

POOL RULES AND THE FEDERAL FAIR HOUSING ACT How to Avoid an Expensive Mistake

A large condominium in California had extensive amenities for its 700+ residents, including three separate pools. As an accommodation for the older residents who enjoyed swimming laps and for “water walking”, the board of directors passed a rule limiting one of the pools to adult use only during the summer months. The other two pools remained open to all residents of any age.

Another condominium association, when presented with health concerns over the use of the pool by non-potty trained children and babies, passed a rule prohibiting all babies and small children who were not fully potty trained from using the pool.

On the face of it, both of these rules may seem to be reasonable. The first rule creates a place for older residents to exercise and to use one pool without contending with loud and raucous children, while children are allowed full access to the other two pools. The second rule addresses a legitimate health concern. However, in both of these real life scenarios, a court found the respective rule in question to violate the Federal Fair Housing Act (“FHA”).

The FHA is a federal law which prohibits discrimination in any respect regarding the sale, rental or financing of dwellings or in the provision of services or facilities in connection with the sale or rental of a dwelling because of race, color, religion, sex, national

origin, handicap or familial status. Associations are bound by the provisions of the FHA. An area where community associations can run afoul of the FHA are pool rules.

When drafting their pool rules, many associations are attempting to address common concerns such as curtailing rowdy behavior at the pool and related amenities, dealing with unauthorized or excessive guests at the pool and preventing vandalism and other damages. However, in doing so, it is easy to unwittingly draft a rule that would be held discriminatory in violation of the FHA. The following are a few key points a board should consider when drafting its pool rules:

- Avoid rules that are facially discriminatory.

A facially discriminatory rule is one that in its very language, treats one protected

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Contact Us:

Coulter & Sierra, LLC
2800 Century Parkway
Suite 275
Atlanta, Georgia 30345

p: 404.554.2071
f: 404.477.6360
info@coultersierra.com

www.coultersierra.com

class differently than another. Common examples include:

Improper: Children shall not bring skates or bikes into the pool area.

Proper: Skates and bikes are prohibited within the pool area.

Improper: Adult Swim shall occur at the top of every hour for 15 minutes, during which children may not be in the pool.

Proper: Lap Swim Time shall occur at the top of every hour for 15 minutes.

Improper: Children 3 and under who are not properly potty trained must wear swim diapers.

Proper: All incontinent individuals are required to wear swim diapers.

When it comes to drafting pool rules, the rules, to the extent possible, should be drafted in a way that applies to everyone, and not just a specific class of people.

- Ensure any rules limiting or restricting use to children of a certain age are reasonably related to the health, safety and welfare of the child.

The U.S. Department of Housing and Urban Development (“HUD”), which is the authority in charge of enforcing the FHA has upheld some rules which limit or even prohibit the use of an association pool or amenities, but only where it is found that such rule is reasonably related to the health, safety and welfare of the child. However, when it comes to the standard under which such rules are reviewed, the key word is “reasonable”.

Perhaps the most common example of this are rules which limit the age a minor child can attend the pool unaccompanied by an adult. It is not unusual for an association to draft a rule limiting the age where a child can come to the pool unaccompanied to 16 or even 18

years old. Oftentimes, the purpose behind such a rule, however, is not related to the health and safety of the minor child as much as it is attempting to limit the number of minor children at the pool.

Current HUD opinions for the most part have found restrictions limiting the use of a pool by children under the age of 14, 13 or 12 without adult supervision to be reasonably related to the health, safety and welfare of the child. Any age limitations above that will call into question as to whether or not the concern is over a child being a competent swimmer so much as it is limiting the use of the pool by children. Please note, however, there are some circumstances where a higher age limit may be acceptable, such as the use of gym equipment or weights. Furthermore, case law involving FHA complaints is constantly evolving so it is important to monitor the current case law to ensure compliance with the FHA.

- When in doubt, have your rules reviewed by an attorney.

The maximum exposure to an association for a violation of the FHA can be anywhere from \$10,000 to \$50,000 in fines. HUD can impose other penalties such as requiring boards to take FHA training classes. In addition to any penalties or claims that may fall under the FHA, it should be noted that Georgia also has a state law which tracks the language of the FHA and which likewise calls for penalties in the event of violation. Furthermore, a determination of a violation of the FHA can pave the way for the complainant to file a civil suit, seeking damages. Have an attorney review your pool rules to ensure they are drafted in a way that addresses the association’s concerns but are also FHA compliant.