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Landlord News

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To Restore, or Not To Restore

When can you require residents to restore modifications under the Fair Housing act?

The Issues

Applicants and residents make requests to modify their units. You are a dedicated Fair Housing provider. Assuming that the resident is disabled and needs the modification, you will grant a resident's modification request. Every one generally understands that disabled residents are entitled to make, at their own expense, reasonable modifications to their unit. The resident's restoration obligations at the end of the lease are not so well understood. What happens when the resident leaves? Can you condition a reasonable modification request on the resident restoring the unit when he moves out?

Maybe. Maybe not. Fair Housing law certainly provides a legal basis for requiring a resident to restore a unit. Both statutes and regulations provide 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. The expression "where it is reasonable to do so" is not clearly defined. Unfortunately, like so many disability related Fair Housing issues, you only find out if your conduct was reasonable when a judge, jury, HUD or the Colorado Civil Rights Division tells you.

The expression, "where it is reasonable to do so" implies that in some cases, it would not be reasonable to require the resident to restore the unit. In fact, HUD has stated that it wishes to stress that the Fair Housing Act does not require a resident to restore all modifications. Similar to other Fair Housing disability issues, whether you can require a resident to restore the unit depends on the facts

and circumstances of the particular case. However, based on client inquiries to the Firm, many property managers have not been adequately educated in this area. Without sufficient training, the policy in every case might be that the resident may make the modification, but must in every case restore the unit to its pre modification condition. This could prove costly. Allowing the modification, but unreasonably requiring restoration is Fair Housing discrimination. Sooner or later, an "always restore" policy is very likely to result in a discrimination charge.

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WHAT'S HAPPENING AT THE LEGISLATURE

The 2008 Legislative Session is shaping up to be of great interest to the multi housing provider industry.

RENT CONTROL LEGISLATION FAILS

HB 1140 (elimination of rent control prohibition) failed to get out of committee on a 5-5 vote. Rep. Mary Hodge, Chair of the Local Government Committee abstained from the vote because she owns several rental properties. All five Republicans voted NO and the remaining Democrats voted YES on the proposal. The apartment industry would have faced significant challenges in local markets across Colorado if HB 1140 became law.

All of the witnesses in opposition to HB 1140 proved the case that rent control is a broken tool that does not create affordable housing. Testimony showed rent control compromises basic economic principles, deteriorates the quality and quantity of rental housing, prevents new development, and increases costs to consumer tenants. The widespread and well documented harmful effects of rent control make it a state wide matter to ensure that rent control is not used in Colorado.

Unfortunately, this may be a short-lived victory as Sen. Gail Schwartz, the bill's Senate sponsor, has apparently requested a late bill from leadership so that she may take another crack at it. Industry stakeholders are attempting to prevent that from happening.

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To Restore, or Not To Restore

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Because you can't require restoration in every case, how do you determine when you can require restoration of the unit? When the modifications to the interior of a dwelling unit can reasonably be expected to interfere with the landlord's or the next tenant's use and enjoyment of the premises, you may require restoration. It's important to note that disabled residents are also legally allowed to make modifications, in appropriate cases, to common areas. You can never require a disabled resident to restore a common area modification. HUD's rationale is that any common area modification is likely to benefit future disabled residents, and thus you can never require restoration for common area modifications.

In appropriate cases, you can condition a modification on the resident's promise to restore, and also further condition the modification on the resident's execution of an appropriate restoration agreement. A restoration agreement is a more detailed written contract between the resident and landlord which requires the resident to financially secure the resident's promise to restore. Restoration agreements are applicable when modifications are substantial, and the circumstances justify a concern about the resident's or applicant's ability to pay for the restorations. Similar to the fact that you can't always require a resident to restore, you can't always require a financially secured restoration agreement when the resident is obligated to restore. Determining when a financially secured restoration agreement is appropriate is a complex legal and factual determination. You should always consult us prior to insisting that a resident sign a financially secured restoration agreement.

Whether a resident's modification to a unit will interfere with your ability to rent the unit is clear in many cases. Frequently, because the modifications won't affect your ability to re-rent, you may not require restoration. Unfortunately, your ability or non-ability to re-rent the unit is not always so clear. For example, you have a 2 bed 2 bath unit. The applicant wants to modify one bathroom by removing the tub shower combination and replacing it with a roll in shower. Is a 2 bedroom, 1 tub shower bathroom, and 1 roll in shower un-rentable in the future? We have posed this question to over a thousand participants at our Fair Housing classes. The result is always the same. A slight majority contends that the modification makes the unit unrentable unless the modification is restored. A very substantial minority thinks that the modification does not impair the ability to rent the unit.



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Our advice in this case depends on the facts. If you have 200 units with 2 beds and 2 baths, your ability to re-rent is probably not going to be affected. Some managers have told us that at least some residents would prefer a unit without a bathtub, and with a large shower. If the unit in question is one of your most desirable units that has always been re-rented the second it becomes vacant, our opinion may change. If your community only has a very limited number of this unit type, our opinion may change. The ability to re-rent is a factual determination. We are not property managers, we are attorneys. You are property managers. You are in the best position to know based on your individual property, types of units, your experience, and historical leasing patterns whether a modification will affect your ability to re-rent. Thus, in close call cases, you should always make the final determination whether the modification will substantially affect your ability to re-rent the unit.

If you decide that that the modification will affect your ability to re-rent, you should take further steps to insulate yourself from potential Fair Housing liability. You should open up a written dialog with the resident or applicant. You should clearly inform them that you are willing to allow the modification if they agree to restore upon moveout. You should communicate in detail why you have determined that the modification, if not restored, will impact your ability to rent the unit to future residents.

For example, you made this same modification 5 years ago to Unit #302, and have had difficulty renting it ever since, or based on your leasing traffic nearly all prospective residents want a 2 bedroom with 2 full baths. You should provide the applicant or resident an opportunity to provide additional information or feedback. Finally, you should make it clear that you are willing to evaluate and consider any additional comments or information that they may provide.

As with all Fair Housing related decisions, risk analysis dictates that you should err on the side of caution. You should not require residents to restore modifications that, while not cosmetically ideal, do not materially affect the use and enjoyment of the unit. Close calls on whether to require restoration should always be decided in favor of the resident if your costs to restore would be minor. Risk analysis also dictates that you always fully evaluate all of the facts of the particular case before conditioning any modification request on the resident restoring. Never insist on restoration without fully evaluating, and until after you have attempted to open a dialog with a resident on the restoration issue.



WHAT'S HAPPENING AT THE LEGISLATURE

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Listed below are the committee members and how they voted. We recommend that you drop a line and thank the Representatives that voted "NO". It is important that the members of the legislature know that the industry is watching and appreciates their support.

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| Hodge (D) n/a | B. Gardner (R) – no |
| McKinley (D) – yes | Garza-Hicks (R) – no |
| Curry (D) – yes | King (R) – no |
| Gagliardi (D) – yes | Liston (R) – no |
| Peniston (D) – yes | Summers (R) – no |
| Soper (D) – yes | |

Warranty Of Habitability Bill Likely To Be Introduced in February

Rep. Merrifield (D) of Colorado Springs is very likely to introduce a Warranty of Habitability bill in February. The bill will mandate that all Colorado residential landlords warranty the habitable condition of all residential rental units. Because Colorado currently has no warranty of habitability law, the Warranty of Habitability Bill significantly changes Colorado Landlord Tenant laws. If the proposed legislation passes in both houses and is signed into law by Governor Ritter, this will change the way you lease and manage rental properties.



Because there is a formidable effort by tenant groups and state legislators to make changes in Colorado's landlord tenant laws, a coalition of industry stakeholders have been working tire

lessly for many months to 1) minimize harmful economic impact of the law on the industry, 2) to limit the potential for increased litigation; and 3) draft the warranty of habitability in a manner that is fair and equitable for both residents and landlords so property owners/managers can manage their businesses with limited government interference.

The Firm's Senior Managing Partner Mark Tschetter has been actively involved from the beginning in the process of bill review and analysis, participated in mediation sessions, met with legislators, and has devoted a significant amount of time to drafting recommendations to protect the interest of both Firm clients and the rental industry as a whole. No final version of the bill has been

agreed to at this time. We are still optimistic that both the tenant advocates and the rental industry advocates can reach a fair compromise on the bill. As soon as the bill is introduced, the bill will be immediately posted on our website, and you will be alerted via email if you are on our e mailing list. Mark will continue to be actively involved in the industry efforts to attain the best possible outcome for the multi housing industry. To keep on top of what is happening we recommend you attend our monthly client luncheons to receive the most timely legislative briefings from Mark.



HTS NEW NORTH LUNCHEON SITE

The Firm has moved the location of our North Client Monthly Luncheon. We are relocating from the Rock Bottom Brewery in Westminster to Dave & Buster's in Westminster. The decision to move the North luncheon was based on the fact that we outgrew the room we were using. If attendance was to continue growing to support our North Metro Clients, it was imperative to find a new facility. We are excited about our new location. It will provide clients with enough room to be comfortable and also provide the wait staff with an environment to provide quicker and better service to our clients.

Dave and Buster's is located at 10667 Westminster Blvd., Suite 100. For those who have attended luncheons at the Rock Bottom Brewery it will be easy to find. The new location is just around the corner of the shopping area on the other side of AMC theaters from the former location. Don't miss the opportunity to help us launch our new luncheon site on the North Side. The first luncheon at Dave and Buster's is on Friday, March 21st. Mark will be updating the status of the proposed legislation along with other timely issues of interest to multi housing professionals.

Remember lunch begins promptly at 11:30 AM. With our new facility we will be able to get lunch ordered expeditiously. You can make a reservation online at our website www.htspc.com where you will find a map to the restaurant, or you can email or call Matt matt@htspc.com or 303 699 3484. We look forward to seeing you there!



IMPORTANT FEBRUARY DATES

February 12th-	Basic Evictions Workshop
February 15th -	AASC Expo
February 18th -	All Courts Closed Presidents Day
February 21st	Advanced Fair Housing Workshop
February 22nd	South Client Lunch @ Piccolo's

**You Can Register for
Luncheons, Workshops, or Any
Scheduled Firm Event
Online at www.htspc.com
Email Matt at matt@htspc.com
or Call Matt - (303) 699-3484**

*A few deep
thoughts*

A bus station is where a bus stops. A train station is where train stops. On my desk, I have a work station...

If quitters never win, and winners never quit, what fool came up with "quit while you're ahead"?

I was thinking about how people seem to read the Bible whole lot more as they get older, then it dawned on me, they were cramming for their finals.

I thought about how mothers feed their babies with little tiny spoons and forks, so I wonder what Chinese mothers use...Tooth-picks?

Why do they put pictures of criminals up in the Post Office? What are we supposed to do...write to these men? Why don't they just put their pictures on the postage stamps so the mailmen could look for them while they delivered the mail?

How much deeper would oceans be if sponges didn't live there?

If it's true that we are here to help others, then what exactly are the OTHERS here for?

Ever wonder what the speed of lightning would be if it didn't zigzag?

How come you don't ever hear about grunted employees? And who has been dissing them anyhow?

Since light travels faster than sound, isn't that why people appear bright until you hear them speak?

How come abbreviated is such a long word?

*Do not go where the path
may lead,
Go instead where there is
no path
and leave a trail.*

Ralph Waldo Emerson

