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The Fair Housing Act:  
Keeping Your Community Association  
in Compliance and Out of Court

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# Today's attorneys and some notes...



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Welcome. With the high number of attendees, please note all lines have been muted for the event. Q&A can be posted at the right of your screen, but any questions (time permitting) will be addressed at the end of the event. If using Q&A – please send to both the host and the presenter. You can send direct questions (including requests for a copy of the slides) to [seminars@leclairryan.com](mailto:seminars@leclairryan.com) with “Community Associations Webinar” in the subject line after the event.

June Webinar



**Upcoming Changes in FHA Guidelines for  
Condominium Project Approval:  
What You Need to Know for the New Decade**

Look for the email invitation very soon

# *What's On Deck For This Webinar*



- We will discuss how the Fair Housing Act (“FHA”) applies to Community Associations;
- We will address the problems, pitfalls, and penalties for non-compliance with the FHA;
- We will offer up some commonsense solutions for staying in compliance and out of trouble

# Who Is Covered By The FHA?



- **The FHA applies to:**
  - Direct providers of housing;
  - Entities and associations that set **terms and conditions for housing**; and
  - Entities and associations that provide **services and facilities** in connection with housing

# The FHA Applies to Community Associations



- Courts have held that the FHA Applies to Community Associations — including HOA's and Condo Associations.
- Community Associations set rules and covenants that apply to homeowners.
- Community Associations provide services or facilities in connection with housing.
- Thus, Community Associations are “housing providers” under the FHA.

# The FHA Applies to Community Associations



*Block v. Frischholz*, 587 F.3d 771 (7<sup>th</sup> Cir 2009)

Plaintiff, an orthodox Jew, sued Condominium Association and Board president for religious discrimination because Board refused to allow him to have a religious display on his exterior door.

# The FHA Applies to Community Associations cont.



*Housing Opportunities Project for Excellence, Inc. v. Key Colony No. 4 Condominium Assoc.*, 510 F. Supp. 2d 1003 (S.D. Fla. 2007)

Plaintiff sued HOA and HOA board members under FHA and Florida housing laws claiming that occupancy restrictions and rules for pool and clubhouse discriminated against families with children.



# The FHA Applies to Community Associations



*Savanna Club Worship Service, Inc. v. Savanna Club Homeowners' Association*, 456 F. Supp. 2d 1223 (S.D. Fla. 2005)

Owners of a religious club sued HOA and board members because the HOA prohibited religious services in common areas

**Note:** The Court dismissed the Plaintiff's claims because the HOA applied its restrictions in a neutral manner. The Court recognized, however, that HOA's are governed by the FHA since they control and regulate certain property rights, such as use of common areas and facilities.

# What Does the FHA Prohibit?



- The FHA Prohibits Discrimination based on the following factors:

■ Race	■ Color
■ National Origin	■ Religion
■ Sex	■ Disability
■ Familial Status	

# What Does the FHA Prohibit? cont.



- .... It shall be unlawful to discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or the provision of services or facilities in connection therewith, because of race, color, religion , sex, familial status, or national origin

**42 U.S.C. 3604(b)**

# What Does the FHA Prohibit? cont.



- ...It shall be unlawful to discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling because of a handicap of:
  - (A) that person;
  - (B) a person residing in or intending to reside in the dwelling after it is sold, rented or made available; or
  - (C) any person associated with that person

**42 U.S.C. 3604(e)(2)**

# Definition of “Familial Status” as used in FHA



“Familial Status” includes:

- Someone with one or more children under the age of 18
- A pregnant woman
- Someone who has custody or guardianship of a child
- Someone in the process of adopting a child
- Foster parents

# Protections Afforded Disabled Individuals



- Additional Protections for Persons with Disabilities:
  - If a person or someone associated with that person:
    - Has a physical or mental disability;
    - Has a record of such a disability; or
    - Is regarded as having such a disability

# Protections Afforded Disabled Individuals



A housing provider may not:

- (1) Refuse allow reasonable modifications to a dwelling
- (2) Refuse to make reasonable accommodations in rules, policies, practices, and services

# You Mean I Need to Worry About State Law Also!?!?



- The FHA sets a “federal floor” regarding fair housing regulations and anti-discrimination requirements.
- Individual states and localities are free to adopt more expansive regulations



# You Mean I Need to Worry About State Law Also!?!?



- Virginia law includes the “elderly” (meaning individuals age 55 and older) as a protected class
- California, Florida, and other states also have fair housing laws and ordinances that go beyond the FHA

# Exceptions to FHA Requirements



- An exception to the FHA exists for “age restrictive housing” which complies with certain legal requirements
- Private clubs are generally exempt from the FHA if not housing providers
- Sex offenders and/or individuals who pose a direct threat to a community are not considered “disabled” for FHA purposes
- Current illegal drug use (but not past substance abuse!)

# Community Associations: Restrictive Covenants



- Courts across the country have allowed lawsuits to proceed based on discriminatory covenant enforcement.
- Racially-restrictive covenants were a major reason for the implementation of the FHA in 1968.
- Currently, race, religion, and national origin are major areas of enforcement and risk for Community Associations.

# Community Associations: Restrictive Covenants cont.



*Tokh v. Water Tower Court Home Owner Association*, 327 Fed. Appx. 630 (7<sup>th</sup> Cir. 2009).

In *Tokh*, a member of an HOA sued his HOA and its Management Company for national origin and race discrimination after being fined for enlarging a patio in violation of the HOA's covenants.

# Community Associations: Restrictive Covenants cont.



Avoiding or minimizing legal risks for covenant and rule enforcement requires:

- Ensuring that covenants and rules are drafted to apply neutrally to all owners;
- Ensuring that covenants and rules are enforced in a neutral and even-handed manner;
- Ensuring that a Community Association board's words match its actions.

# Community Associations: Restrictive Covenants cont.



## **SOME DO'S:**

- **Enact covenants and rules that are based on permissible, neutral categories — not impermissible protective categories.**
- **Enforce covenants and rules in a neutral, non-selective, manner.**
- **Ensure that Board Members do not single out protected groups (either favorably or unfavorably) with respect to the enactment and enforcement of covenants and rules.**
- **If your Community Association does not intend to enforce a covenant or rule — get rid of it!**
- **Think critically about whether a requested modification or exception is appropriate, particularly where disability is at issue**
- **Carefully police Board and committee meeting minutes and take curative steps to ensure that problematic wording is deleted before adoption.**

# Community Associations: Restrictive Covenants cont.



## **SOME DON'TS:**

- Establish restrictive covenants and rules that are not supported by controlling declarations or bylaws.
- Selectively enforce covenants and rules.
- Provide inappropriate comments or justifications at board meetings.
- Fail to properly follow controlling law and your bylaws with respect to enforcement actions.
- Allow outside entities to put you at risk.
- Adopt policies that put the Board and its members at risk for lawsuits, penalties, and fines.

# Community Associations: Provision of Services and Facilities



WHAT DOES IT MEAN TO PROVIDE  
SERVICES AND FACILITIES?



# Community Associations: Provision of Services and Facilities



# Community Associations: Provision of Services and Facilities cont.



# Community Associations: Provision of Services and Facilities cont.



# Community Associations: Provision of Services and Facilities cont. LR

## Types of Discriminatory Actions:

- Openly discriminating in services or facilities provided based on a protected category;
- Engaging in activities that favor certain groups or classes over others

# Community Associations: Provision of Services and Facilities cont.

Community Associations can run afoul of the FHA and state law by:

- By providing advantages (i.e. waiving fees) in providing services and/or facilities to groups that discriminate
- Sponsoring or endorsing groups that discriminate

# Community Associations: Provision of Services and Facilities cont. LR

Which of these is a **potential FHA violation**?

- HOA allows religious groups to use a community chapel facility but not non-religious groups
- Condominium Association waives fee for Boy Scouts of America to use community room for free but charges other groups
- Community pool establishes “adult swim” hours
- Community Association-controlled golf course restricts men from playing on Tuesday mornings

# Community Associations: Provision of Services and Facilities cont.

Answer....

**ALL OF THEM**

# Community Associations: Provision of Services and Facilities cont. LR

- HOA allows religious groups to use a community chapel facility but not non-religious groups (*religious discrimination*)
- Condominium Association waives fee for Boy Scouts of America to use community room for free, but charges other groups (*religious and gender discrimination*)
- Community pool establishes “adult swim” hours (*familial status discrimination*)
- Community Association-controlled golf course restricts men from playing on Tuesday mornings (*gender discrimination*)



# Community Associations: Provision of Services and Facilities cont. LR

## STEPS TO AVOID FHA LIABILITY:

- (1) Establish neutral criteria and regulations for use of common area elements.
- (2) Establish neutral criteria for fees (or fee waiver) for services and facilities.
- (3) Ensure that accessibility to services does not create discrimination based on disability or other protected categories.

# FHA: Enforcement and Liability



NOW FOR THE REALLY SCARY PART....

## Civil Violations

- **Civil Penalties** include fines of up to **\$10,000** for a violation of the FHA and up to **\$74,000** for multiple violations
- Injunctive and equitable relief to stop and change practices and policies that violate the FHA
- Payment of Court costs and attorneys' fees to the Government
- Individual penalties and liability for board members and other individuals!!

## Criminal Penalties

- Violations of the FHA that involve threats, intimidation, or violence can also lead to criminal fines and imprisonment.

## Federal Lawsuits:

An individual who has been (or believes he/she has been) a victim of an FHA violation:

- (1) Can sue for actual and compensatory damages (the harm);
- (2) Punitive damages (\$\$\$ for punishment);
- (3) Injunctive and equitable relief (change in policy);
- (4) And recover his/her costs and attorneys fees (if successful)

# Thank you for attending



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# Upcoming Webinar:



The Housing and Economic Recovery Act of 2008 (“HERA”) creates a new approval process for mortgage insuring

Coming in June – date to be determined  
More on this soon!

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