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COMMONtary is a free publication intended to provide helpful and relevant information to Eastern Iowa Condominium Association Boards of Directors and Management Professionals. We hope that you will find COMMONtary to be a valuable resource in managing your community or portfolio of communities.

COMMONtary

A NEWSLETTER FOR EASTERN IOWA CONDOMINIUM ASSOCIATIONS AND MANAGEMENT PROFESSIONALS

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ISSUE NO. 3

AUGUST 2013

The Federal Fair Housing Act and You: Avoiding Discrimination Against Families

In this first installment of our segment on *The Federal Fair Housing Act and You*, we discuss the possibility of a board unwittingly discriminating against families in violation of federal and state mandates that housing providers (including associations) not discriminate on the basis of familial status.

RESIDENCY RESTRICTIONS

Some condominium communities' organizational documents include residency restrictions in one form or another. Often these restrictions will purport to limit the number of adults and the number of children who may occupy a dwelling unit. It is the opinion of this attorney that, although there are no known Iowa cases on point, such restrictions likely conflict with provisions of the Federal Fair Housing Act and the Iowa Civil Rights Act intended to prohibit discrimination against families with children.

The United States Supreme Court has held that rules capping the total number of occupants in a dwelling unit to prevent overcrowding are generally permissible, however, rules intended to preserve the familial character of a neighborhood by focusing on the composition of households are questionable. See, *City of Edmunds v. Oxford House, Inc.*, 514 U.S. 725 (1995).

The United States Department of Housing and Urban Development ("HUD"), which administers the Fair Housing Act, has echoed these sentiments. HUD has issued guidance providing that occupancy restrictions which simply limit the number of "people" per unit are less likely to run afoul of the Fair Housing Act than



occupancy restrictions which limit the number of children per unit. HUD has issued further guidance providing that in setting residency restrictions housing providers (which include owners' associations) should follow the general rule of two people per bedroom, with the caveat that other factors might impact this analysis. These other factors include, but are not limited to, "the number and size of sleeping areas or bedrooms and the overall size of the dwelling unit."

The Iowa Civil Rights Commission has issued guidance similar to HUD in regard to provisions of the Iowa Civil Rights

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Families

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Act, which mirror relevant provisions of the Federal Fair Housing Act in relevant respects. This includes advocating the general rule of thumb of two people per bedroom insofar as occupancy restrictions are concerned.

DEFINING "FAMILY"

Another common area where a board may risk unwittingly discriminating against families relates to how the board interprets the term "family," as in the context of single-family housing. The United States Supreme Court has noted that a strict definition of this term based upon the relationship of occupants (e.g., relation by blood, adoption, or marriage) may violate the Federal Fair Housing Act. See, City of Edmunds v. Oxford House, Inc. Many organizational documents nevertheless purport to limit the occupancy of a unit to an owner or lessee and that owner or lessee's family. Just keep in mind that a family is not simply a mother and/or father and minor children; it may include extended family members, adult children,

unmarried couples, or even friends and roommates.

SINGLING OUT CHILDREN



Children generally should not be singled out for special treatment under an association's restrictions or rules and regulations. A community's restrictions and rules and regulations regarding the use of common areas and facilities should avoid defining privileges based upon age. A rule banning children from playing upon a community's common elements, for example, would likely be unlawful. A rule banning recreational activities upon the common elements, or restricting recreational activities to certain common elements, however, would be more likely to survive judicial scrutiny. The key difference here is that the second provision is age-neutral; it does not single out children.

Communities with swimming pools should be particularly cautious when adopting rules pertaining to

children. Courts have overturned association rules banning children from swimming pools based solely upon their age, rules establishing adults-only swim times, rules requiring children, but not adults, to take breaks from swimming, and others. The only exceptions appear to be rules directly correlated to legitimate health and safety concerns.

CONCLUSION

The potential expense involved in defending a lawsuit for violation(s) of the Federal Fair Housing Act and/or the Iowa Civil Rights Act can be staggering, including not only an association's own legal expenses, but potentially those of the plaintiff as well. Damages, including punitive damages and emotional distress, are also a possibility. Consequently, when it comes to the possibility of discriminating against families, even if unintentional, it pays to be cautious. A board encountering any of the issues raised in this article would be wise to consult legal counsel to determine first, whether the association is discriminating, and subsequently, how to eliminate that discrimination and any associated liability.

Restrictions Prohibiting or Unduly Restricting

Displays of the American Flag Likely Violate Federal Law

Some association's organizational documents, particularly older documents, prohibit or unduly restrict the display of flags. To the extent that any such restriction includes, or is interpreted to include, the display of the American flag, that restriction and/or interpretation may very well be unlawful.

The Freedom to Display the American Flag Act of 2005 (the "Act") specifically provides that "a condominium association...may not adopt or enforce any policy, or enter into any agreement that would restrict or prevent a member of the association from displaying the flag of the United States on residential property within the association with respect to which such member has a separate ownership interest or a right to exclusive use or possession." Nevertheless, an association may adopt "any reasonable restrictions pertaining to the time, place, or manner of displaying the flag of the United States necessary to protect a substantial interest of the condominium association..."

Just what portions of a condominium property a member has a separate ownership interest in or an exclusive right to use

or possess will be dictated by a specific association's composition as set forth in its governing documents. In many (but not all) communities, this will likely include the limited common elements appurtenant to a unit. This is not to say that an association could not, if it so chooses,



determine to permit flag pole holders to be installed upon or affixed to a common element, such as the common element exterior of a building (granted, in this event it may be wise for the association to designate a particular uniform location for the installation of flag pole holders and installation instructions intended to prevent damage to the common elements, such as water intrusion).

About the Author



Steve Leidinger is an attorney with Lynch Dallas, P.C., in Cedar Rapids, Iowa.

Steve has served as general counsel to condominium and homeowners' associations since 2006. During this time, he has represented associations on a host of matters, in-

cluding collections, enforcement, document amendment and interpretation, litigation, operational issues, corporate governance, and others.

He also has years of experience drafting condominium documents for both residential and commercial developers.

Reasonable restrictions under the Act may include, without limitation, rules intended to accomplish the following:

- The reduction of noise which may constitute a nuisance to other occupants, such as the thump of a metal chain or rope against a flag pole;
- Safety concerns, such as the proper installation of a flag pole or obstruction of sight lines;
- The respectful display of the flag in accordance with long-standing custom, including, but not limited to, the respectful retirement of tattered, faded, or unsightly flags; or
- The proper installation of flag poles and/or flag pole holders so as to not damage the condominium property.

Before adopting any restrictions or rules and regulations, or enforcing existing restrictions or rules and regulations pertaining to displays of the American flag, a board should carefully consider relevant provisions of the Act and confer with association counsel to ensure that any restrictions are reasonable and related to a substantial interest of the Association.

Steve would welcome the opportunity to meet with your board to discuss the possibility of representing your association, whether as general counsel or special counsel with respect to a specific project or matter. Lynch Dallas, P.C. provides services to condominium and homeowners' associations at competitive hourly rates.