Volume I • Issue IV July 2008

Hopkins • Tschetter • Sulzer
Attorneys and Counselors at Law

HOA COMMUNICATOR

DISABLED OWNER PARKING - A COMMON BUT FREQUENTLY MISUNDERSTOOD FAIR HOUSING ISSUE
Part II

In our last edition, we discussed disability parking requests under the Fair Housing Act Amended. (FHAA). Part II of this Article will help Associations grasp some of the different issues that come up with these type of parking requests and provide them with the means to make the correct decisions. As discussed last time, it is critical for Associations to know how to respond to parking requests and to understand some of the misconceptions they may have related to these parking requests.

PARKING REQUESTS RAISE A VARIETY OF ISSUES

After discussing disability related parking requests in our Fair Housing workshops, class members have raised some other issues that should be discussed here. What is a housing provider's disclosure obligations? If an owner or resident asks for a handicapped space, are you obligated to tell them they may be entitled to a close-up reserved space? The answer is no. You are not obligated to tell an owner or resident what accommodation they should seek. However, as stated in part I of this article, you need to document the request in writing to avoid problems later. Also, it may be better to provide the close-up space to avoid problems later. That is a decision that has to be made by the Association on a case-by-case basis.

If an owner or resident asks for a handicapped space, can you condition providing the space on the owner or resident proving handicapped parking credentials? Surprisingly, the answer is no. If the owner or resident is disabled, he or she needs the accommodation and it is reasonable, this is all the law requires. You may not place additional conditions on granting the accommodation. The properly credentialed issue can be avoided by providing a reserved space in the first place.

Clients also ask whether they can charge the costs related to the installation of a parking sign.

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Avoid Attorney's Fees:
Education + Communication = Prevention

Seriously, an attorney is writing this article. Associations and the Management Companies can save thousands of dollars in attorney's fees, by either avoiding the costly situation or promptly identifying and remedying a problem early on. How does a client do this? Through communication and education. Preventative law is the concept. Legal wrangling and wasted resources can be avoided with homeowner education and effective communication between Associations and Members.

EDUCATION

Attend workshops put on by the CAI and attend workshops put on by law firms. For example, our Firm provides educational opportunities for clients and non-clients on topics ranging from Fair Housing to Operation to Introduction to Associations. It is important to take advantage of these opportunities. CCIOA requires it under C.R.S. §38-33.3-209.7. For example, many new Association Board Members do not realize that they are on the board of a company. The Association, in most cases, is a non-profit corporation. By being a

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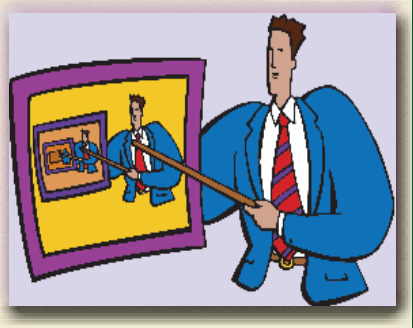
Avoid Attorney's Fees: Education + Communication = Prevention Continued From Page 1

Board Member, you are taking on a fiduciary duty to your community. This can be intimidating if you are unaware of what your responsibilities are to the community.



Knowledge is empowering, if you have read governing documents and attended classes on topic, you are better prepared to represent your Association. If your fellow homeowners have done the same, they are more likely to use the mechanism the Association has in place to resolve conflicts.

Knowing the limits of the association's power and the duties of the association members creates the opportunity to be better communicators on behalf of the association. If the association is doing a good job communicating with the members, then there are going to be fewer disputes.

COMMUNICATION

"Get your facts first, then you can distort them as you please." – Mark Twain

Often, disputes can be avoided or minimized through effective communication. Taking action with incomplete information can be dangerous for both the homeowner and the Association. For example, if a homeowner is unaware of the Architectural Guidelines that are in effect, then there is a good chance they will violate those guidelines. While everyone is supposed to be provided with Association documents upon purchase within a community, the reality is not everyone takes the time to review those documents. By reminding Association members through letters or newsletters you can minimize disputes. Seasonal reminders of landscaping requirements or snow removal while they take time upfront, they can reduce the number of non-compliant owners in the long run.

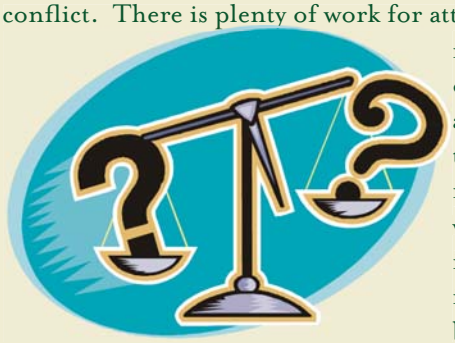
One of the common elements of almost every lawsuit is bad communication. Denver County Court Judge Galchinsky starts every court day with words of wisdom for the litigants in his crowded courtroom. The theme of which is that so many issues can be resolved if people just **"pick up the phone and talk".** A day in county court reveals that many cases do get resolved the day of court, because everyone is present with facts in hand and they communicate with the assistance of their attorneys.

The quote from Mark Twain highlights a critical element of winning a dispute. Before you can construct your argument, you have to have all of the facts. Attorneys best serve their clients' interests in a dispute by gathering the facts, and communicating with opposition regarding a resolution. One of the more important roles that attorneys provide clients is the investigative role. Often, attorneys get to be the detective and assist clients and interview witnesses to determine the underlying dispute. Cases evolve from when clients first pick up the phone to the attorney, to when the investigation concludes. Sometimes that communication is a letter, and a phone call, but sometimes the only way to get someone's attention is a lawsuit.

While talking does not always work to resolve association disputes, effective investigation of facts and communication will go a long way to minimizing disputes that get sent to the attorney.

The Reality

We live in a litigious society that is filled with conflict. There is plenty of work for attorneys, because no matter how often you try and avoid a lawsuit, the association or management company will be involved in a suit. There is always going to be the homeowner that insists that blue is an earth tone, and there will be genuine disputes of fact. However, as an attorney, the best practice is educating associations and management companies about the legal pitfalls to be avoided to reduce overall association expenses. Education provides Associations with the means to use effective communication to shut down unnecessary disputes, and for those unavoidable disputes the Association enforcement procedures inevitably lead to the lawyer.



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such as labor, materials, paint, etc. Owners and residents are generally responsible for any costs involved with a "modification" under the FHAA. A modification is a structural change to a unit or common area that helps the disabled resident better enjoy his or her home. ***As you have learned by now, an accommodation is different from a modification in that it is an exception to a rule, policy, procedure or service.*** In our opinion, parking requests are normally requests for accommodations. An owner or resident is asking for an exception to a normal rule or policy about the parking (e.g. "please give me a close-up reserved parking space.") Unlike modifications, accommodations require housing providers (e.g. Associations) to pay for costs associated with the request, unless such costs are overly burdensome and pose a financial hardship to the community. The costs associated with a parking sign are rarely expensive enough to be considered a burden. Thus, the answer to the above question is that Associations cannot charge the disabled owner or resident the expenses associated with the parking sign.

Sometimes clients ask what to do if they do not have any parking spaces to give the disabled owner or resident.

If this is truly the case, an Association cannot give what it does not have. The FHAA makes it clear that a request is not reasonable if it is not practical or if it is impossible for the housing provider to grant. If an Association does not have any close-up reserved spaces or spaces it can designate as handicapped, the Association does not have to create one to grant the parking request. Remember, the law only requires you to provide an accommodation if it is reasonable. ***A request is reasonable if it is feasible and practical.*** (More on that below).

"If we give this resident a handicapped or reserved space, we will have to give every owner or resident a handicapped or reserved space." Many housing providers fear that granting a parking request will result in a flood of similar requests from other folks. Just because you grant one disabled resident a parking request does not mean that you have to grant all requests that come your way. Granting a reasonable accommodation parking request does not set a precedent. Rather, every request has to be evaluated separately and on a case-by-case basis. The mentality of "if we do it for him, we will have to do it for others, so we are not going to do it period" should never, ever factor into a housing provider's evaluation of any accommodation or modification request.

Sometimes we hear Associations contend that they already have enough designated handicapped parking, so the disabled owner resident should "just deal with what is available." If the disabled owner or resident thought the community's handicapped parking was sufficient, he or she probably would not be asking for an accommodation. The owner or resident's request is a clear indication that he or she is having parking problems. Really, the owner or resident's request is a clear indication that the Association might just be better off assigning this owner or resident a close-up reserved space.

Another frequent comment we get is: "We can't provide the resident a reserved space because we have a non-reserved parking policy." Some Associations have such a policy set forth somewhere in their governing documents. Many condominium communities are structured such that owners have deeds for set parking spaces. Thus, this is where parking requests can get complicated for Associations. While it seems logical for an Association to simply rely upon its governing documents to deny a request for a reserved parking space, ***an Association must remember that a reasonable accommodation request is an exception to a policy in order for the disabled person to have equal enjoyment of the community.*** Failure to make an exception to a policy for a disabled resident, if the exception is warranted under the test fully discussed in part I of this Article, is a clear violation of fair housing laws. If a disabled owner or resident has demonstrated that she is disabled, needs a close-up reserved space and that it is feasible for the Association to grant it, the Association commits housing discrimination if it refuses to grant the close-up reserved space and insists on the disabled owner or resident using a handicapped space. Thus, an Association must always go through the three-part analysis set out in part I.

Further, new legislation amplifies this requirement. In recent articles, we discussed House Bill 08-1135, which sought to reference the FHAA in the Colorado Common Interest Ownership Act. ("CCIOA"). On April 21, 2008, Governor Ritter signed this bill that was sponsored by Representative Morgan Carroll. HB 08-1135 modified CCIOA at Colorado Revised Statute § 38-33.3-106.5(g).

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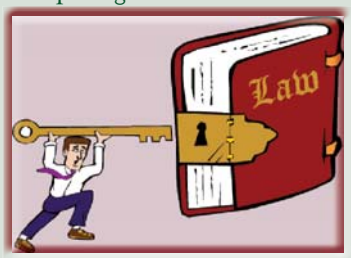
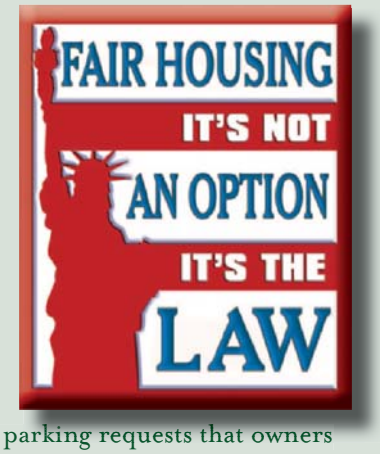
The passage of this bill now requires Associations to make certain modifications and accommodations, when the requesting party is entitled to such modification or accommodation, under CCIOA and not just the FHAA. So, to reiterate, Associations cannot deny a modification or accommodation request just because a covenant, by-law or some written policy prohibits the request. Instead, the Association must evaluate the request and use the three-part test covered in detail in part I of this article. This is true for parking requests. Always remember that an accommodation is an exception to such covenants, rules and policies. Now, Associations have a federal law and two state laws to comply with. (FHAA, state fair housing act and CCIOA's § 38-33.3-106.5(g)).



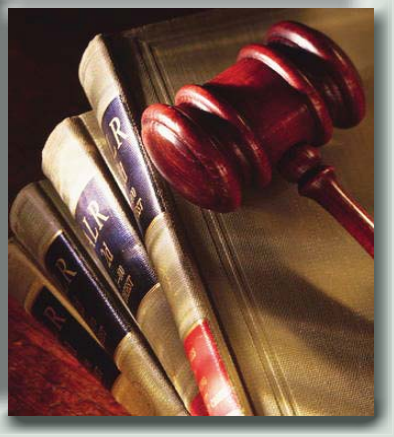
Associations can only deny a request if it does not meet the three-part test. If an owner or resident cannot demonstrate he or she is disabled as defined by the FHAA, then he or she is not entitled to the accommodation request. If an owner or resident cannot demonstrate that he or she needs the parking accommodation, then he or she is not entitled to it. When looking at the need, the owner or resident has to show that there is a definite connection between his or her disability and the request; that the accommodation will help him or her better enjoy the home and/or common areas of the community. Lastly, the accommodation must be reasonable. Not all parking requests that owners and residents make are reasonable.



DISABLED OWNERS AND RESIDENTS ARE ENTITLED TO REASONABLE ACCOMMODATIONS FOR PARKING, NOT PREFERENTIAL TREATMENT

Accommodations that go beyond affording a disabled owner or resident "an equal opportunity to use and enjoy a dwelling" are not required by the FHAA. Congress did not design the FHAA and other disability laws such as the Americans with Disabilities Act to be affirmative action laws. The real intent of these laws is to give disabled individuals equal access and enjoyment in their housing. Yet, sometimes, disabled residents seek accommodations that would give them more rights than a non-disabled resident. As stated above, Associations are not required to give what they do not have. If a disabled owner or resident asks for a space that does not exist or asks for a space that would require significant and expensive changes and engineering, the Association is in a good position to argue that the request is unreasonable because it's either not feasible or a financial burden. Likewise, an Association does not have to and should not give preferential treatment to a disabled owner or resident.

Nevertheless, the "reasonableness" inquiry is highly fact-specific, requiring a case-by-case determination. (There is that "case-by-case" term again!). Associations have to look at every parking request separate from prior requests and isolate the issues. The analysis can be so fact specific that we highly recommend that Associations obtain proper legal counsel to evaluate these parking requests. By proper legal counsel, we mean lawyers who are well educated on the FHAA and the United States Department of Justice's fair housing guidelines published in connection with HUD.



As mentioned above, many condominium Associations involve units that have deeded parking along with the other deeds to the properties. This can pose challenges with respect to reasonable accommodation requests for parking spaces. Fortunately, a 2001 federal court case from New Jersey provides some guidance for Associations that have deeded spaces. Sporn v. Ocean Colony Condominium Assoc. sheds some light on what constitutes an unreasonable request for parking. In that case, an owner in a wheelchair had a deeded parking space. He requested that the Association provide him with a close-up space adjacent to a wheelchair-accessible entrance. He made this request because his deeded parking space was not close to the wheelchair-accessible entrance. This owner's request was that he keep his deeded space and be given an additional up-close space. The Association's position was for this owner to trade his deeded space in order to provide him a closer space. The Association made this request because of the limited number of parking spaces in the community. The owner insisted on keeping his deeded space, arguing that his family needed it for visitor parking. The court in that case found in favor of the Association, holding that the owner's request was unreasonable. The court basically ruled that if this owner had just agreed to trade his deeded space for **CONTINUED ON PAGE 5**

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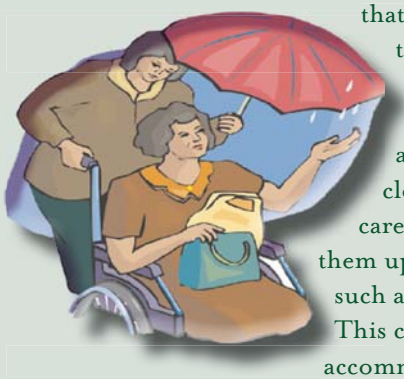
the up-close space adjacent to the wheelchair-accessible entrance, the request would have been reasonable. But, because he wanted to keep his deeded space, what he really asked for was a reasonable accommodation coupled with a demand for special treatment. This case lends help to Associations in illustrating that they do not have to provide special treatment. They simply have to provide owners or residents with parking that accommodates their disabilities.

Another issue with reasonableness comes up with carports. We have seen requests from owners and residents asking for two spaces or two ports. The analysis is the same: does the disabled resident need two spaces and it is reasonable? If the resident can show that his or her disability is such that they need more space to negotiate in and out of their vehicle, or something along those lines, such a request could be reasonable. Of course, the number of spaces available in the community, expenses, practicality, etc., all have to be factored in. These considerations are different for each community.



One final reasonableness issue that comes up from time to time has to do with caregiver parking. Some owners will argue that they need a close-up space for their caregiver who comes to pick them up and take them places such as medical appointments. This can be a valid basis for an accommodation. However, this can be a complex issue and we will provide a future article dealing exclusively with caregiver parking.

It should be clear by now that disabled residents do ask for special parking arrangements and that Associations must carefully consider the requests. As we always preach, do not follow Nancy Reagan's edict concerning drugs of "Just say no" when receiving any kind of accommodation or modification request. Apply the three-part test and obtain legal advice if you feel you need it. Last but certainly not least, always thoroughly document every request you get for any type of accommodation or modification and how the Association responds.

Coming Soon
One of our favorite topics
Requests by Disabled Owners and Residents for Assistance Animals

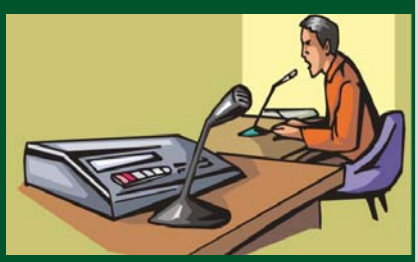
ENCORE PERFORMANCE ON THE HOA CONNECTION

On June 22nd Pete Muccio took to the airwaves again and appeared on 630 KHOW's 'The HOA Connection'. This marks the second guest spot on this program for the HTS HOA Department Attorneys. This special interest program tackles HOA issues and answers questions of concern to HOA managers, boards and residents. Previously both Pete and Wes have appeared on this popular HOA resource program.

Pete's comments on this occasion focused on the legal perspective of current trends in the use of solar panels as well as other environmental and energy-saving devices. In particular, he gave insight into recent legislation that significantly limits the restrictions associations can place on the use of energy-efficient technology such as solar panels. ***Previously legislation restricted rules that would significantly increase costs to the homeowner, this new legislation now bars restrictions that would limit efficiency as well.*** This is an important new perspective on ever increasing resident interest in installing and utilizing energy-efficient devices.

From the response to his commentary and his ability to handle questions that were posed, Pete's performance appeared to impress radio listeners with both his expertise and down-to-earth approach to a complicated subject matter. We at the firm wonder if Pete's ease on the airwaves can be attributed to his illustrious career as a college radio DJ. The HTS team is hopeful that he will not succumb to the lure of media fame and fortune and instead stick with the legal profession!

Tune In To
The HOA Connection
Sunday Afternoon
5:00 p.m. to 6:00 p.m
KHOW 630 AM



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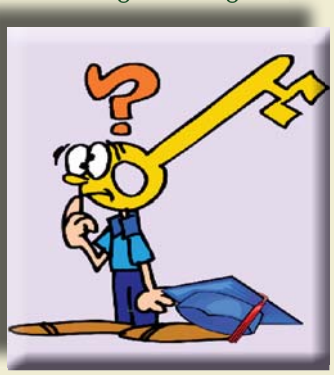
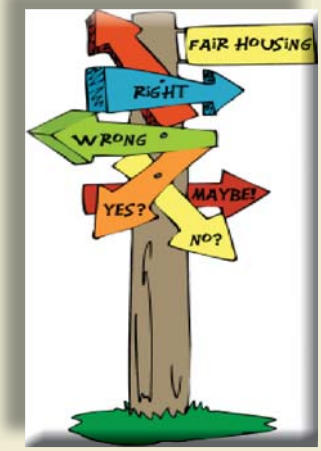
EDUCATION IS THE KEY

The Firm of Hopkins Tschetter Sulzer are HOA advocates that specialize in Fair Housing Training. At HTS, preventive law is King. We know that better educated clients are less likely to get into legal trouble. What your HOA does not know or understand about compliance liability can and will hurt you. Education is the Key. All HOA communities and their Board Members are responsible for compliance with federal, state and local Fair Housing Laws. Understanding that this is such a critical area of liability for Associations, HTS offers Free educational seminars to train Associations on understanding the Fair Housing Laws and how to deal with difficult Fair Housing situations.

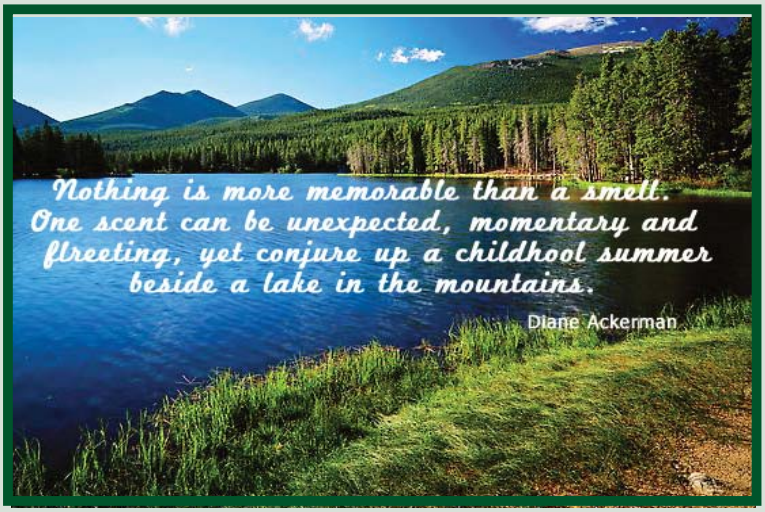


Fair Housing Complaints against HOA's are on the rise. According to the Colorado Civil Rights Commission (CCRD) over 40% of recent Fair Housing Complaints have been against Homeowner Associations. An adverse finding from the CCRD can result in significant fines and/or litigation. Defending Fair Housing Complaints can not only be costly but are very time consuming.

Education is the Key to understanding the law, and providing you with the correct way to handle difficult situations quickly and effectively, so you don't have to worry later on. As the old saying goes, ***"An ounce of prevention is worth a pound of cure."***



What you don't know CAN hurt you. If you are interested in scheduling a Free Fair Housing Seminar for your Board Members and/or Community Managers please call Pete or Wes at 303-699-3484. The HTS HOA Department Fair Housing training is specifically tailored to the unique concerns of Homeowner Associations and we would be pleased to present it for you.



TO SCHEDULE A FREE FAIR HOUSING SEMINAR FOR YOUR ASSOCIATION PLEASE CALL THE HTS HOA DEPARTMENT 303-699-3484

Food For Thought

Life is like playing a violin solo in public and learning the instrument as one goes on." -

-- Samuel Butler