitled *Reasonable Accommodations Under the Fair Housing Act* (hereinafter, the Joint Statement), at 7. Under such circumstances, an association may request reliable disability-related information that (1) is reasonably necessary to verify that the person meets the FHA's definition of "disability" (i.e., has a physical or mental impairment that substantially limits one or more major life activities), (2) describes the needed modification, and (3) shows the relationship between the person's disability and the need for the requested modification.

A common source of concern among associations is the cost associated with approving a request for modification. While cost could, in some limited circumstances, speak to the reasonableness of the request, the approval of a request for modification does not necessarily require the association to pay for the same, or to take on, itself, the construction or installation of the requested modification. In fact, courts have explicitly refused to find that an association failed to meet its obligations under the FHA where the individual refused, among other things, to pay any cost associated with the installation of the wheelchair ramp he requested. *Weiss* at *1346 ("Plaintiffs' obstinate refusal to participate with Defendants and to obtain the proper plans, permitting, and payment for the construction of a ramp renders the Court's conclusion as to this claim an easy one: Defendants are entitled to summary judgment and Plaintiffs' claim against Defendants for a failure to construct an accessible ramp fails as a matter of law."). Moreover, if the modification is made in an area not already maintained by the association, it generally does not undertake the obligation to maintain the modification by approving the request. See *Joint Statement* at 13 ("If a modification is made to a common area that is normally maintained by the housing provider, then the housing provider is responsible for the upkeep and maintenance of the modification. If a modification is made to a common area that is not normally maintained by the housing provider, then the housing provider has no responsibility under the Fair Housing Act to maintain the modification.").

Importantly, associations may have the option to propose an alternative reasonable modification or an alternative design for the modification, to the extent that the alternative still satisfies the needs of the individual and does not cost more than the originally requested modification.

Conclusion

Though similar to requests for reasonable accommodation, requests for reasonable modification require a distinctly different analysis, which should be undertaken in a prompt and careful manner to avoid liability and other consequences under the FHA and the FFHA. Still, upon receipt of a request for accommodation or a request for modification, an association should consider consulting with legal counsel to ensure careful compliance with applicable laws.