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New HUD Guidelines make Associations Responsible for Homeowner Discriminatory Harassment and Hostile Conduct

Imagine this . . . the association's architectural control guidelines allow picket or split-rail fences, but prohibit solid privacy fences. An owner submits a request to the architectural control committee for a 5' tall full privacy fence because his neighbor is verbally abusing his family, throwing trash onto his property, and making hostile and threatening comments about his religious and cultural practices.

In the past, most associations would deny the request for a privacy fence and tell the owner that the neighbor's harassing behavior is a private dispute, and not the association's problem. As of October 14, 2016, this no longer works.

Effective October 14, 2016, the United States Department of Housing and Urban Development ("HUD") amended its regulations regarding the Fair Housing Act ("Act") to require community associations to investigate and act on allegations of harassment on the basis of race, color, religion, national origin, sex, familial status, and disability. Many people think the Act applies to landlord-tenant issues and traditional residential real estate transactions. However, courts and HUD have long taken the position that community associations are subject to the Act, since community associations provide services and/or facilities related to people's use and enjoyment of their homes.

Community associations, of course, are prohibited by the Act from directly discriminating against people based on the seven protected classes listed above and must make accommodations in their practices and in the interpretation and enforcement of their legal documents to avoid any such discrimination.

But now, the HUD's guidelines require associations to take actions authorized under their community legal documents to help a homeowner or resident who is the victim of quid pro quo harassment and/or hostile environment harassment by a neighbor

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based on race, color, religion, national origin, sex, familial status, or disability.

What is quid pro quo harassment? Quid pro quo harassment is more common in employment situations than community association operations. It is an unwelcome request or demand to engage in conduct where submission to the request or demand, either explicitly or implicitly, is made a condition of the provision of services or facilities with respect to their dwelling. Hostile environment harassment refers to unwelcome conduct that is sufficiently severe or pervasive (from the perspective of the aggrieved person) as to interfere with the provision or enjoyment of services or facilities in connection with someone's use and enjoyment of their home.

The totality of the circumstances will be reviewed to determine if hostile environment harassment exists in any particular situation. Courts will look at the nature of the conduct, the context in which the incident(s) occurred, the severity, scope, frequency, duration, and location of the conduct and the relationship of the persons involved. Neither psychological nor physical harm must be demonstrated to prove hostile environment harassment, and the harassment can be written, verbal or any other conduct. Using the original example above, the neighbor's conduct of verbal abuse, throwing trash onto the other owner's property, and making hostile and threatening comments about the other owner's religious and cultural practices, could be considered hostile environment harassment.

How does this create potential liability for community associations? The new HUD guidelines essentially state that associations could be liable if: (a) the board of directors engages in this type of harassing conduct; (b) the association's agents (i.e. management company, concierge staff, committees, and volunteers) engage in this discriminatory practice; or (c) third parties (i.e. homeowners, residents, and/or guests in the community) engage in this discriminatory conduct, the association knew or should have known of the discriminatory conduct, the association has the power to correct or end it, and the association fails to do so.

HUD makes it clear that associations are strictly liable for the behavior of their boards of directors and their agents. Accordingly, associations need to provide training and education about these new guidelines for board members, managers, concierge staff, committee members, volunteers, and other association agents, because associations can be held liable for discriminatory behavior engaged in by such parties (even if the association takes steps to correct or end such conduct). Associations also should create polices regarding what to do if any sort of quid pro quo harassment or hostile environment harassment is noticed and/ or reported by others.

Keep in mind that associations are <u>not</u> strictly liable for a third party's discriminatory behavior. Associations <u>could be</u> liable for discriminatory behavior of an individual homeowner, resident, or guest if the board knows or should have known about the discriminatory behavior and if the board has the power to correct or end it, but fails to do so. For example, if the association's legal documents prohibit this type of conduct and provide

enforcement powers, such as fining powers or authority to obtain restraining or protective orders, the board must utilize such enforcement mechanisms to try to make the neighbor stop verbally abusing the other owner's family, stop throwing trash onto the other owner's property, and stop making hostile and threatening comments to the other owner. If the association has enforcement authority, but does not take any action against the harassing neighbor, the association could be liable to the other owner who is being discriminated against. HUD recognizes that if there are no relevant enforcement powers in the association's legal documents and the association has no power to correct or end the harassing conduct, the association should not be held liable for any inaction.

With these new Federal guidelines, associations have two significant issues to address from our example: (1) the request for architectural approval of a non-conforming fence; and (2) the possible discriminatory harassment towards one family. In this case, to minimize risks of both claims and liability under the Act, based on the long-standing requirement to make accommodations for owners in protected classes, the association's safest course of action is to: (1) allow the owner to install the non-conforming fence as a fair housing accommodation; and (2) take reasonable enforcement action to discourage, correct, and/or stop the reported hostile discriminatory acts when credible reports are received.

Finally, a related but equally important issue is whether the association is adequately insured for these situations. Not all directors' and officers' liability policies are created equal. The association should confirm with its insurance agent whether its policy will cover the association, the board members, and the association's agents if a claim is brought alleging a Fair Housing Act violation for any of these situations.

Alleged violations of the Act bring significant risks for community associations, including expense of association time, money, and resources defending claims, even if insurance coverage is involved and the association has a likelihood of defeating the claim. While we all wait to see how the HUD ruling works in practice, it's pretty clear that HUD has said community associations can no longer tell neighbors to resolve complaints about discriminatory harassment or hostile conduct between or among themselves.

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