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THE COMMUNITY ASSOCIATION LAW
LUNCH & LEARN LECTURE SERIES
DESK REFERENCE SET

VOLUME 3:

Everything You Wanted to Know
About Avoiding or Filing HOA Lawsuits -
Fair Housing, Enforcement, Collections, and Construction
Defect.

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INTRODUCTION

This booklet and lecture is designed to help homeowner associations avoid some of the more common homeowner association lawsuits. Hopefully, after reading the materials and actively participating in the Lunch and Learn Lecture, you will have a better understanding concerning how to avoid the common homeowner association lawsuits.

I. FAIR HOUSING LAWSUITS AND PITFALLS

Increasingly, many homeowner associations (“HOAs”) are facing issues regarding requests from disabled members of the Association to make modifications to their property or common area property or requests that the HOA modify its restrictions to accommodate the disabled owner.

A. Does the Americans with Disabilities Act Apply to HOAs

Many individuals and associations commonly believe that the ADA applies to homeowner associations. This is not the case. Issues involving a disabled individual’s access to Association property is not governed under the ADA, but rather is governed under Arizona Fair Housing laws.

Under the ADA, as found in Title 42 USCA 12101 et. seq., individuals with disabilities may not be discriminated against and must be afforded reasonable accommodations for their disabilities.

The key issue regarding the ADA involves the determination of whether a facility falls within the purview of the statute. The ADA requires owners of commercial facilities to reasonably accommodate the disabled. Under 42 USCA 12181, the definitions section

of the ADA, “commercial facilities” are defined as “facilities that are intended for nonresidential use and whose operations will affect commerce.” Additionally, in order to be liable under the ADA, the facility must be owned or operated by a “public entity,” which, under 42 USCA 12131, is defined as any “State or local government or any department, agency, special purpose district, or other instrumentality of a State or States or local government.”

Finally, “Public accommodations” as defined in 42 USCA 12181 are subject to the ADA. “Public accommodations” are private entities that, due to their inherent public nature, will be subject to the ADA. Such accommodations include:

- an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;
- a restaurant, bar, or other establishment serving food or drink;
- a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
- an auditorium, convention center, lecture hall, or other place of public gathering;
- a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;
- a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;
- a terminal, depot, or other station used for specified public transportation;
- a museum, library, gallery, or other place of public display or collection;
- a park, zoo, amusement park, or other place of recreation;
- a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
- a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
- a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

Thus, in order to be a “covered entity” under the ADA and be subject to the ADA, facilities must be designated as “commercial facilities” or must be owned or operated by a “public entity.” Also, selected “private entities” will be considered “public accommodations” if they fall within the definition found at 42 USCA 12181.

The Association’s facilities are neither “commercial facilities”, owned or operated by a “public entity”, or “public accommodations” and, as such, the ADA does not apply to the Association.

The inapplicability of the ADA to the Association is also based on case law and the definitions found within the ADA itself. For example, the Court in *Independent Housing Services of San Francisco v. Fillmore Center Association*, 840 F.Supp 1328, 1344 (N.D. Calif. 1993) found that “[T]he residential portions of Fillmore Center (the only portions at issue in this suit) do not themselves fall within the bounds of the ADA since apartments and condominiums do not constitute public accommodations within the meaning of the Act.” Also, mandatory membership community associations do not fall under the definition of “public accommodation” as found in 42 USCA 12181. Therefore, the Association may not be determined a public accommodation.

Finally, the Association may not be considered a public entity under the ADA. A homeowner Association is not a part of any State or local government or any department, agency, special purpose district, or other instrumentality of a State or States or local government. Therefore, it cannot be considered a public entity.

Thus, as can be seen above, the ADA is not the appropriate statute in which to evaluate requests by disabled individuals to accommodate their disability. The proper law that should be applied to said situation is Arizona Fair Housing Law.

B. What Laws Apply to Fair Housing Issues

Arizona Fair Housing Laws may be found at Arizona Revised Statutes § 41-1491.19 (B). It states in part as follows:

A person may not discriminate against any person in the terms, conditions or privileges of sale or rental of a dwelling or in the provision of services or facilities in connection with the dwelling because of handicap of:

1. That person.
2. A person residing in or intending to reside in that dwelling after it is sold, rented or made available.

Under A.R.S. §41-1491(5), a person is “disabled” if the person suffers from:

A mental or physical impairment that substantially limits at least one major life activity, a record of such an impairment or being regarded as having such impairment. Disability does not include current illegal use of or addiction to any drug or illegal or federally controlled substance. Disability shall be defined as the term is defined by the Americans with disabilities act of 1990 (P.L. 101-336).

A.R.S. § 14-1491.19(E), in defining discrimination, states:

A refusal to permit, at the expense of the disabled person, reasonable modifications of existing premises occupied or to be occupied by the person if the modifications may be necessary to afford the person full enjoyment of the premises . . .

C. What is a Reasonable Accommodation

A proposed accommodation or reasonable accommodation under the federal Fair Housing Amendments Act (“FHAA”) and the Arizona Fair Housing Laws must be reasonable, necessary, and must afford the Complainant equal opportunity to use and enjoy housing. *Lapid-Laurel, L.L.C. v. Zoning Bd. Of Adjustment*, 284 F.3d 442, 457 (3rd Cir. 2002). To prove that an accommodation is necessary, Complainant must show

that, but for the accommodation, she will be denied an opportunity to enjoy her house. *Smith & Lee*, 102 F.3d 781 (6th Cir. 1996). The U.S. Department of Justice and the U.S. Department of Housing and Urban Development, in their joint statement titled *Reasonable Accommodations Under The Fair Housing Act*, stated that for a requested accommodation to be necessary, “there must be an identifiable relationship, or nexus, between the requested accommodation and the individual’s disability.” *Reasonable Accommodations Under The Fair Housing Act*, U.S. Department of Justice; U.S. Department of Housing and Urban Development (May 17, 2004). A reasonable accommodation request can be denied if there is no disability related need for the accommodation. *Id.*

D. What must a HOA do to comply with the Fair Housing Laws.

HOAs must provide owners with a reasonable accommodation to either make modifications to their property or modifications to the common area if said modification would allow the owner to use and enjoy their property. Pursuant to A.R.S. § 14-1491.19(E), any reasonable accommodation granted by a HOA to allow an owner to modify their property or common area must be paid for by the owner requesting the modification. The Association does not have to pay for the modifications requested by the owner. Common types of modifications include:

1. Allowing accessible ramps on the owner’s property or common area;
2. Modifying doors on the owner’s property or common area; and
3. Modifications made to a common pool.

HOAs must also provide owners with a reasonable accommodation concerning the enforcement of certain HOA restrictions if those restrictions do not allow the disabled

owner the ability to use and enjoy their property. Common types of restriction reasonable accommodations are:

1. Allowing a “care animal”; and
2. Allowing a modified van or vehicle to park on the streets of the HOA.

The above is not to say, however, that a HOA does not have any rights regarding the providing of a reasonable accommodation. A HOA may require that the proper documentation be filed with the HOA before the HOA makes a reasonable accommodation. For example, the HOA may demand that the owner provide it with the following:

1. A letter from a doctor stating that the owner is disabled; and
2. A letter from a doctor stating that the requested accommodation would aid the disabled owner’s health and aid the owner in enjoying their property.

Attached as **Exhibit A**, please find a sample Reasonable Accommodation Request Form that may be used to gain the above information.

II. ENFORCEMENT AND COLLECTION LAWSUITS AND PITFALLS

One of the most important functions of a HOA is to enforce the restrictions, rules and regulations in place at the HOA and to collect the assessments of the HOA. Enforcing the restrictions and collecting assessments is the main source of HOA lawsuits and legal action. This is why it is important to insure that a HOA has proper procedures in place to assure that if litigation is necessary, the Association will have the best chance possible of prevailing.

A. The Importance of Having a Good Enforcement and Collection Policy

It is important that a HOA have well established and set policies concerning the enforcement of the HOA's restrictions and the collection of the HOA's assessments. Set policies allow the HOA to treat owners equally concerning enforcement of the restrictions and assessment collection. This in turn aids the HOA in avoiding unequal enforcement lawsuits.

As enforcement and collection policies will differ from HOA to HOA, it is important to understand the core goals of an enforcement or collection policy. Said core goals are:

1. To draft a policy that is in line with Arizona Law;
2. To draft a policy that treats all owners equally; and
3. To draft a policy that is clear, concise, and easy to understand.

Attached as **Exhibit B** please find a sample Enforcement Policy. Attached as **Exhibit C** please find a sample Assessment Collection Policy. Please note that these policies are examples, and may be modified per the desire of the HOA's Board of Directors and Professional Property Manager.

III. IF YOUR HOA IS SUED, WHAT DO YOU DO

Having someone threaten to sue a HOA or actually suing a HOA can be an intimidating experience. No matter what the underlying basis of the threat or actual lawsuit may be, it is important to accomplish the following tasks as soon as possible.

A. Call Your Lawyer Immediately

If your HOA ever receives a letter from an owner or attorney threatening a lawsuit or ever receives service of process, i.e. service of documents concerning the filing of a

lawsuit, it is imperative that you contact your HOA's attorney immediately. Contacting the HOA's attorney will insure that the HOA's rights are protected adequately.

B. Tender the Lawsuit to the HOA's Insurance Carrier

Like with everything else in law and insurance, as much as we want the issue of a tender of defense to be clear and unambiguous, it is not. The reason is because there are both legal and practical consequences regarding the tender of defense. Specifically, on the one hand, if a matter is not tendered immediately pursuant to the terms and conditions of a policy, certain rights under a policy can be waived or forfeited. On the other hand, no matter what an insurer may say, the tender of a matter for defense can have a direct impact on how a risk is underwritten whether it is a renewal or with a new carrier.

All matters, whether large or small, must be dealt with as if "time is of the essence." If we act as if "time is of the essence", the chances of missing a deadline are minimized.

First Step

Regardless of what an insured decides to do with respect to a "claim", "demand" or "lawsuit" that is presented, the first step is to **know each available policy** and **know whether the available policies are "claims made" or "occurrence" forms.**

The reason we need to know what type of form is because we need to know what will "trigger" coverage under a specific form. Under an "occurrence" form, the trigger is in most cases the "damage." Under a general liability policy, this would normally be the bodily injury or property damage that is being complained about.

On the other hand, if the policy form is a "claims made" form, the issue is when the "claim" (as defined in the policy) was made. In "claims made" policies some policies

require that both the claim and notice of the claim to the insurer be made during the policy period, while others only require that notice be made as soon as practicable.

As a side note, there are also state statutes that, regardless of what the policy says, may treat notice in such a manner that if it is not given timely, it will only hurt the insured if it is prejudicial to the insurer to be able to properly adjust the claim.

Second Step

The second issue is to look to the condition section of the policy. This section may provide specifics with respect to the tender of defense, including to whom it is to be made and how it is to be presented.

Third Step

Once you know what type of policy you have and once you know the insured's duties and obligations pursuant to the term and conditions of the policy, the insured must determine whether it is in its benefit to tender a matter. Keep in mind that when insurers are underwriting, they look at two primary issues, "severity" and "frequency." Severity is the nature and magnitude of a matter from both a defense and indemnity standpoint. The other is the frequency of claims.

The insurer is a business. Even if the insured is not at fault it costs money to establish the necessary defense and show absence of fault. Every time a matter is sent to the insurer, a file is opened, a claims analyst is assigned and the insurer is obligated to respond pursuant to state regulation. This is a "cost." Cost is covered by premiums. The higher the costs, the higher the premiums. This is why carriers push higher deductibles so insured's try and handle little matters. Thus, although the carrier is obligated to respond on behalf of the insured, the insured must determine on its own cost benefit

analysis whether to submit a matter that could impact its cost of insurance and insurability. Each insurer treats this differently.

Different insurance agents, agencies and attorneys have different philosophies. Many agencies take the position that all matters should be sent to all insurers regardless of whether there may be potential coverage.

Fourth Step

Once a decision is made to tender a claim, the question is “how is that done?” Some are of the opinion that it should be sent exactly as it is received. If a complaint is served, just forward the complaint. Others are of the opinion that it should be sent along with a cover letter that shows exactly where the coverage is to be found. Yet others go a step further and send the complaint, a copy of the policy and a letter showing why the policy in question must respond. As with many things, claims analysts are over worked and are often part of bureaucracies. Thus, the more you make their job easier the better and quicker of a response you may get. Specifically, the best defense is often a good offense.

Never sit back and wait thinking your matter is being addressed. Follow up, follow up, follow up. However, be syrupy sweet. Do not put the analyst on the defensive at the beginning. You do not want them to take a position and have to un-ring the bell.

All policies require that you cooperate with the insurer and/or its appointed counsel to defend you. A defense attorney is obligated to look at your matter coverage neutral and not with an eye to deny coverage.

Fifth Step

How does the carrier respond?

- Accept defense and indemnity obligation
- Accept defense and possibly reserve rights to deny some form of indemnity obligation
- Deny coverage.

A reservation of rights, depending on the state, may lead to the insured's right to independent counsel paid for by the insurer. That is the basis for another topic.

CONCLUSION:

Although this booklet does not discuss every type of HOA related lawsuit, it does highlight some of the more common HOA lawsuits and how to avoid them. The Booklet also discussed what to do if your HOA is sued.

Hopefully your HOA will never be sued. If you follow the contents of the booklet, however, you will be well prepared should the event occur.

EXHIBIT A

REASONABLE ACCOMMODATION REQUEST VERIFICATION FORM

DATE: _____

TO: _____
ARIZONA HEALTH CARE PROVIDER'S NAME (Arizona Licensed
Physician)

HEALTH CARE PROVIDER'S ADDRESS

FROM: _____ HOMEOWNERS ASSOCIATION

RE: REQUEST FOR ACCOMMODATION

MEMBER'S NAME: _____

ADDRESS: _____

The member named above has requested that our community association accommodate his/her disability by allowing the member to install a gate on her property that differs in design from all other similar gates located on the property (attached please find a design of the gate). Under normal circumstances, our policies would require us to deny the request. However, under state law, if an individual with disabilities requests a reasonable accommodation to that disability, we must consider the request. To do this, we must verify that the individual qualifies as disabled under state law and requires the accommodation in order to have an equal opportunity to use and enjoy his/her home.

We would appreciate your cooperation in answering the questions on this form and returning it to the address listed above. The member has consented to this release of information, as shown below.

INFORMATION REQUESTED

1. Is member named above disabled as defined below? Yes No
2. In your professional opinion, does member named above need the accommodation requested in order to have the same opportunity that a non-disabled individual has to use and enjoy the living quarters? Yes No

3. If you answered “Yes” to question number 1, can the member’s condition be otherwise treated to prevent any substantial limits in any of his/her major life activities? Yes No

DEFINITION OF ‘DISABLED’

Under federal law, an individual is disabled if he/she has a physical or mental impairment that substantially limits one or more major life activities; has a record of such an impairment; or is regarded as having such an impairment.

The term “physical or mental impairment” includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, Human Immunodeficiency Virus infection, mental retardation, emotional illness, drug addiction, and alcoholism. This definition doesn’t include any individual who is a drug addict and is currently using illegal drugs, or an alcoholic who poses a direct threat to property or safety because of alcohol use.

NAME & TITLE OF PERSON SUPPLYING INFORMATION

FIRM/ORGANIZATION

ARIZONA HEALTH CARE PROVIDER’S SIGNATURE

Telephone No. () _____

ARIZONA MEDICAL LICENSE # (If Physician)

DATE _____

RELEASE

TO THE MEMBER

RELEASE: I hereby authorize the release of the requested information. Information obtained under this consent is limited to information that is no older than 12 months.

SIGNATURE _____

DATE _____

EXHIBIT B
SAMPLE ENFORCEMENT POLICY

RESOLUTION OF THE BOARD OF DIRECTORS
_____ **ASSOCIATION**

ENFORCEMENT POLICY

Adopted _____, 2007

At a duly called and noticed meeting of the Board of Directors on _____, 2007, the Board resolved as follows:

WHEREAS, the Board of Directors of the _____ Association (the "Association") has recognized a need to implement a policy concerning violations of the Declaration of Covenants, Conditions, Restrictions and Easements, recorded at Recording Number _____, records of Maricopa County, AZ (the "CC&Rs") and the rules and regulations of the Association; and

WHEREAS, due to the recent change in Arizona Revised Statutes §33-1807 or §33-1242, the Board of Directors must enforce violations of the restrictions in a different manner; and

WHEREAS, as a result of changes in Arizona Revised Statutes §33-1807 or §33-1242, the Board of Directors has approved implementation of the below Enforcement Policy; and

WHEREAS, the Board of Directors desires to give notice to the members of the Association concerning the implementation of the new Enforcement Policy; and

WHEREAS, this Enforcement Policy repeals and replaces all other enforcement policies of the Association.

BE IT THEREFORE RESOLVED, that the Board of Directors, in full compliance with Arizona Revised Statute § 33-1803, hereby adopts the following policy:

- 1. A member of the Association who is found to be in violation of the CC&Rs, rules and regulations or any other provision of the governing documents of the Association (the "Restrictions") will be notified in writing, either by the Association's Board of Directors or by Association's managing agent of a violation of the**

Restrictions, said notice containing the following information:

- a. The provision restriction, rule or regulation that has allegedly been violated;**
- b. The date of the violation or the date the violation was first observed;**
- c. The first and last name of the person or people who observed the violation;**
- d. The process the member must follow to contest the violation.**

2. If the Owner continues to violate the Restrictions, the Association will send the Owner a second demand letter demanding that the Owner complies with the Restrictions and notifying the Owner that if they do not comply with the Restrictions, the Association may take the following action:

- a. The Owner's file may be transferred to the Association's attorney with all attorney's fees (\$150.00 for the attorney's first letter) to be placed on the Owner's account ledger; or**
- b. A fine of \$100.00 may be levied against the Owner after the Owner has had an opportunity to address the Association.**

3. If, after receipt of the letter referenced in Section 2 above, the Owner continues to violate the Restrictions, the Owner will be either referred to the Association's attorney and any legal fees expended by the Association's attorney will be placed on the Owner's account or a fine of \$100.00 will be levied against the Owner.

An Owner who has received notification of the violation, may appeal the violation as follows:

- A) Any request for an appeal shall be in writing and be received by the Association in care of the address provided in the initial notice.**
- B) Appeal shall be received within ten (10) days of the date of initial notification.**

- C) **In the event a timely request for a hearing is received, any fine(s) will be held in abeyance pending the hearing, lack of success at the hearing will result in all interim fines becoming due and payable.**
- D) **The appeal must include all pertinent information supporting the existence of the extenuating circumstance.**
- E) **All decisions of the Board of Directors are final and may not be further appealed.**
- F) **Any fine(s) referenced herein shall be collected pursuant to the Association's collections policies and procedures.**

This resolution and policy is not intended by the Board of Directors to preclude any other enforcement remedy the Association may possess at law or in equity with respect to any violation of the governing documents of Association.

All legal, collection and other expenses incurred by Association to obtain compliance of a member with the Declaration or other provisions of the governing documents will be the obligation of the member.

BE IT ALSO RESOLVED, that this resolution is included in the books and records of Association and that a copy of this resolution is sent to all homeowners in the Association.

_____ Director

_____ Director

_____ Director

_____ Director

_____ Director

EXHIBIT C

**SAMPLE COLLECTIONS POLICY
ASSOCIATION COLLECTION POLICY**

1st of Month

Assessment is due and payable to:

HOMEOWNERS ASSOCIATION
PO Box
Phoenix, AZ

15th of Month

If payment is not received at the above address by this date, a _____ late charge for late payment is automatically assessed. (This charge will be applied any time the equivalent of one full monthly assessment is shown as owing on the account.)

If Two Months of Assessments are Unpaid by the 15th of the Second Month

If payment is not received by the 15th, in addition to a late charge, a notice will be sent advising that a lien will be filed/recorded on the property after the end of the month if there is no payment.

1st of Third Month

If payment is not received by this date, a lien fee of _____ will be added to the account of the homeowner and a notice of lien will be recorded and a copy mailed to the owner. As of this date, payments must include all collection costs unless otherwise agreed. (Could also require cashier's check or money order).

15th of Third Month

If payment is not received by this date, the account will be turned over to legal counsel for a demand letter. You will be responsible for all attorneys' fees and costs incurred.

At any time thereafter, you may be sued personally for a money judgment, and can be held liable for all collection costs and attorneys' fees. The lien against your property may also be foreclosed in the same manner as a mortgage.

Payment will be applied to the account first to lien fees, collection costs and legal fees, then to late charges, then to the oldest assessment, then to any interest that has been

applied to the account. The Association is entitled to interest on delinquent assessments at the rate of _____ percent per year under the CC&Rs.

There will be a _____ charge for checks returned for insufficient funds.