

Fair Housing Essentials for Associations

2:00pm – 3:30pm

Location: Windsor B&C

Presenters: Louise Dix & Anthony Rafel

Louise Dix:

Louise Dix, Education and Outreach/AFFH Specialist for the Fair Housing Council of Oregon, has been training housing providers and advocates since 2012. She has facilitated hundreds of trainings for all types of housing providers throughout Oregon and SW Washington .

Prior to joining the Fair Housing Council, Ms. Dix administered the Community Development Block Grant, HOME and Neighborhood Stabilization Programs for 12 years, first for the City of Medford and then for the City of Gresham. She was involved in the development of housing policy for both jurisdictions and took an active role to assure that both communities were affirmatively furthering fair housing.

Anthony Rafel:

Tony is a trial lawyer and a trusted advisor. In his 35 years of practice, Tony has successfully handled cases involving real property purchase and sale disputes, shopping center project disputes, condominium and construction defect claims, product liability, insurance coverage, contracts, intellectual property, business torts, partnership disputes, employment and wrongful death/serious personal injury. He also has many years of experience providing advice and guidance to condominium and homeowner association boards and associations. He is a tenacious lawyer who always puts his full effort into achieving his client's objectives. Tony is the Managing Partner of Rafel Law Group.

**Fair Housing
Community Associations Institute
CA Day
March 3, 2018**


Louise Dix
Fair Housing Council of Oregon

Anthony L. Rafel
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What is Fair Housing?

- The set of federal, state, and local civil rights laws that protect individuals based on their membership in a protected class from individual or systemic discrimination
- Civil Rights Law passed in 1968
- 50th anniversary this year



Fair Housing Act's Scope

- Law's purpose: "to provide . . . for fair housing throughout the United States" [42 USC 3601]
- Applies to:
 - Direct providers of housing (i.e., landlords)
 - Entities that provide services and facilities in connection with housing (e.g., maintenance, common amenities like fitness rooms, pools)
 - Entities that set terms and conditions for housing (e.g., covenants, rules, policies)



Protected Classes

Federal

- Race
- Color
- National Origin
- Religion
- Gender
- Familial Status (families with children)
- Disability



Oregon Protected Classes

- Marital Status
- Source of Income
- Sexual Orientation/ Gender Identity
- Domestic Violence survivors (Landlord/ Tenant Law)



Discrimination in Oregon

- Disabilities are the most prevalent by nearly 50%- Follows national trend
- Race, National Origin and Familial Status 15-20%



Illegal Transactions

- Applying different policies, rules and procedures
 - Watch out for favoritism!
- Inconsistent use of fines and other penalties
- Discriminating against home owners/tenants with protected class guests
- Harassing, intimidating, threatening or coercing
 - Sexual harassment
 - Neighbor on neighbor harassment
- Retaliation



Liability Can Result from Intentional Discrimination

- “Disparate Treatment”
 - Intentional action against protected class
 - Examples:
 - “Whites only” covenant
 - “Men’s grill”
 - “Adult swim” in non-55+ community
 - “Children not allowed in pool without adult supervision”
 - Pets not allowed except for residents with “physical handicap”



Liability Can Also Result from Unintentional Discrimination

- “Disparate Impact”
 - When a neutral policy has a disproportionate and negative effect on a protected class
 - Intent to discriminate not required
 - Examples:
 - Rule prohibiting owners from renting to anyone with an arrest or conviction record
 - Rule prohibiting women with headscarves
 - “No skateboards or scooters allowed”



Harassment, Intimidation, Threats & Coercion are Illegal

- Religious harassment
- Harassing someone because of their sexual orientation or gender identity
- Sexual harassment

Housing providers have a legal obligation to address resident-on-resident harassment based on protected class



When Neighbor-on-Neighbor Harassment is a Fair Housing Issue

- Provider's responsibility
 - Investigate & Take Action to Remedy
- Issues: harassment of residents with assistance animals, national origin, people with disabilities, sexual orientation



Forms of Harassment

- Words-especially if threat and/or continuing
- Actions (spying, touching, leaving derogatory messages on car, etc.)
- Emails, texts, social media
- Displaying swastikas, etc.
- In most cases, more than one incident-but a single incident counts if severe



Harassment in Rentals and HOA-Governed Communities

- **Oregon State Landlord-Tenant Law**
 - Right to peaceful enjoyment of housing
 - "A housing provider is liable for a resident's harassment of another resident when the housing provider knew or should have known of the conduct, unless the housing provider took immediate and appropriate corrective action." (OAR 839-005-0206(5))



Harassment in Rentals and HOA-Governed Communities

- **Federal Fair Housing Law (42 USC 3604)**
 - Harassment based on protected class violates civil rights
 - Landlord/HOA responsible for investigating & taking action if both harasser & harassee are residents
 - Fair Housing covers hate crimes + hate crime laws



Take Action!

- "Corrective action may include verbal and written warnings, enforcing lease provisions to move, evict or otherwise sanction tenants who harass or permit guests to harass. "
- "Housing provider should follow up to make sure the corrective action was effective."
- "Liability arises when the person/entity knew or should have known that a resident was harassing another resident and yet, did not take prompt action to correct and end it."



Familial Status

- Families with children under the age of 18 years
- Pregnant women
- Persons in the process of securing legal custody of children through adoption, divorce, written permission of parents or legal guardians



Familial Status Discrimination

- FHA prohibits familial status discrimination
- 55+ communities can utilize exemption from this prohibition if they satisfy the requirements:
 - Must be intended for occupancy by persons 55+
 - At least 80% of the housing units must be occupied by at least one person age 55 or greater
 - Community must publish and adhere to policies to maintain exemption, including ongoing age verification procedures



Familial Status Discrimination

- If community qualifies for exemption, then it can lawfully discriminate against families with children:
 - It can age-restrict the remaining 20% of housing units so they are limited to 55+
 - It can limit duration of visits by children
 - It can age-restrict use of common areas
 - It can prohibit skateboards and scooters!



Familial Status



Safety of the Child is not a Factor

A housing provider is responsible for complying with applicable building codes but any personal risk assessment of potential safety hazards for a child is the responsibility of the parent



Familial Status Discrimination

- Common familial status violations in communities that are not 55+ qualified:
 - "Adult swim" (disparate treatment)
 - "No children allowed in pool without adult supervision"
 - "Active adult community"
 - "No bicycles or skateboards" (disparate impact)
 - Occupancy limits in CC&Rs that are more stringent than local law (e.g., not more than two persons per bedroom)



Disability is Broadly Defined

- A mental or physical impairment that substantially limits one or more major life activities (e.g., caring for oneself, walking, talking, seeing, hearing, learning, working)
- Includes:
 - Physical (e.g., orthopedic, neurologic, cancer, heart disease, diabetes, MS, MD, HIV/AIDS)
 - Mental (autism, retardation, depression)
 - Sensory (seeing, hearing, speaking)
 - Persons recovering from past addiction



The Protected Class of Disability Includes:

- Ongoing chronic medical conditions
- Alcoholics and recovering drug addicts (but not current users of illegal drugs)



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Reasonable Accommodation

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Reasonable Modification

- Accommodation = Change in rules, policies, practices or services when necessary to afford an equal opportunity to use and enjoy a dwelling.
- Modification = Change in physical structure of home, unit, common property.

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Reasonable Accommodation – First Requirement

- Owner (or occupant) must request the accommodation
- No particular form or timing is required
 - Oral or written request ok
 - No magic words required
- Request can be made by someone on behalf of owner or occupant
- Law protects prospective owners too

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Reasonable Accommodation – Second Requirement

- **Owner must show that he or she is disabled (i.e., has a physical or mental impairment that limits a major life activity)**
 - What form of verification is sufficient? What can you request?
 - If the disability is readily apparent, is any form of verification required?
 - What questions are permitted/not permitted?



Reasonable Accommodation – Third Requirement

- **Owner must show a relationship (“nexus”) between the disability and the requested accommodation**
 - What if the need for the accommodation is obvious?
 - What form of documentation can you require (or must you accept) if the nexus between the disability and the requested accommodation is not obvious?



Reasonable Accommodation – Allowable Reasons to Deny

- **HOA must grant accommodation if disability and nexus are shown, unless:**
 - It would impose an undue financial or administrative burden, or
 - It would cause a fundamental alteration of the association’s operations
- **Tough standard; case-by-case analysis**
- **Consult counsel before denying request**




Reasonable *Modification*

- **Structural change to premises to allow full use and enjoyment of dwelling by disabled person**
- **Unlike reasonable accommodation, which is change to a rule or policy**
- **But owner must show same predicates: disability and nexus between disability and need for the requested modification**




Reasonable Modification – Applicable Rules

- **Modification must be reasonable**
 - E.g., widening doorway, adding ramp, adding grab bars, lowering electrical switches, etc.
 - Not: changing roof material because more fire resistant
- **Owner must pay for modification**
- **Owner must follow ARC process (plans, permit) but request should get priority**



Reasonable Modification to Common Element or Area – Applicable Rules

- **Maintenance:**
 - If used solely by owner, owner maintains
 - If used by others too, association maintains
- **Removal when owner moves:**
 - HOA pays to remove, not owner
- **Fees and Insurance:**
 - HOA cannot require special liability insurance or charge fees for processing RM request



Assistance Animals

- Assistance, service, aid, companion and therapy animals – all are treated the same under FHA
- Fair Housing Law is different from ADA, which applies only to places of public accommodation



Service Animals and Assistance Animals

- Service animals are trained to do work or perform tasks for a disabled person
 - Under federal law, service animals are limited to dogs and mini-horses
 - Owner seeking RA (i.e., permission to have dog in “no pets” community) must verify disability and need for animal in order to use and enjoy the dwelling (unless it’s obvious)
 - No proof of training or certification is required.



Service Animals and Assistance Animals

- Assistance Animals/Emotional Support Animals:
 - Do not require training like service animals
 - Sufficient that they provide some therapeutic benefit to the disabled person
 - Can be any species of domesticated animal
 - To obtain accommodation to have an ESA, owner must verify (1) disabled and (2) ability to cope with disability is aided by the ESA



Service Animals and Assistance Animals

- Rules applicable to both types:
 - HOA may not request pet fee or damage deposit
 - Weight limit for pets is not applicable
 - Wherever owners can go, service and support animals can go
 - Owner responsible for animal waste, damage to persons or property
 - Tip: don't try to assess owner's "need" for the animal; assess only whether they have met the requirements for a reasonable accommodation



Focus on compliance, behavior

Have an assistance animal agreement:



- Cannot be more restrictive than a pet policy
- Focus on damage, noise, restraints
- Address common areas
- Can require vaccinations, licensing (local regulations)
- No fees or deposits



Hoarding Disorder

- Persistent difficulty in discarding or parting with possessions, regardless of the value others may see in them
- Mental disability(DSM-5)
- Reasonable Accommodations apply



Hoarding: What Can HOA Do?

- **But HOA can take reasonable actions to protect life/safety:**
 - Inspect to assure fire hazard is not present
 - Corrective action if hazard is found to exist, including removal and disposal of items
 - At whose expense?



Fair Housing Practice Pointers

- **Do:** have the board adopt a written reasonable accommodation/modification policy (DOJ and HUD have sample policies)
- **Don't:** request information about the nature or extent of someone's disability, or try to assess the "need" for an accommodation
- **Do:** limit your inquiry to whether owner has verified his/her disability (if not obvious) and verified the need for the requested RA/RM



Fair Housing Practice Pointers

- **Don't:** deny request for RA or RM because owner has failed to pay assessments or fines, or is in violation of a covenant or rule; do not condition the accommodation on curing the violation
- **Do:** maintain confidentiality
- **Do:** act promptly on every request for RA/RM
- **Do:** communicate decision in writing



Fair Housing Practice Pointers

- **Don't:** try to "negotiate" better terms for an accommodation; if the owner is entitled to it, grant the request
- **Don't:** retaliate or allow others to retaliate against a person who requests an accommodation or files a discrimination complaint; this can constitute a separate FHA violation
- **Do:** consult legal counsel before *denying* a request for accommodation





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