



NAPERVILLE
114 East Van Buren Avenue
Naperville, IL 60540
phone 630 369 2700
facsimile 630 369 9279

CHICAGO
161 North Clark Street, Suite 1600
Chicago, IL 60601
phone 312 899 9989
www.kmlegal.com

Improperly Drafted Rules and Regulations Can Give Rise to a Discrimination Claim **(And Result in An Expensive Lesson Learned)**

It is well known that a Board of Directors for a community association can only adopt reasonable rules and regulations. It is also well known that such rules and regulations cannot conflict with the terms of the community association's governing documents. While members of a Board keep this in mind when drafting rules, they often forget to think very carefully about the words they select to use within the association's rules and regulations. Selecting the wrong terms can result in a very expensive lesson for the association. Often, rules are drafted in a way that appears to discriminate against children. I often see rules that prevent *children* from running in hallways or any part of the common elements. There also is the rule that prevents *children* from playing ball on the common elements. I recently saw a rule that prevented children from even being in the common elements without an adult. While the Board of Directors may have good intentions in adopting these rules to avoid certain activities, these rules can create more problems for an association as they can be perceived as discriminatory.

The Fair Housing Amendment Act ("FHAA") prohibits housing providers from discriminating against Owners and tenants based on family status. 46 U.S.C. § 3604(b). An association cannot have rules and regulations that treat children and families with children differently than other Owners and residents. An association that has rules and regulations that discriminate against children can quickly find itself named in a Charge of Discrimination or as a defendant in a federal lawsuit. Such lawsuits can be time consuming and very expensive. Often, allegations related to discrimination are not covered by insurance. Hence, the cost for the association to defend itself, even when it has done nothing wrong, is expensive.

Further, allegations of discrimination can adversely affect the credibility of the Board. A Board of Directors that is perceived as not treating all members fairly and in a consistent manner will not be respected by the members. Such allegations can also affect the marketability of the association, as most people do not want to live in a community that appears to discriminate.

While there certainly are times when the members of the board act in a discriminatory manner, more often it is the language within the rules that are misconstrued and create these serious problems for the association. For example, I met with the Board of Directors for the ABC Association, which has a rule that prohibits children from playing ball in the common areas. The Board sent an Owner a violation notice because the Owner's son and friends were playing catch in the front of the association's building. At the hearing with the Board, the Owner said he believed he was being discriminated against because he is the only Owner with a young child in the building. When he asked the Board if other Owners were cited for this violation in the last several years, the Board answered

honestly by saying “no”. The Board told me the answer was no because for at least the past 10 years there have been no other children living in the building. The Owner filed a Charge of Discrimination against the association and its manger, who sent out the notice of violation, because he believed the Board was discriminating against him since he had a child. The Board of the ABC Association was shocked because they were just trying to stop ball playing in the front of the building. Their intentions were in no way discriminatory.

However, the language within the ABC Association’s rules made it very easy for one to misconstrue the purpose of such a rule and to perceive the actions of the Board as discriminatory. When I asked the Board of the ABC Association if they wanted to allow adults to play catch on the grass in the front of the building they unanimously said “no”. When I then asked how they would stop such conduct, they also unanimously said they would rely on the same rule that they cited the Unit Owner for violating. They were quite surprised when I said they could not rely on that rule since it was only geared toward *children* playing ball on the common areas.

Even rules that are not intended to be discriminatory can result in the “enforcer” being named in a lawsuit. In *Iniestra v. Cliff Warren Invs., Inc.*, a housing provider had several rules that restricted children from doing certain things within the property. 886 F. Supp. 2d 1161 (C.D. Cal. 2012). Among other things, the rules prohibited children under the age of 18 from entering the pool area without an adult and prohibited children from being on the property without adult supervision. The court found that both rules discriminated against children and family status, in violation of the Fair Housing Amendment Act. *Id.* at 1168. In doing so, the court acknowledged that although the rules may have been well intended, they nevertheless were discriminatory. The provider could have adopted more general rules that prohibit persons from entering certain areas of the property or a rule with a lower age limit for children entering the pool alone. (The court’s reasoning on this rule is very well articulated. The rule would prohibit a 17-year-old fully trained lifeguard from swimming alone). The court noted that although certain rules can be adopted to protect the safety of residents, the rules could not be so broad as to discriminate against families with children. *Id.*

Likewise, in *United States of America v. Plaza Mobile Estates, et al.*, the Court held that rules which required adults to supervise children who are 18 years and younger when they are using recreational facilities is discriminatory and violates the FHA. The Court noted that supervision does not always address the issue, as by way of example some children under 18 are better swimmers than those over 18, who would be unsupervised. 273 F.Supp. 2d 1084 (C.D. Cal 2003).

Therefore, when drafting rules and regulations, it is important to focus on the conduct that the association seeks to prevent, and not on the actor. Understandably, an association may have a legitimate interest in keeping residents and guests from playing in certain parts of the association or engaging in certain conduct. An association can still accomplish such goals, without the rules being perceived as discriminatory. The following are examples of a few rules that appear to be geared toward children and can be perceived as discriminatory. However, if drafted properly, they can be reasonable and enforceable rules.

Problematic Rule: No children are allowed to play in the elevators.

Acceptable: No horseplay or rough housing is permitted in the elevators.

Problematic Rule: Children that are not potty-trained and in diapers are prohibited from entering or using the pool.

Acceptable: No person who is incontinent or not fully potty-trained can enter or use the pool unless he or she is wearing the appropriate waterproof clothing.

Problematic Rule: Adult only swim time shall occur between 2:00pm and 3:00pm.

Acceptable: Lap swim shall occur between 2:00pm and 3:00pm.

Problematic Rule: No children's toys or bikes shall be stored in the hallways or common areas.

Acceptable: No items shall be stored in the hallways or common areas, including, but not limited to, bikes.

Associations should regularly review their rules and regulations to ensure compliance with the law. Having the association's legal counsel review the rules when drafted is typically less expensive than waiting until there is an allegation of discrimination. With rules and regulations, the Board of Directors always wants to remain proactive and not reactive. This includes eliminating any perception of discrimination based on the words used within the rules and regulations.