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COMMUNITY LAW

Fair Housing Amendments Act May Require Financial Accommodations to Prospective Homeowners with Disabilities

BY ROBERT G. WILLIAMSON, JR. Esq.

A significant factor in qualifying a prospective homeowner for community residency is an applicant's demonstrated ability to satisfy the community's income standards. Yes, a community may set financial criteria for residency without running afoul of anti-discrimination laws *provided* the community's financial qualification policies, rules and practices are applied equally.

However, when the prospective homeowner is disabled or handicapped as recognized under federal law,[1] it may require community management to alter or deviate from its standard administrative policies and practices as a reasonable financial accommodation to afford the applicant the ability to use and enjoy a home within the community. No, this does not mean a rent reduction because the applicant's income falls short of community qualification standards. Nor does it require management to participate in the Section 8 voucher subsidy program.[2] It means potentially making an adjustment to one or more policies that could affect income qualification standards which would then allow a disabled applicant to meet those standards without causing an undue administrative burden or financial risk on the community owner.

Can there be a causal connection between the prospective tenant's disability and his or her need for an accommodation so as to afford that person an equal opportunity to use and enjoy a dwelling? And if so must community management under certain circumstances make a reasonable accommodation?

Unquestionably, the Fair Housing Amendment Act (FHAA) makes it unlawful to discriminate against disabled or handicapped persons in the sale or rental of housing. FHAA's definition of prohibited discrimination encompasses "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling."[3]

The FHAA thus, "imposes an affirmative duty upon landlords reasonably to accommodate the needs of handicapped persons,"[4] not only with regard to the physical accommodations,[5] *but also with regard to the administrative policies governing rentals.*[6]

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There is no bright line test establishing what might be a reasonable financial accommodation. Courts are guided by the goals of FHAA: "to protect the right of handicapped persons to live in the residence of their choice in the community," and "to end the unnecessary exclusion of persons with handicaps from the American mainstream."[7]

So how would this work in practice? There are three factors to consider.

First, the prospective homeowner/applicant requesting an accommodation must demonstrate he or she has a handicap recognized by FHAA. Under FHAA a person's (disability) handicap means:

(1) A physical or mental impairment which substantially limits one or more of such person's major life activities,

(2) A record of having such an impairment, or

(3) Being regarded as having such an impairment,

(4) But does not include current *illegal* use of or addiction to a controlled substance as defined under federal law.[8]

HUD has broadly defined a person's major life activities as, "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working."[9] Thus, an applicant's mental or physical impairment that substantially limits his/her ability to work and/or earn an income could be a recognized consequence of a handicap under FHAA.

To satisfy a prospective resident's burden of proof, an applicant requesting a financial accommodation would need to disclose the nature of his or her impairment placing management on actual notice. [For purposes of this article it is assumed that there is no material dispute over a claimed disability or handicap.]

Next, management would ask/determine if the substantial impairment is the cause of an applicant's inability to satisfy the community's income standards. This factor, like a claimed disability is usually readily apparent. Again, this article assumes that an applicant's disability is a cause of the applicant's economic circumstances.

The pivotal determination is whether the financial accommodation requested is *reasonable* in light of the risk that the prospective homeowner may later default on his/her financial obligations to the community, or cause some other undue financial risk, and the extent to which the accommodation may increase management's administrative burden. In other words, will the requested accommodation impose on the community owner an undue financial risk and/or administrative burden that would justify declining a requested financial accommodation?

An example of a request that could be subject to the above three factors is a community's policy and practice of prohibiting acceptance of "co-signers" to qualify an applicant for residency when the applicant alone fails to meet the community's income qualifications.

In a leading case,[10] an applicant who all parties agreed was disabled and unemployable within the meaning of FHAA and who received government subsidies, applied to rent an apartment. The apartment was less expensive than his prior apartment and closer to his mother from whom he also received support. His disability income alone was insufficient to meet management's requirement of three times the monthly rent. His mother, who did satisfy the income requirements, applied as "co-signer" to "rent the apartment for her son," but would not reside on site. The applicant son requested that as an

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accommodation management waive its “no co-signer” policy. Management refused and the applicant sued.

After the trial court upheld management’s refusal of the requested accommodation, the U. S. Ninth Circuit Court of Appeals reversed. The Appeals Court stressed that the applicant’s requested accommodation was neither an “attempt to avoid payment of the usual rent” nor an inadequate disclosure of the mother’s financial condition and availability that would, as suggested by the community owner, frustrate collection efforts if the son defaulted.

The Appeals Court noted that it was undisputed the applicant’s mother, “was both a good credit risk and easy to track down; her income, based on monthly pension checks, was a reliable and ample source of rent funds; and she had an unblemished credit record [;] that she had significant assets, including a home which she had owned and resided in for 27 years and for which she had paid off the mortgage in full. Her home [was] located less than a mile from the [apartment] complex.” The Court concluded that by allowing the applicant’s mother, “to rent the apartment so that her disabled son could live in it, [management] would not assume any substantial financial or administrative risk or burden.” It held that under the circumstances waiver of the community’s “no co-signer” policy was a reasonable accommodation within the meaning and intent of FHAA and reversed the trial court’s decision.

The above considerations apply equally to community policies or rules prohibiting use of personal guarantees or third party payment of rent or similar financial policies. Because of the numerous factual scenarios that may occur, it is a case by case analysis. What is important in each case, however, is carefully assessing the community’s financial risk (non-payment) and/or administrative burden (collection) of a requested financial accommodation while thoroughly considering the FHAA’s policy goals of affording disabled persons an equal opportunity to use and enjoy housing. Doubt should likely tip in favor of granting an accommodation.

[1] The statutory definitions of “handicap” and “disabled” are similar under the Fair Housing Amendments Act and Americans with Disabilities Act, respectively, and those terms are used interchangeably in this article.

[2] *Salute v. Stratford Greens Garden Apts.*, 136 F. 3d 293 (2d Cir. N. Y. 1998)

[3] 42 U. S. C. § 3604(f)(3)(B)

[4] *United States v. California Mobile Home Park Mgmt. Co.*, 29 F. 3d 1413, 1416 (9th Cir. 1994) ("*Mobile I*")

[5] See 42 U. S. C. § 3604(f)(3)(A) and (C)

[6] *Giebeler*, 343 F. 3d 1143, 1147 (9th Cir. 2003)

[7] *Id.* at 1149

[8] 42 U. S. C. § 3602(h)

[9] 24 CFR 100. 201(b)

[10] *Giebeler*, *supra*, 343 F. 3d 1143

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This article is intended only as an alert to the Fair Housing Amendments Act’s requirements on housing providers to potentially make reasonable financial accommodations for disabled persons when circumstances warrant. It is not intended to be relied on and is not a substitute for legal advice. You should consult with your legal counsel for advice specific to any situation involving these high risk and complex legal issues.

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