



Community Associations and Third-Party Harassment Association Obligations to Intervene in Resident Disputes

June 2018

Community Associations Institute
Federal Legislative Action Committee

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About Community Associations Institute

With more than 38,000 members dedicated to building better communities, CAI develops and provides information, education and resources to association board members, community managers and other professionals who support the community association housing model. CAI's mission is to inspire professionalism, effective leadership and responsible citizenship—ideals reflected in homeowners associations and condominium communities that are preferred places to call home.

CAI's mission of building better communities is achieved by:

- Advancing professionalism through national and chapter-based education programs.
- Publishing the largest collection of resources available on community association management and governance, including website content, books and periodicals.
- Conducting research and serving as an international clearinghouse for information, innovations and best practices in community association operations, governance and management.
- Advocating for public policies that protect associations and the investments that owners have made in their homes and communities.
- Giving community managers and other industry professionals the opportunity to earn professional credentials, which demonstrate to homeowners that these professionals have the training, knowledge and expertise needed to manage and guide communities.

For more information on CAI and the community association housing model, please visit www.caionline.org or phone (888) 224-4321.

About the Community Association Housing Model

Often referred to as homeowners associations, planned communities, condominium associations, or housing cooperatives, community associations play a central role in meeting the nation's housing needs. In 2016, more than 69 million individuals called a community association home, a number that has increased year-over-year in recent decades.¹

National research shows a supermajority of association homeowners have a positive view of their community, a satisfaction that has driven consistent strong demand for community association housing.² The Foundation for Community Association Research estimates there are 342,000 community associations nationwide and that one-in-five households lives in a community association.³

Association Legal Structure and Governance

While community associations come in many forms and sizes, all modern associations share three basic characteristics: (1) membership in the association is mandatory and automatic for all property owners; (2) certain legal documents bind all owners to defined land-use requirements administered by the community association; and (3) all property owners pay mandatory lien-based assessments that fund association operations.

The community association housing model is actively advocated by local government as it permits the transfer of many municipal costs to the association and homeowners. Today, many community associations deliver services that once were the exclusive province of local government.

Notwithstanding the provision of municipal-type services, community associations: (1) are not vested with police powers typically associated with state or local government; (2) do not enjoy the immunity from civil liability of governmental entities; and (3) do not have the primacy of municipal tax liens over virtually all other liens, including those of first mortgagees, rendering their ability to sustain extraordinary expenses questionable.⁴

Community associations are governed by a board of directors or trustees comprised of owners and residents elected by their neighbors. This board guides the association in providing governance and other critical services for the community.

¹ Foundation for Community Association Research, *National and State Statistical Review (2016)*. Available at <https://foundation.caionline.org/wp-content/uploads/2017/07/2016StatsReviewFBWeb.pdf>.

² Foundation for Community Association Research, *2018 Homeowner Satisfaction Survey* (June 2018, CAI Press, Falls Church, VA). Available at https://foundation.caionline.org/wp-content/uploads/2018/06/HOMEsweetHOA_2018.pdf

³ *National and State Statistical Review (2016)*

⁴ Twenty-one states and the District of Columbia provide limited priority for community association liens. In these jurisdictions, statutes typically accord an amount equal to six months of delinquent association assessments priority over a first mortgage. For more information on community association lien priority, visit <https://www.caionline.org/Advocacy/StateAdvocacy/PriorityIssues/PriorityLien/Pages/default.aspx>

All community association officeholders are volunteers who are uncompensated for hours of service given to their community and neighbors. Volunteers are the heartbeat of the community association housing model, which could not function without the service and dedication of such community leaders.

Research shows that association volunteers donate an estimated 80,000,000 hours of service annually to the community association housing model on a nationwide basis. In 2016, the annual monetary value of this volunteerism was estimated at \$1.93 billion.⁵

Association Duties and Responsibilities

Boards of directors' powers and duties are governed by state statute, often through a version of the Uniform Condominium Act or Uniform Common Interest Ownership Act.⁶ Community association boards are responsible for the financial stability of the community, maintenance and protection of the common interest elements, and enforcement of the community's covenants.

In planned communities, boards ensure that community infrastructure (e.g., roads, bridges, street lights, sidewalks, and storm water systems) and amenities are in good condition and protected from loss through appropriate insurance coverage and a capital improvement plan. A condominium association board of directors, in addition to maintaining and insuring common elements and building infrastructure, may also purchase utility services on behalf of residents.

The majority of association boards rely on professional community managers to assist with community operations. This is particularly the case with large-scale communities that include thousands of housing units. Smaller-scale communities are often self-managed. CAI estimates up to 40 percent of community associations nationwide are managed solely by volunteer leaders supported by attorneys, accountants, insurance agents, and other professionals on an as needed basis.⁷

Regulation of the Community Association Housing Model

The community association housing model is largely regulated at the state and local levels of government. This follows the long-standing principle that control of land use policy and real estate law is fully vested in state government.

A substantial majority of community association residents do not believe additional government regulation of community associations is necessary. In 2018, 80 percent of respondents to a national survey of community association homeowners said that no additional government regulation of their

⁵ National and State Statistical Review (2016).

⁶ Respectively, http://www.uniformlaws.org/shared/docs/condominium/uca_80.pdf and http://www.uniformlaws.org/shared/docs/Common%20Interest%20Ownership/2014_UCIOA_Final_08.pdf.

⁷ Foundation for Community Association Management, *Fact Book for 2016—Comprehensive Association Data and Information* (May 2017, CAI Press, Falls Church, VA), p. 33. Available at https://foundation.caionline.org/wp-content/uploads/2017/07/FB_Narrative_2016.pdf

association was desirable. Importantly, 32 percent of respondents expressed a preference that government regulation of associations be reduced from current levels.⁸

The attitudes of association homeowners toward enhanced regulatory burdens is indicative of the functions of the association and the costs of regulation. Association budgets are primarily devoted to capital costs of the community and other management activities that provide a direct benefit to the land. These activities protect home values in the community and enhance marketability of units, a fact explicitly noted by association homeowners.⁹ Excessive regulation diverts the limited financial resources of community associations from the primary functions of the association.

As the increasing regulatory burden on community associations is accompanied by higher legal, insurance, management, and other costs, residents face higher housing costs. Associations generally have one source of income: owner assessments. Any increase in an association's regulatory burden and related costs is directly funded by residents in the form of higher assessments.

CAI members do not oppose regulation of community associations, but CAI members do oppose regulations imposing duties and burdens outside the general authorities and activities of associations.¹⁰ The cost of additional regulatory burdens, both monetarily and in volunteer board members' time, must necessarily produce a benefit that materially outweighs the burden. CAI urges federal, state, and local government to carefully calibrate regulations and ordinances to ensure such instruments are lawful and constitute the minimum standard necessary to achieve statutorily authorized ends.

Association Liability and HUD Quid Pro Quo/Hostile Environment Rule

A 2016 regulation imposing on community associations liability under the Fair Housing Act for the discriminatory actions of third-parties is highly concerning to CAI members. This paper discusses the legal and practical sources of these concerns, offering information and recommendations for the consideration of federal policymakers to ensure those responsible for fair housing violations are liable for their actions.

This paper does not propose community associations be exempted from liability for hostile environment discrimination. Community association boards are liable for the actions of board members and managers that create a hostile housing environment.¹¹

⁸ 2018 Homeowner Satisfaction Survey, p. 5.

⁹ *Ibid.*

¹⁰ CAI Public Policy: *Government Regulation of Community Associations (Updated April 29, 2015)*. Available at <https://www.caionline.org/Advocacy/PublicPolicies/Pages/Government-Regulation-of-Community-Associations.aspx>

¹¹ See, e.g., *Skj Alabama v. Sierra Blanca Condo I Association*, 2000 WL 18896648—Condominium association and its president allegedly engaged in direct discrimination through a campaign of false liens and lawsuits in addition to resident children's verbal harassment; see also *Will Steen vs. St. Tropez Condo Master Association* 1999 WL 262145—condominium board members verbally and physically harassed plaintiff and allegedly acted in concert with unidentified individuals to create a hostile housing environment; see also *Hicks vs. Makaba Valley Plantation Homeowners Association, Inc.* 2015WL4041531—board of directors and managing agent selectively enforced rules and regulation against plaintiff.

A community association should be liable where its actions create a hostile environment and is a direct party to the harassing behavior. A community association should ***not*** be liable where the harassing behavior is committed by a third-party where there is no agent relationship.

In light of these considerations, CAI respectfully requests and urges that the Department review the information and discussion presented herein that form the basis of the following recommendations—

CAI recommends:

1. *Policy realignment so liability for discriminatory housing practices lies with the perpetrators of such acts.*
CAI urges revision of the Quid Pro Quo/Hostile Environment regulation to achieve consistency with long-standing judicial precedent, confirmed by the U.S. Supreme Court as recently as 2015, that a defendant must have acted with discriminatory motive or intent to be liable for hostile environment housing discrimination.
2. *Official guidance from the Department of Housing and Urban Development's Office of General Counsel.*
Absent a realignment of policy consistent with well-established precedent, the Department must provide reliable legal guidance concerning reasonable actions a community association volunteer board may take based on association authority under State statute to comply with the 2016 rule. Such guidance should contain ascertainable standards that must—
 - a. clearly communicate an association's sources of liability under the rule;
 - b. describe lawful actions an association may take to comply with the rule; and,
 - c. describe any extraordinary actions the Department does not intend for associations to undertake in pursuit of compliance.

Background and Discussion of Quid Pro Quo/Hostile Environment Regulation

On September 14, 2016, the U.S. Department of Housing and Urban Development (the Department) published in *The Federal Register* a final rule entitled, *Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act* (the rule).¹² The Department's intent in promulgating the rule was to “provide for uniform treatment of Fair Housing Act claims in judicial and administrative forums.”¹³

Pursuant to the rule, a housing provider is directly liable for the illegal, discriminatory practices of a third-party if the provider (1) knew or should have known of the discriminatory housing practice; (2) had the power to correct the discriminatory housing practice; and, (3) failed to take prompt action to end such practice. A housing provider's authority to end a discriminatory practice is deemed a function of the provider's control over the discriminating third-party *and* any legal obligation the provider may have to end discriminatory housing practices.¹⁴

¹² *Federal Register*, Volume 81, No. 178 (Washington, DC, September 16, 2016), p. 63054.

¹³ *Ibid.*

¹⁴ 24 CFR § 100.7(a)(iii)

The Department asserts the rule is necessary to educate housing providers on the extent of liability under the Act, writing “...there has been significant misunderstanding among public and private housing providers as to the circumstances under which they will be subject to liability under the Fair Housing Act for discriminatory housing practices undertaken by others.”¹⁵ Further, the Department states, “The rule does not create any new forms of liability under the Fair Housing Act and thus adds no additional costs for housing providers and others engaged in housing transactions.”¹⁶

Rule Imposes New Liabilities and Costs on Associations

CAI finds specious the Department’s conclusion the rule imposes no new liability or costs on association boards and homeowners. The Department’s abandonment of long-standing precedent where courts have *required* a demonstration of intent to discriminate for certain fair housing complaints to be successful is a significant departure from established jurisprudence, exposing associations to liability and litigation risk where none previously existed.¹⁷ The departure from precedent has contributed greatly to the current confusion of community association board members and counsel concerning third-party housing discrimination. This outcome is directly at odds with the Department’s stated goal of reducing market “misunderstanding” of liability under the Act for third-party discrimination.

CAI members are not alone in questioning this departure from judicial precedent. There are active cases on appeal in which federal courts have upheld precedent concerning intent to discriminate in assigning liability for hostile housing environment violations of the Act. These courts have limited housing providers’ liability for the discriminatory housing practices of third-parties where there are no facts to support allegations the housing providers directly engaged in discriminatory practices or to support allegations a housing provider’s refusal to take certain actions were motivated by, or based on, discriminatory intent.¹⁸

Defendants in such cases argue the Department’s rule is an *ultra vires* amendment of the Act, imposing new forms of liability other than that authorized by the Act or intended by Congress. CAI members concur.

Under the rule as finalized, community associations face the prospect of significant and new legal costs arising from litigation required by the regulation to “end” discriminatory activities of third-parties that may violate the Act. Costs to seek and obtain an injunction against an association property owner in violation of the Act are projected to range between \$10,000 to \$25,000 per suit. These estimates are directly dependent on the defendant owner not contesting the injunction and

¹⁵ *Federal Register*, Volume 81, No. 178, p. 63055.

¹⁶ *Ibid.*

¹⁷ See, e.g., *Bloch v. Frischholz*, 587 F. 3rd (7th Cir. 2009) where Court notes that for a plaintiff to prevail on a Section 3617 claim, plaintiff must show (1) they are a member of a protected class under the Act, (2) they were engaged in the exercise or enjoyment of rights protected under the Act, (3) defendant(s) coerced, threatened, intimidated, or interfered with plaintiff’s rights protected under the Act, and (4) defendant(s) were motivated by an intent to discriminate.

¹⁸ *Wetzel v. Glen St. Andrew Living Community, LLC et al.*, and *Donohue Francis v. Kings Park Manor, Inc., et al.*

could escalate if contested.¹⁹ It is critical to recognize that where contested, in virtually every state, the standards for temporary injunctive relief are quite high,²⁰ resulting in courts requiring a full trial before ruling, which would multiply the foregoing estimate of cost severalfold.

An additional direct cost to community associations and association homeowners is exposure to uninsured losses. Community associations purchase directors and officers (D&O) insurance policies as a best practice and to comply with lender and secondary mortgage market requirements. While D&O policies protect the association and homeowners from the costs of wrongful acts, policies offered by major carriers exclude claims for violations of the Act.²¹ The rule exposes associations and homeowners to the potential for uninsured losses when neither the association or its agents have engaged in illegal housing discrimination.

The Department's statement that community associations face no new liabilities or costs under the rule does not withstand minimal scrutiny. The rule departs from established and confirmed judicial precedent and exposes associations to increased litigation costs and uninsured losses.

Department Improperly Relies on *Reeves v. Carrollsburg*

In seeking to attach such new liabilities and costs to community associations, the Department relies heavily on the unpublished decision of the D.C. federal district court in *Reeves v. Carrollsburg Condominium Owners Association*.²² This case is cited several times by the Department in justification for its issuance of the final rule.²³

Reeves is a thin reed upon which the Department relies. CAI takes note that despite having been decided over 20 years ago, *Reeves* has never been cited by any other court to hold that a community association has the duty to end discriminatory conduct of a third-party.

As the Department is aware, the decision in *Reeves* is an unpublished trial level decision having no precedential value. Further, the only judicial precedents cited by the *Reeves*' court for holding the association potentially responsible for discriminatory conduct of an owner are cases concerning the

¹⁹ CAI consulted attorneys specializing in the practice of community association law to arrive at the cited cost estimate range. Legal fees associated with obtaining injunctive relief vary by region and by firm, but no firm indicated fees less than \$10,000 to sue for injunctive relief.

²⁰ Many states require that a party demonstrate "irreparable harm" (harm that cannot be compensated by monetary damages); that the claims are supported by settled legal rights; that there is a reasonable probability of ultimate success; and the detriment to one party by granting a preliminary injunction outweighs the detriment to the moving party where temporary relief is not granted. See, for instance, *Crone v. De Gioia*, 90 N.J. 126, 132–34, 447 A.2d 173 (1982); *Hollywood Towers Condo. Ass'n, Inc. v. Hampton*, 40 So. 3d 784 (Fla. Dist. Ct. App. 2010); *Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860, 552 N.E.2d 166 (1990); and *Gilitz v. Bellock*, 171 P.3d 1274 (Colo. App. 2007).

²¹ Farmers Insurance D&O policies contain the following exclusion, "...For violation of any federal, state, or local civil rights law, ordinance, or regulation, including but not limited to discrimination on account of race, religion, sex, familial status or handicap;" See also exclusion under State Farm D&O policy, "...violation of any federal or state civil rights law or local ordinance, including but not limited to discrimination on account of race, religion, sex, or age;"

²² *Reeves v. Carrollsburg Condominium Unit Owners Assn.*, 1997 WL 1877201. United States District Court, District of Columbia. December 18, 1997.

²³ *Federal Register*/Vol. 81, No. 178 (Washington, DC, September 16, 2016), p. 63054.

physical infrastructure of condominiums. In *Reeves*, the court cited litigation in New Jersey concerning an association's duty to make a parking space available for a handicapped owner²⁴ and litigation in California seeking to hold an association liable to take reasonable action with respect to lighting of common elements in response to foreseeable criminal harm.²⁵ In general, there is no analog for an association to mandate civil conduct.

While finding the association had authority to require compliance with federal law, the *Reeves* court *fails* to quote the terms of the association's governing documents granting such authority, an unusual omission from a written decision of a court. The Department magnifies this deficiency of *Reeves* by (1) similarly failing to cite provisions of association governing documents the Department asserts are legally sufficient to compel an association to intervene in third-party disputes; (2) imposing an untested standard of Fair Housing Act liability on community associations nationwide; and (3) failing to provide reliable guidance for community associations to comply with the rule.

The rule's abandonment of precedent concerning hostile housing environment litigation and overreliance on *Reeves* as precedential litigation when no court has accorded the case such status greatly concerns CAI members. These concerns are reinforced by the Department stating no new liabilities or costs have been imposed on associations while at the same time urging that courts accept its new, broad, and flexible interpretation of liability under the Act.

CAI Member Compliance Concerns

Notwithstanding ongoing litigation and the consequential questions of law in these cases, community associations continue to develop policies and procedures to ensure compliance with the rule as finalized. In this process, some common issues have been reported to CAI that present material challenges to compliance.

CAI strongly urges the Department to consider the practical challenges to compliance community associations have raised and address these challenges by revising the rule in an equitable manner to hold discriminating parties liable for their illegal acts and avoiding establishment of regulatory standards through enforcement actions rather than the rulemaking process.

These challenges include, but are not limited to—

- 1. Limitations on Association Authorities**
- 2. Lack of Eviction Authority**
- 3. Lack of Compliance Standards**

1. Limitations on Association Authorities

Association rules and regulations address the operation, maintenance, and aesthetics of the community. To illustrate, it is common for community association rules to designate locations and

²⁴ *Gittleman v. Woodhaven Condo. Ass'n, Inc.*, 972 F.Supp. 894 (D.N.J.1997)

²⁵ *Frances T. v. Village Green Owners Ass'n*, 42 Cal.3d 490, 229 Cal.Rptr. 456, 723 P.2d 573, 576 (Ca.1986)

times homeowners and residents may place waste for collection. Associations enforce architectural standards that govern external alterations to properties and establish lawn maintenance standards.

If a homeowner has failed to comply with a community covenant (i.e., built an unsightly storage shed that obstructs the neighborhood walking trail or fails to maintain the exterior of their home) a written warning is typically all that is required to prompt the homeowner to address the violation. Association enforcement authorities are reflective of the nature of association rules and are typically cumulative (escalating) in nature.

A substantive concern of CAI members is the rule's determination that authorities designed to enforce compliance with architectural standards and maintain community aesthetics will end discriminatory housing practices. The Department has placed association boards (neighbors) in a precarious position as such authorities are not likely to end a discriminatory housing practice.

It is the experience of CAI members that individuals with declared racial animus or other invidious prejudice are unmoved by verbal or written warnings from an association. The Department, based on its own experience, knows this to be the case as well, being aware of instances in which an association's warning did not alter a harasser's conduct.²⁶

Association Authorities Calibrated to Enforce Association Rules

The Department has direct knowledge that authorities typically possessed by community associations are unlikely to end a discriminatory housing practice by a third-party, yet nevertheless imposes liability on the association for the ineffectiveness of the remedies available. This raises the question if the Department intends that community associations seek new authorities or penalties by amending association legal documents.

Amending association documents is an expensive and uncertain process. Most state statutes and common interest community declarations require a two-thirds affirmative vote of all owner residents to amend association legal documents. What is the recourse for an association board if property owners do not agree to amend governing documents to assume a duty to prohibit housing discrimination or authorize penalties intended to effectively end a third-party's discriminatory practices?

Associations May Not Assume Authorities Not Granted by Statute or Governing Documents

In general, an association board may only enforce rules or take actions that are both lawful and authorized under the association's declaration of covenants. Thus, an association board responding to a homeowner complaint will seek to determine if a violation of the community's governing documents has occurred. The intent or motivation leading to the violation is generally not a basis for an association enforcement action.

²⁶ In *Reeves v Carrollsbury Condo. Unit Owners Ass'n.*, the association issued warnings to a resident owner to halt harassing behaviors, which the harasser ignored.

If it is demonstrated a homeowner has placed waste in a neighbor's yard, caused excessive noise, or has damaged another homeowner's property, the board will act within its authority concerning the actual, provable violation. The board will address the violation that has occurred as that is the extent of the board's authority. Associations are not empowered to investigate homeowners and residents to determine if the motivation of a rule violation is racial animus or other prejudice.

Community association boards that exercise authorities not granted in statute or a declaration of covenants are routinely rebuffed in court.²⁷ The basis of such court decisions are state statutes preventing association boards from enforcing rules, bylaws, or regulations inconsistent with or lacking a basis in a declaration of covenants and/or state law.²⁸ These statutes define association board authorities and are an affirmative constraint on board control over property owners, housing units, lots, and common elements. Any association board assessing penalties and fines or imposing restrictions on a homeowner without a clear basis in statute or the association's governing documents will be subject to legal challenge.

Associations Lack Authority to Determine Intent to Discriminate

As the Department knows, courts have long required a determination a plaintiff was motivated by an intent to discriminate.²⁹ The rule will likely compel an association board to attempt to reach conclusions that are outside the legal competencies of the board and act on such conclusions, exposing the association to legal risk.

Video evidence of one neighbor vandalizing another's property is dispositive but may not establish motivation or intent necessary to determine if such conduct violates the Act in addition to the association's covenants, by-laws, and regulations. The rule does not appear to contemplate that community association boards are not empowered to undertake investigations that may be required to determine intent. This raises important questions for association boards seeking to determine if a violation of the Act has occurred, if the disputing parties simply do not like each other, or a particular resident's demeanor is such that they generally are coarse in all communications. In

²⁷ See, e.g., *Shadowood Condominium Association, et al., v Fairfax County Redevelopment and Housing Authority* (2012), the Virginia Supreme Court ruled Shadowood Condominium may not impose an assessment not authorized by the declaration, writing, "The circuit court did not err in finding that the assessments levied against FCRHA were beyond SCA's authority as defined in its governing documents and that the policy resolution authorizing the assessments therefore was invalid."; see also *Sarnir R. Farran, et al., v. Olde Belhaven Towne Owners Association* (19th Jud. Cir. VA, July 8, 2010), the court found "Nothing in Va. Code § 55-513(B) gives Belhaven authority to exceed the power granted to it in its governing documents."

²⁸ See, e.g., Code of Virginia § 55-513(A), "...the board of directors shall have the power to establish, adopt, and enforce rules and regulations...except where expressly reserved by the declaration to members."; see also California Civil Code § 4350, "An operating rule is valid and enforceable only if all the following requirements are satisfied... (b) The rule is within the authority of the board conferred by law or by the declaration, articles of incorporation, or association, or bylaws of the association. (c) The rule is not in conflict with governing law and the declaration, articles of incorporation or association, or bylaws of the association."; see also North Carolina General Statutes Chapter 47F-2-103(a) "To the extent not inconsistent with the provisions of this Chapter, the declaration, bylaws, and articles of incorporation form the basis for the legal authority for the planned community to act as provided in the declaration, bylaws, and articles of incorporation... (c) In the event of a conflict between the provisions of the declaration and the bylaws, the declaration prevails except to the extent the declaration is inconsistent with this Chapter."

²⁹ In *Bloch v. Frischholz*, 587 F. 3rd (7th Cir. 2009) the Court notes that for a plaintiff to prevail on a Section 3617 claim, plaintiff must show (1) they are a member of a protected class under the Act, (2) they were engaged in the exercise or enjoyment of rights protected under the Act, (3) defendant(s) coerced, threatened, intimidated, or interfered with plaintiff's rights protected under the Act, and (4) defendant(s) were motivated by an intent to discriminate.

interpersonal interactions a member of a protected class may detect an animus connected to class status; however, the conduct of the transgressor may be generalized. Association governing boards are placed in an unenviable position in that the rule functionally requires the board to take a decision for which it is not trained or authorized to adjudge.

In public comments on the rule, CAI noted association declarations almost never empower association boards to investigate Fair Housing Act claims. Association governing documents do not typically authorize fines or penalties specifically designed or intended to end discriminatory housing practices by a third-party. Notwithstanding these structural barriers to compliance, the rule requires that association boards end discriminatory actions by third-parties.

2. Lack of Eviction Authority Constrains Association Actions & Increases Litigation Risk

The Department appears to acknowledge the flaw of relying on limited fines and penalties designed to correct trash violations to end a discriminatory housing practice but offers no remedy. The Department shifts this burden to community association boards, misplacing the onus to solve the legal conundrum created by the rule.

Associations Exposed to Liability for Harassment Despite Exercising Authority

In the preamble to the rule, the Department notes, “*with respect to Section 107(a)(1)(iii), the rule requires when a community association has the power to act to correct a discriminatory housing practice by a third-party which it knows or should have known the community association must do so*”.³⁰ The Department continued, writing, “*HUD understands that the community association may not always have the ability to deny a unit owner access to his or her dwelling, the rule merely requires the community association to take whatever actions it legally can take to end the harassing conduct.*”³¹

State statutes do not authorize association boards to deprive a homeowner of property except in the most limited of circumstances.³² The lack of eviction authority, or even threat of eviction, severely limits an association’s ability to end a discriminatory housing practice by a third-party. From a practical standpoint, a community association may not ever be able to halt a discriminatory housing practice by a third-party, but notwithstanding remains at-risk of litigation.

The Department insinuates that limiting a harasser’s access to common elements (partial eviction) or suspension of voting rights may be sufficient to end a third-party hostile housing environment. Such assertions are contrary to the Department’s own experience with the Act and would often not be lawful.

In 2017, Maryland’s highest court held that associations may not deny property owners access to common elements unless the association’s declaration of covenants specifically authorize such action. The court determined that denying an owner’s access to common elements is a substantial

³⁰ *Federal Register, Vol. 81, No. 178, p. 63068.*

³¹ *Ibid.* (emphasis added)

³² Community associations may, subject to state statute and attendant regulation, foreclose a lien for delinquent community association assessments. See footnote 4.

infringement of property rights.³³ The partial eviction theory of enforcement which the Department suggests as a remedy is likely unlawful.

The Department espouses such views as a direct result of its conflation of the homeowner to association relationship with that of the tenant to landlord relationship. There are substantial differences in law and contract between the two and association authorities are significantly constrained by comparison.

Association to Owner Relationship Differs from Landlord to Tenant Relationship

In this rulemaking, the Department fails to address fundamental differences in the legal relationship of community associations to property owners with that of landlords to tenants. The Department's discussion of *Lawrence v. Courtyards of Deerwood Association, Inc.*³⁴, important jurisprudence establishing limits on association obligations to intervene in property owner disputes, is dispositive of this failure.

Rather than acknowledging the parties in *Lawrence* were property owners living in a community association, the Department consistently refers to the parties as tenants and the association as landlord, taking no notice of the differences in law or contract between the two.³⁵ The Department writes, "...the dispute did not involve discriminatory harassment of one tenant by another but instead reflected mutual antagonism between two tenants." Additionally, in discussing *Reeves v. Carrollsburg Condo. Unit Owners Ass'n*, the Department directly refers to the condominium unit owners association as "landlord" and homeowners as "tenants" of the association.³⁶

The differences in the legal status of homeowners in a community association and tenants in leased housing are fundamental. Community association homeowners take title to real property and an undivided interest in common elements, tenants do not. Landlords have specific obligations under law and contract to tenants that associations do not have to property owners. Landlords may unilaterally impose restrictions on the use of a dwelling and the conduct of tenants while associations are limited in the ability to add new restrictive covenants.

One difference of note is lack of eviction authority. Community associations do not possess the one penalty that will, when applied, end a discriminatory housing practice: eviction.

The Department views the lack of eviction authority as a surmountable limitation, urging associations to act as if the relationship between association and homeowner is substantially the same as the relationship between landlord and tenant. This conflation of authority places association boards in an untenable position. The community association is required by the rule "...to take prompt action to correct and end a discriminatory housing practice by a third-party" (§ 100.7(a)(1)(iii)) but lacks eviction authority necessary to achieve this end.

³³ *Ehvaton Towne Condominium Regime II, Inc., et al. v. William Kevin Rose, et ux.*, No. 33, September Term, 2016

³⁴ *Lawrence v. Courtyards of Deerwood Ass'n, Inc.*, 318 F. Supp. 2d 1133 (S.D. Fla. 2004)

³⁵ *Federal Register*, Vol. 81, No. 178, p. 63069.

³⁶ *Ibid.*

In public comments on the rule as proposed, CAI requested the Department acknowledge the fundamental difference between associations and landlords and provide clear guidance on lawful actions associations could reasonably take to comply with the rule. Regrettably, the Department dismissed as unnecessary and undesirable any calibration of the rule to account for the association to property owner legal relationship. The Department wrote, “*No further refinement to the rule is necessary to address the commenter’s concerns; nor is any further refinement desirable, as it would risk inadvertently inserting limiting factors into the otherwise broad and flexible*” standards imposed by the rule.³⁷

CAI additionally commented that community associations generally lacked the authority to require residents to cease objectionable conduct. The Department’s response, in an apparent misunderstanding of the comment, stated, “*the commenter recognizes a community association generally has the power to respond to third-party harassment by imposing conditions authorized by the association’s CC&Rs or by other legal authority.*”³⁸

Further, in response to another comment, the Department cited *Reeves* as the basis for the proposition that a landlord is “*liable under the Fair Housing Act for its failure to adequately address sexual harassment of one tenant by another because “the [Carrollsbury Condo] association’s by-laws specifically authorized the association to curtail conduct that contravened the law.”*”³⁹ This bespeaks ongoing confusion by the Department over the distinction between landlords and community associations.

Reeves did not involve a landlord or tenants. Rather, the litigation involved two owners who were the disputants, the association and, apparently, an unusual governing document provision that authorized the association to enforce compliance with all federal and state law.

HUD, U.S. Department of Justice, & Other Parties Urge Expansive View of Association Liability

The rule’s conflation of the relationship of a community association board and homeowner to that of landlord and tenant without distinction means the regulation and decisions made by the courts involving landlords and tenants will apply equally to community associations. Community association boards will be treated under the rule and by courts as having equal liability under the rule irrespective of the material differences in control over third-party conduct.

This view is not speculative, being confirmed in the brief of the U.S. Justice Department in *Donabue Francis v. Kings Park Manor*, a case pending before the United States Court of Appeals for the Second Circuit. In its consideration of *Donabue*, the Court invited parties to present views with respect to certain questions of law under the Act deemed applicable to the case.

The five questions posed by the Court were directed at the landlord/tenant relationship. In responding to the Court’s interrogatory, the U.S. Department of Justice Civil Rights Division,

³⁷ *Federal Register*, Vol. 81, No. 178, p. 63063.

³⁸ *Ibid.*, p. 63068.

³⁹ *Ibid.*, p. 63069.

Appellate Section, took the position that standards for proving a case of third-party harassment “applies to all landlords and other housing providers covered by the Act”.⁴⁰

The final sentence of the brief proves the legitimacy of CAI’s concern where the United States, no longer referring to the landlord/tenant relationship, writes “*Thus, for the reasons set forth in HUD’s final rule and herein, HUD’s rule provides that housing providers – regardless of their own discriminatory animus – are liable for failing to take proper action to correct and end a discriminatory housing practice by a third-party where the housing provider knew or should have known of the discriminatory conduct and had the power to correct it*”.⁴¹

An additional case commencing in 2015 prior to the enactment of the rule further confirms CAI member views that association boards will be held to the same standard of liability as all housing providers despite lacking eviction authority. The decision of the United States District Court for the Northern District of Illinois in the case of *Marsha Wetzel v. Glen St. Andrew Living Community, LLC* on appeal to the United States Court of Appeals for the Seventh Circuit is now being considered in light of the rule.

As was done by the Department and the U.S. Department of Justice, AARP, in its brief as amicus curiae supporting the plaintiff appellant, continues the position that decisions involving the landlord/tenant relationship will apply to all housing providers.⁴² Commencing with its position that one of a landlord's most substantial obligations under the common law is an implied warranty of habitability, AARP asserts that “*a landlord's FHA obligation to correct and stop discriminatory harassment is part of its day to day business operations... Through the threat of eviction landlords are capable of ending harassment*.”⁴³ Landlords yes, community association boards no.

Though the Department asserts no new liabilities or costs are imposed on community associations, legal briefs by the U.S. Government and other parties indicate otherwise. The government’s argument that plaintiffs need not demonstrate an intent to discriminate casts a shadow on the long-standing consensus that the Act is not intended to serve as a civility code.⁴⁴ This, in the view of many CAI members, unquestionably expands an association’s liability under the Act.

Lawrence v Courtyards of Deerwood Association, Inc. Limited Association Liability

The assertion of CAI members that the rule imposes new liabilities on associations is based, in part, on the decision reached in *Lawrence v. Courtyards of Deerwood Association*.⁴⁵ In determining that the community association in *Lawrence* had not violated the Act, the court wrote, “*The Lawrences have*

⁴⁰ Brief of the United States as Amicus Curiae, *Donabue Francis v. Kings Park Manor, INC, et al.*, p. 8. (Available at <https://www.justice.gov/crt/case-document/francis-v-kings-park-manor-brief-amicus>)

⁴¹ *Ibid.*, p. 17-18.

⁴² Brief of AARP and AARP Foundation as Amici Curiae, *Marsha Wetzel v. Glen St. Andrew Living Community, LLC, et al.*, p. 20. Available at https://www.aarp.org/content/dam/aarp/aarp_foundation/litigation/pdf-beg-02-01-2016/Wetzel-v-Glen-St-Andrew-Living-Community.pdf

⁴³ *Ibid.*, p. 27.

⁴⁴ In its brief amicus curiae in *Francis v. Kings Park Manor* the Government writes “*A plaintiff does not need to prove a landlord’s discriminatory intent or motive to establish liability under the FHA for failing to intervene in tenant-on-tenant racial harassment*.” (p. 14)

⁴⁵ *Lawrence v. Courtyards at Deerwood Ass’n, Inc.*, 318 F. Supp. 2d 1133 (S.D. Fla. 2004).

provided no circuit law that remotely suggests the FHA imposes a duty on a homeowner association or property manager to intervene in a neighbor-to-neighbor dispute.”⁴⁶ The court rightly notes associations are subject to governing documents and have authority to enforce the conditions in those documents, “...but the documents do not prevent racial harassment by one neighbor against another or require the Association or Property Manager to intervene in a neighbor-to-neighbor dispute.”⁴⁷

To highlight this distinction, the court in *Lawrence* references *Reeves v. Carrollsburg Condo. Unit Owners Ass’n*, where the court determined on a motion for summary judgment that the condominium unit owners association could be held liable for an owner’s harassment of another owner due to the presence of a highly unusual provision in the governing documents empowering the association to end all violations of any federal or state law. The conclusion of the *Lawrence* court is unless the association’s governing documents specifically require the association to end violations of the Act, there is no duty on the association to intervene.

Directly contravening the rule and the Department’s views, the court in *Lawrence* dismissed the complaint as there was no evidence or showing that the association board had engaged in any discriminatory conduct or that the board’s failure to end alleged harassing behavior was motivated by an intent to discriminate. The court wrote, “*Not only do the facts fail to establish that the Defendants directed any threatening conduct toward the Lawrences, these facts do not present even a scintilla of evidence from which a reasonable jury could infer that the Defendants refused to intervene or stop Novillo because of a racial animus.*”⁴⁸

The actions of the homeowners in the *Lawrence* case are regrettable, but the acts were not caused or encouraged by the association or its agents. The association enforced its governing documents as so empowered but did not seek to adopt new rules or assume new duties under contract. To the extent the association exercised its authorities, these actions were insufficient to end the neighbors’ dispute. The involvement of law enforcement achieved a similar ineffective result with the harassing behavior continuing even after police officers spoke to the parties—the involvement of law enforcement and judicial authorities did not end the harassing conduct.

The *Lawrence* court rejected the assertion the association could have adopted new rules to prohibit or end racial harassment. The court criticized attempts by the plaintiffs to “*bootstrap a failure to meet the alleged duty into a violation of the FHA.*”⁴⁹

Lawrence identifies the logical and practical source of liability for a community association. The court, in making its decision, left open the possibility that the association board or property manager may have been liable if the alleged failure to act was due to discriminatory motives. The Court noted there was no evidence the association treated similarly situated residents differently and noted the facts presented no direct evidence of discrimination.⁵⁰

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

Citing *Gourlay v. Forest Lake Estates Civil Association of Port Richie, Inc.*, the judge in *Lawrence* noted long-standing precedent that “the FHA was passed to ensure fairness and equality in housing...Not to become some all-purpose civility code regulating conduct between neighbors.”⁵¹ Building upon *Egan vs Schmock*,⁵² a case involving claims of discrimination between neighbors which held that Congress did not intend the Act to cover all discriminatory conduct which interfered with an individual's enjoyment of his or her home, the Court in *Lawrence* wrote—

*"From a public policy perspective, the Court is also unpersuaded that the FHA should be interpreted to impose a duty or hold the Association liable for the conduct of a member resident. At best, application of the statute is unclear in this context and the Lawrence's offered no support from legislative history. As a practical matter, none of the solutions they offer – inviting a social agency to mediate the dispute, forming a committee of homeowners to review the situation, issuing a policy statement, imposing a fine or revoking the harassers right to vote or to use the common property – would have produced their desired result. Even the Lawrence's themselves were unable to stop the harassment with the assistance of police power and the state court system, it is unclear, therefore, exactly what the defendants could have done to stop the harassers conduct."*⁵³

CAI members agree with the decision in *Lawrence*, where the Court concludes that remedies the Department intends that associations use to end a hostile environment will not end violations of the Act. Despite exercising these ineffective penalties, the association in *Lawrence* was still a named party in litigation. It was only the Court's determination that the association's covenants could not be interpreted as imposing a duty to intervene in violations of the Act and that the association's inability to end the hostile housing environment was not due to any racial animus on its part that the association was not held liable for the harassing actions of the neighbors.

Under *Lawrence* and similar cases, associations had a reliable standard that helped association boards comply with the law. The rule disrupts this standard, asserting that a defendant association may be liable under the Act for a third-party's discriminatory behavior based on undefined provisions in governing documents and notwithstanding the absence of discriminatory intent or motive on the part of the association. This has caused confusion.

Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.

The Department attempts to dismiss *Lawrence* and other jurisprudence upholding the necessity to establish an intent to discriminate through a discussion of *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*⁵⁴ In this case, the Supreme Court determined that disparate impact claims are actionable under the Act and that such claims may be brought on the basis of a policy outcome rather than an intent to discriminate.

⁵¹ *Lawrence v. Courtyards at Deerwood Ass'n*, quoting *Gourlay v. Forest Lake Estates Civic Ass'n*, 276 F. Supp. 2d 1222 (M.D. Fla. 2003)

⁵² *Egan v. Schmock*, 93 F. Supp. 2d 1090 (N.D. Cal. 2000)

⁵³ *Lawrence v. Courtyards at Deerwood Ass'n* (*emphasis added*).

⁵⁴ *Texas Dept. of Hous. and Cmty. Affairs v. Inclusive Communities Project, Inc.*, No. 13-1371, 576 U.S. ___, slip op. at 23 (2015).

Justice Kennedy, writing for the 5 to 4 majority, expressly noted the difference between disparate-treatment and disparate-impact claims under the Act. Justice Kennedy wrote—

*“In contrast to a disparate-treatment case, where a “plaintiff must establish that the defendant had a discriminatory intent or motive,” a plaintiff bringing a disparate-impact claim challenges practices that have a “disproportionately adverse effect on minorities” and are otherwise unjustified by a legitimate rationale.”*⁵⁵

The Department attempts to expand the reach of the Supreme Court’s opinion by inferring that claims under the Act other than disparate-impact claims may be adjudicated irrespective of discriminatory intent. The Supreme Court drew a distinction in this regard, leaving intact decisions such as that of the court in *Lawrence*.

Rather than relying on a plain reading of the Act and the Supreme Court’s opinion in *Inclusive Communities*, the Department takes an elastic view of the law and the Justices’ opinion, seeking to apply certain standards of employment law to the relationship of a community association to a property owner. The Department asserts the opinion in *Inclusive Communities* supports its preferred position that no finding of discriminatory intent is required for fair housing violations under the rule. The Department wrote that the rule follows “relevant case law including the Supreme Court’s recent ruling in *Texas Department of Community Affairs v. Inclusive Communities Project, Inc.* holding that the Fair Housing Act is not limited to claims of intentional discrimination...”⁵⁶ Such a pronouncement departs from the Supreme Court’s reiteration that intent to discriminate is a material requirement of disparate-treatment claims.

Rather than disregard or obscure the clear meaning of the Justices in *Texas v. Inclusive Communities*, the Department should acknowledge the Supreme Court’s affirmation of precedent. This alone should be sufficient basis for the Department to revise the rule consistent with the Supreme Court’s opinion and at the very least to provide legal certainty to community associations through legally reliable guidance from the Department.

3. Lack of Compliance Standards

Given the lack of effective authority to end discriminatory housing practices and the Department’s assertion that intent to discriminate is no longer required in disparate-treatment fair housing violations under the rule, the Department has an obligation to clearly communicate (1) an association’s contractual sources of liability under the rule, and (2) actions a community association must take to comply with the rule and the Act. The Department’s failure to do so will have profound consequences for association boards, homeowners, and, importantly, residents who may be victims of harassment

Rule Contains No Apparent Limitation on Association Responsibility to End Harassment

⁵⁵ *Ibid.*, quoting *Ricci v. DeStefano*, 557 U.S. 557, 557 (2009), *emphasis added*.

⁵⁶ *Federal Register*, Vol. 81, No. 178, p. 63068.

With the rule abandoning long-standing judicial precedent and challenging the opinion of the Supreme Court, association boards have little choice other than to engage in defensive actions to minimize litigation risk. This is a direct result of the open-ended requirement of the rule compelling the association to take “whatever actions it legally can” to end a discriminatory housing practice.

The Department does not indicate or provide any guidance as to the extent or limit of actions association boards must take to satisfy the rule’s requirements. In the preamble to the rule, the Department dismissed requests to provide clarity, indicating any such refinement would be tantamount to limiting the Act.⁵⁷ The Department’s position, compounded by the fact a community association may not evict or take a homeowner’s property, exposes associations to unknown liabilities based on an open-ended standard.

CAI members, including those accepted for membership in the College of Community Association Lawyers, believe community associations will be obligated, at association expense, to sue for injunctive relief through a Temporary Restraining Order and a permanent injunction to demonstrate an attempt to halt violations of the Act. Filing lawsuits of this nature, as noted, will impose significant costs on the association and by extension to homeowners and residents of the community. If the association’s lawsuit is contested, legal costs increase, and the association is exposed to counter-litigation by the alleged harasser that the association has exceeded its authority.

Additionally, CAI members have become aware that some associations have been urged by counsel that the Department intends associations to amend governing documents to authorize new penalties to be used by the association to “end” third-party discrimination. As pointed out above, such amendments require supermajority owner approval, rendering them difficult to obtain. Clarification by the Department is necessary to assure associations that they need not assume a new legal duty under contract by amending governing documents.

Verbal Guidance by Department Staff Contradicted by Government Briefs

On September 26, 2017, CAI members met with officials from the Department’s Office of Fair Housing and Equal Opportunity. Senior Fair Housing Act enforcement staff averred the Department would never require an association to sue to obtain injunctive relief under the rule.

These assurances were verbal, not written, and appear to directly conflict with the rule and legal positions advocated in the government’s brief in *Francis v. Kings Park Manor*. Given this discrepancy, CAI members believe it unlikely the Department or the U.S. Department of Justice would intervene should a court determine an association board was negligent in failing to seek or obtain injunctive relief or other extraordinary action.

Conclusion

CAI members do not assert that community associations be exempted from liability for hostile environment discrimination. Community association boards are liable for the direct actions of board members and managers that create a hostile housing environment. A community association should

⁵⁷ See footnote 31.

not be liable where the harassing behavior is committed by a resident against another resident, where there is no agent relationship.

It is the view of many community associations the rule imposes on association boards the burden to police conversations and interactions between homeowners. Numerous courts have opined the purpose of the Act is to end discriminatory housing practices, not to compel homeowners to adhere to a civility code. The Department appears to substantially reinterpret the Act in this regard.

There are more than 342,000 community associations across the nation subject to the rule. It is CAI's goal to ensure liability for hostile housing environments rests with harassing parties and to correctly advise community associations concerning compliance with the rule.

By reaffirming the long-standing legal standard to which associations have been held concerning hostile housing environments and providing reliable guidance, the Department will eliminate uncertainty, prevent associations from incurring unnecessary financial and legal burdens, and assist in the efficient enforcement of the Act as Congress intended.

CAI respectfully requests:

1. The Department reaffirm, through a revision of the rule, adherence to legal precedent requiring an intent to discriminate be shown for a community association to be liable for third-party hostile housing environment discrimination, and
2. The Department provide written, legal guidance for community associations to ensure compliance with the rule.