Proposed HUD Rule Would Make Associations Guardians of Civil Rights

Commentary by Michael Chapnick, Daily Business Review

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Community associations are microcosms of democratic society. They are relatively self-sufficient communities, each with their own rules and citizens, and they are governed by an elected board of directors that serves to manage and operate the community as well as enforce and abide by the provisions of its declaration and all of the applicable state and federal laws.

When disputes arise that are strictly between community association members, associations typically allow the members who are involved to come to terms between themselves. Associations cannot become involved in every member-to-member issue as that would create a significant drain on their administrative time and finances.

However, in October 2015 the U.S. Department of Housing and Urban Development promulgated proposed rules and regulations that have the potential to significantly expand associations' involvement in some matters involving disputes among members. The proposed changes would serve to standardize how claims of harassment are to be treated under the Fair Housing Amendments Act, and they address both quid pro quo (this for that) and hostile environment harassment in housing.

Claims of quid pro quo harassment typically arise in the context of sexual harassment, which is considered a form of sex discrimination and is prohibited under the Fair Housing Act, in cases in which housing providers condition housing or housing-related services or transactions on sexual conduct.

Hostile environment harassment includes subjecting a person to unwelcome conduct that is sufficiently severe or pervasive such that it interferes with or deprives the person the right to use and enjoy their home.

The proposed hostile environment rule is not based solely on sexual discrimination. It covers all of the protected characteristics, also known as protected classes, under the Fair Housing Act: race, color, national origin, religion, sex, family status and disability.

The new rule intends to clarify standards for liability based on traditional legal principles of tort liability. It states that a person would be directly liable for failing to take prompt action to correct and end a discriminatory housing practice by that person's employee or agent when the person should have known of the discriminatory conduct. A person would also be directly liable for failing to take prompt action to correct and end harassment by a third party when the person knew or should have known of the harassment and had a duty to intervene.

Beyond Referrals

Under this new rule, community association directors and property management can be found to be directly liable for discriminatory conduct that occurs solely between community residents if it is found that the association, its board members or property management "fail to fulfill a duty to take prompt action to correct and end the discriminatory conduct which they either knew or should have known existed."

Associations, through their boards of directors, have a duty to enforce the provisions of their governing documents, which typically include nuisance prohibitions barring owners from interfering with the peaceful possession and proper use of any other unit. Given this relatively standard provision and HUD's proposed rule change, the federal agency would appear to be poised to hold associations and their agents liable for the actions of their members that are deemed to be discrimination under the FHA.

Given the potential for HUD complaints, investigations and costly settlements for community associations spurred by this rule change, associations now need to be more proactive than ever in their vigilance and actions to thwart members who are engaging in discrimination and harassment against other members or tenants. No longer can they simply refer the victims of such alleged actions to law enforcement. Instead, they must take immediate steps to notify their legal counsel, issue cease and desist letters and perhaps seek resolutions involving arbitration, mediation or even litigation.

The new proposed rule by HUD has very significant implications for the liability of associations in cases involving discrimination and harassment by their unit-owner members and resident tenants. In light of the expected change, association directors and property managers should work with qualified legal counsel to reassess their protocols and procedures involving their response to possible acts of discrimination and harassment by their members.

Michael E. Chapnick is a West Palm Beach partner with the South Florida law firm of Siegfried, Rivera, Hyman, Lerner, De La Torre, Mars & Sobel, who has focused on community association law since 1996. The firm represents more than 800 associations in Florida. He may be reached at mchapnick@srhl-law.com.

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