



## **Don't Be Disabled by Reasonable Accommodation Requests**

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Whether you live in a condominium or a subdivision governed by an association, chances are either you or one or more of the residents living within your community are coping with some form of disability. When the U.S. Census Bureau released its report on Americans with Disabilities in 2010, it estimated that 56.7 million Americans were living with disabilities [1]. Of that number, more than half of the disabled individuals described their disability as severe.

Despite those numbers, condominium and homeowner association boards of directors are often unprepared and ill-equipped to deal with a disabled person's request to make a reasonable accommodation in the association's rules, policies, practices or services when such an accommodation may be necessary to afford that individual the equal opportunity to use and enjoy their residence.

This article reviews the statutes applicable to condominium and homeowner associations and offers guidance to association boards, managers and attorneys in dealing with requests for accommodations.[2]

### **Federal and State Legislation**

Several state and federal statutes address disabled residents' rights to reasonable accommodations. At the federal level, the Fair Housing Act and the Fair Housing Amendments Act of 1988 (the "Fair Housing Act") provide for fair housing throughout the United States.[3] The Fair Housing Act prohibits housing discrimination, which includes an association's "refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [a handicapped] person equal opportunity to use and enjoy a dwelling . . . ."[4] Importantly, the protections are not limited in scope to owners of property, but also relate to tenants, guests, family members, and others associated with such individuals.

In Michigan, Section 47a of the Condominium Act[5] and Section 506a of the Persons with Disabilities Civil Rights Act[6] require associations to permit reasonable modifications of existing premises to afford disabled persons full enjoyment of the premises, mirroring the requirement in the Fair Housing Act.[7]

The Fair Housing Act defines a handicap as "(1) a physical or mental impairment which substantially limits one or more of such person's major life activities; (2) a record of having such an impairment, or (3) being regarded as having such an impairment . . . ."[8] Michigan similarly defines disability as:

1. A determinable physical or mental characteristic of an individual, which may result from disease, injury, congenital condition of birth, or functional disorder, if the characteristic . . . substantially limits 1 or more of that individual's major life activities and is unrelated to the individual's ability to acquire, rent, or maintain property.
2. A history of a determinable physical or mental characteristic described in subparagraph (i)
3. Being regarded as having a determinable physical or mental characteristic described in subparagraph (i).[9]

Among the diseases and conditions included in the term "physical or mental impairment" are "orthopedic, visual, speech and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, Human Immunodeficiency Virus infection, mental retardation, emotional illness, drug addiction (other than addiction caused by current , illegal use of a controlled substance) and alcoholism." [10]

### **Determining Whether the Requested Accommodation is Required**

Accommodation requests may relate to any of the rules, policies, practices, or services provided for by an association's governing documents. Examples include requests for exceptions to pet restrictions, reservation or assignment of parking spaces, and exemptions from occupancy restrictions. It is important to note that the Fair Housing Act does not impose on an association the obligation to provide an accommodation unless a request has been made by or on behalf of a disabled individual.[11] The request need not be in writing, but must simply be made "in a manner that a reasonable person would understand to be a request for an exception, change, or adjustment to a rule, policy, practice, or service because of a disability." [12] In determining whether to grant the request, a board must consider if the person making the request has a qualifying disability, or the request is made on behalf of someone with a qualifying disability, and whether the accommodation directly alleviates one of the symptoms or effects of the disability.[13]

When an accommodation request is made, associations need only be provided with such information which is sufficient to establish that a disability exists and that the accommodation may be needed.[14] If the disability is known or is "readily apparent" (e.g., blindness or confinement to a wheelchair), and if the need for the accommodation is known or readily apparent, no further information may be requested.[15] If the disability is known or readily apparent to the association but the disability-related need is not, the association may ask for only such information as is necessary to determine whether the accommodation is needed.[16]

Where a disability is not obvious, an association may ask for reliable disability-related information that is necessary to establish the disability, that describes the needed accommodation, and that shows a relationship between the two.[17] That information may be provided by the individual making the request, or by other parties having knowledge of the disability.[18] In considering a request, an association may not make requests for "extraneous information," i.e., information that is not necessary to establish one of those criteria.[19] Examples of such extraneous information include "treatment, medications, and the number of counseling sessions . . . attended per week; details about how the diagnosis was made; whether the condition was permanent or temporary; and 'details of the prescribed treatment moving forward.'" [20] Though an association is entitled to "conduct a meaningful review," [21] it may not unnecessarily extend its inquiry, as a failure to make a timely decision may constitute a failure to accommodate.[22]

Once the association's review is completed, a request may be denied if the person by or for whom the accommodation is requested is not disabled, or if the accommodation does not address the symptoms or effects of the disability.[23] In addition, a request that would impose an undue financial and administrative burden or fundamentally alter the nature of the association's operations may be denied as unreasonable.[24] In such cases, the association should consider with the requestor whether some reasonable alternative would address his or her needs.

### **Penalties for Noncompliance**

If a request for a reasonable accommodation is denied, the person seeking the accommodation may file a complaint with HUD up to one year after the denial, or may initiate a lawsuit in federal court within two years of the denial.[25] Whether a case proceeds administratively or through the courts, associations may face significant costs in defending their decision not to grant an accommodation. The relief through an administrative hearing may include an award of actual damages, injunctive or other equitable relief, and/or a civil penalty of \$11,000.00 for a first offense, \$27,500.00 for a second offense, and up to \$55,000.00 for a third offense within 7 years of the two prior offenses.[26]

In a civil action, a court may award actual and punitive damages, injunctive relief, and reasonable attorney's fees and costs.[27] However, courts have held that such an award of attorney's fees against the complainant is appropriate only if the complaint is frivolous.[28]

## **Conclusion**

Boards of Directors, property managers and attorneys must take special care to protect their associations from liability for refusing to make reasonable accommodations for a disabled individual. Requests for accommodations should be carefully reviewed and responses should be sufficiently prompt. When requesting documentation, boards should be mindful to limit such requests to only that information which is necessary in making their decisions. Consideration should be given to whether an undue hardship would result from an accommodation, and whether an acceptable alternative may be agreed upon. Boards should review their insurance policies to determine whether the Directors and Officers coverage held by the association sufficiently protects them from liability. Before making any decision to deny, boards certainly should first seek input from their professional managers and attorneys. In taking these steps, boards, managers and attorneys can protect their associations and themselves from liability.

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[1] *Americans With Disabilities: 2010, U.S. Census Bureau, Survey of Income and Program Participation, May – August 2010.*

[2] *While the primary focus of this article is reasonable accommodations in rules, policies, practices, or services, it should be noted that there will often be overlap between accommodations and modifications, such as regarding parking where an accommodation, e.g., a change in the association’s parking policy, may also require a modification, e.g., the installation of a physical sign.*

[3] *42 USC §3601 et seq.*

[4] *42 USC §3604(f)(3)(B).*

[5] *MCL 559.147a.*

[6] *MCL 37.1506a.*

[7] *42 USC §3604(f)(3)(A).*

[8] *42 USC §3602(h).*

[9] *MCL 37.1103(d).*

[10] *Department of Justice and HUD, Joint Statement of Reasonable Accommodations at 3 (May 17, 2004), available at <http://www.hud.gov/offices/fheo/library/huddojstatement.pdf> (last visited November 9, 2015) (“Joint Statement”).*

[11] *Joint Statement at 10.*

[12] *Id.*

[13] *Joint Statement at 6; Schwarz at 1226.*

[14] *Bhogaita v Altamonte Heights Condominium Assn, Inc*, 765 F3d 1277 (11<sup>th</sup> Cir 2014).

[15] *Joint Statement at 12.*

[16] *Joint Statement at 13.*

[17] *Id.*; *Colwell v Rite Aid Corp*, 602 F3d 495, 506 (3d Cir 2010).

[18] *Joint Statement at 14.*

[19] *Bhogaita at 1287.*

[20] *Id.*

[21] *Schwarz v City of Treasure Island*, 544 F3d 1201 (11<sup>th</sup> Cir 2008).

[22] *Groome Res Ltd v Parish of Jefferson*, 234 F3d 192 (5<sup>th</sup> Cir 2000); *Joint Statement at 11.*

[23] *Joint statement at 7.*

[24] *Id.*

[25] *Id. at 14.*

[26] 42 USC §3612(g).

[27] 42 USC § 3613(c).

[28] *Bryant Woods Inn, Inc v Howard County, Maryland*, 124 F3d 597 (4<sup>th</sup> Cir 1997).