



# Tackling Mental Health Issues in Community Associations

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# TACKLING MENTAL HEALTH ISSUES IN COMMUNITY ASSOCIATIONS

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## Goals

- Mental Health in the US
- COVID-19 Effects on Mental Health
- Federal Regulations and Case Law
  - Federal Housing Act
  - Reasonable Accommodations (Assistance Animals and Group Homes)
- Association's Purpose and Obligations
- Best Practices
- Final Takeaways

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## What is mental health?

- Our emotional, psychological, and social well-being.
- Affects how we think, feel, and act.
- It helps determine how we handle stress, relate to others, and make healthy choices.



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## What is mental health?

- Poor mental health and mental illness are not the same.
- A person can experience poor mental health and not be diagnosed with a mental illness.
- Likewise, a person diagnosed with a mental illness can experience periods of physical, mental, and social well-being.
- One in five people live with a mental health condition of some kind.

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## What causes mental illness?

- No single cause
- Number of factors can contribute to an individual's increased risk for contracting a mental illness including:
  - Early adverse life experiences, such as trauma or a history of abuse (child abuse, sexual assault, witnessing violence, etc.)
  - Experiences related to other ongoing (chronic) medical conditions, such as cancer or diabetes
  - Biological factors or chemical imbalances in the brain
  - Use of alcohol or drugs
  - Having feelings of loneliness or isolation

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## The Stats

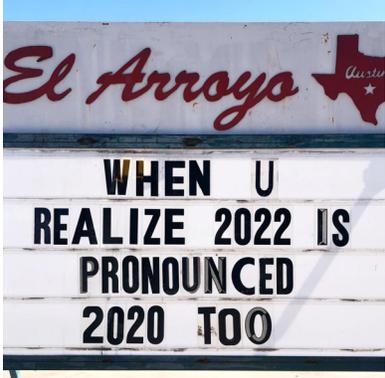
- 74.1 million Americans live in homeowners' associations, condominium communities, cooperatives and other planned communities.
- Great percentage suffering with mental illness or mental health issue.
- Percentages include board members, managers, even lawyers!

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## COVID-19 Effect on Mental Health



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## COVID-19 Effect on Mental Health

- Isolation
- WFH
- Layoffs
- Virtual School
- Frontline workers
- Boston University study says depressive symptoms in adults jumped from 8.5% pre-pandemic to 27.8% in 2020 to 32.8% in 2021.
- The elevated rate of depression now affects 1 in every 3 US adults.



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## COVID-19 Effect on Mental Health

- Pandemic has touched every homeowner, board member, manager and vendor in some way.
- Neighborhood civility is on the decline.
- Residents are more demanding than ever on management and boards.

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## The Fair Housing Act (FHA)

- Protects individuals against discrimination by housing providers.
- A community association is a “housing provider” per the U.S. Justice Department.
- Unlawful to exclude or otherwise discriminate against a person because they—or someone associated with them—has a disability.

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## FHA and Disabilities

- FHA defines “disability” as a physical or mental impairment that substantially limits one or more major life activities.
- Three key elements to definition:
  - Physical or mental impairment
  - Substantially limits
  - Major Life Activity



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## FHA and Disabilities

- Disability discrimination leads to more FHA actions against associations than any other protected class.
- How? Two most common issues:
  - Requests for reasonable accommodation or reasonable modification; and
  - Prohibition against commercial/business use.

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## Reasonable Accommodation/Modification

- What is the difference?
- How does the community association evaluate a request for reasonable accommodation or reasonable modification?
- Remember, a person will generally be entitled to a requested reasonable accommodation or modification if:
  - (1) that person meets the FHA's definition of a person with a disability; and
  - (2) there is a nexus between the person's disability and the requested accommodation or modification

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## Reasonable Accommodation/Modification

- Can a community association deny a request for reasonable accommodation?
  - Yes, but with caution.
- Community associations must balance the need to be prompt with the needs to be thorough in their review.
- Evaluations are rarely intuitive.

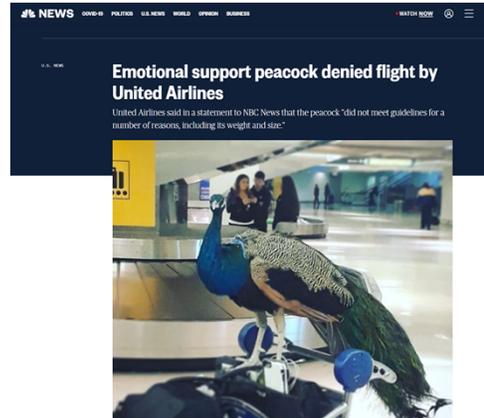
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## Assistance Animals

- Service vs. Support Animals
- January 28, 2020, HUD Assistance Animal Notice
  - Reasonableness standard
- Unlike airlines, associations cannot ban support animals.



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## Examples of Types of Support Animals Requested



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## Relevant Case Law – Assistance Animals

- Bhogaita v. Altamonte Heights Condominium Assn.
- Warren v. Delvista Towers Condo. Ass'n, Inc.,
- Eastwood v. Willow Bend Lake Homeowners Association
- 79 W. 12th St. Corp. v. Kornblum

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## Group Homes

- Associations may not enforce an outright ban.
- Adoption and enforcement of the restrictions must occur in a legally complaint manner.
- Two most common issues:
  - Commercial and business use restrictions; and
  - Single-family use restriction.

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## Group Homes

- Federal courts and the DOJ have consistently found that both “alcoholism” and “drug addiction” can qualify as a “physical or mental impairment.”
- Not extended to impairment resulting from current, illegal use of a controlled substance.
- Exceptions:
  - Undue financial burden; or
  - Fundamentally alter nature.

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## Relevant Case Law – Group Homes

- Rhodes vs. Palmetto Pathway Homes, Inc.
- Deep East Texas Regional Mental Health and Mental Retardation Services vs. Kinnear
- Westwood Homeowners Association vs. Tenhoff

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## Association Purposes and Obligations

- Community associations are designed to do the following:
  - Maintain the property's common areas
  - Preserve and protect property values
  - Provide services for members
  - Develop a sense of community
- Mental health issues affect each and every category.
- How does mental illness affect the association's ability to achieve its purposes and meet its obligations?

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## Best Practices

1. Educate Management and Boards
2. Document Everything
3. Schedule a Violation Hearing
4. Take Legal Action
5. Engage Government Assistance
6. Call the Emergency Contact or Family
7. Adopt Amendments/Policies/Procedures and Follow Them
8. Make Resources Available
9. Host Relaxing Group Activities
10. Call the Cops
11. Call the Lawyer

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## Final Takeaways

- The country is divided, and mental health is at a low point.
- Boards and management should lead with *compassion* and *empathy* while complying with enforcement provisions.
- Avoid emotional involvement in the resident's mental health struggles, if possible.
- Education regarding the legal issues and providing clients with best practices is crucial.

# TACKLING MENTAL HEALTH ISSUES IN COMMUNITY ASSOCIATIONS

by

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## INTRODUCTION

True story: Last year, when Noelle and I were in the thick of our work on overcoming racism in community associations, we were contacted by a desperate client with a “racism” issue that the homeowners’ association<sup>1</sup> didn’t know how to handle. According to this client, an owner in the community had hung a noose on a tree in his front yard and it had been hanging from that tree for over three months. “Um, WHAT!?” was our initial response. We had so many questions. How could the association allow this situation to continue? Had they demanded the noose’s removal? Had they gone onto the property and tried to remove it themselves? Wasn’t the membership up in arms?

The answer to all questions was a resounding “YES.” The association had tried traditional enforcement methods and remedies (apart from initiation of formal legal action), but the noose remained, much to the horror and outrage of the community. Here was the deal: The owner is a disabled veteran suffering from post-traumatic stress disorder. Every time an association representative tried to go onto the property to remove the noose, the owner ran out of the house with a shotgun and chased the person off his property.

In addition to the legal guidance we provided regarding the association’s liability for hostile environment harassment (among other causes of action) by allowing the noose to remain in that tree (see our manuscript from last year’s Law Seminar<sup>2</sup>), we could not ignore the fact that a serious mental issue was clearly at play. To that end, we decided to delve into the existence of mental health issues in community associations, especially in

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<sup>1</sup> We will use the terms “community associations”, “homeowners’ associations” and “property owners’ associations” interchangeably throughout this paper. In using these terms, we are referring to the corporations that operate and govern planned communities, including single-family subdivisions, condominiums, cooperatives and mobile homes.

<sup>2</sup> Leah K. Burton et al., *Agents of Change: Overcoming Racism in Community Associations (ETHICS)*, CMTY. ASS’NS INST. (Jan. 26, 2021), <https://foundation.caionline.org/wp-content/uploads/2021/02/Overcoming-Racism-in-Community-Associations-ETHICS.pdf>.

light of the ongoing COVID-19 pandemic; explore the legal issues at play; and offer best practices to address these issues in our clients' community associations.

Mental health issues impact community associations in many ways. From a legal standpoint, mental health issues give rise to issues involving deed restriction enforcement; Fair Housing Act discrimination on the basis of age and disability; and potential liability for negligence should an association allow an unreasonably dangerous condition in the community to go unaddressed or a potentially dangerous resident to remain unchecked.

Whether dealing with an aging resident with dementia who can no longer independently care for himself/herself, or a schizophrenic resident suffering from hallucinations in the common area, the reality is that mental health issues don't always stay inside the home of the mentally ill resident. How many times have we been contacted by a client with an issue involving a mentally unstable resident who is engaging in outrageous behavior in the common areas or common elements that is not only a nuisance to his/her neighbors, but a legitimate health and safety concern? At first blush, many of these issues may seem harmless, but occasionally they lead to dangerous situations depending on the level of mental instability. In many situations, relatives whose guilt or finances prohibit them from moving a troubled or aging family member into a care facility instead relocate that family member into a house or condo governed by a homeowners' association. Unfortunately, the homeowners' association is subsequently asked/forced to become a form of care provider for the troubled resident. The COVID-19 pandemic has exacerbated existing mental health conditions for many individuals, as the isolation and stress of life during these unprecedented times has led to an increase in anxiety, emotional distress, substance abuse and even suicide.

While it is not the community association's duty or obligation (nor would it be appropriate) to try to determine if a resident has a mental disability, it is the association's responsibility to preserve peace in the community. When dealing with mental issues in the community, our clients need to know their obligations and responsibilities. Oftentimes, traditional deed restriction enforcement activities (like the sending of violation letters) just aren't effective at obtaining compliance from a mentally unstable resident. We need to provide more options to our clients in dealing with these issues.

In this paper, we will discuss the Fair Housing Act discrimination issues at play when dealing with mentally unstable residents; the association's obligations and responsibilities to the community; and the liability potential our clients face should they allow an unreasonably dangerous condition to remain in the community. We will also examine the effect the COVID-19 pandemic has had on the mental health of our communities, including not only the membership, but our board directors and managers

as well. Finally, we will provide best practices for tackling mental issues in our clients' communities.

First, let's begin with a general discussion of mental health and mental illness.

## MENTAL HEALTH IN THE UNITED STATES

What is mental health? According to the Centers for Disease Control and Prevention ("CDC"), "mental health includes our emotional, psychological, and social well-being. It affects how we think, feel, and act. It also helps determine how we handle stress, relate to others, and make healthy choices...Although the terms are often used interchangeably, poor mental health and mental illness are not the same. A person can experience poor mental health and not be diagnosed with a mental illness. Likewise, a person diagnosed with a mental illness can experience periods of physical, mental, and social well-being."<sup>3</sup>

Mental illnesses are one of the most common health conditions in the United States. Mental illness does not discriminate on the basis of age, gender or culture. One in five people live with a mental health condition of some kind.<sup>4</sup> One in twenty-five people live with a serious mental illness, such as schizophrenia, bipolar disorder or major depression.<sup>5</sup> Over fifty percent of us will be diagnosed with a mental illness or disorder at some point in our lives.<sup>6</sup>

What causes mental illness? According to the CDC, there is no single cause for mental illness. A number of factors can contribute to an individual's increased risk for contracting a mental illness, such as the following:

- Early adverse life experiences, such as trauma or a history of abuse (child abuse, sexual assault, witnessing violence, etc.)
- Experiences related to other ongoing (chronic) medical conditions, such as cancer or diabetes
- Biological factors or chemical imbalances in the brain
- Use of alcohol or drugs

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<sup>3</sup> *Mental Health*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/mentalhealth/learn/index.htm> (last reviewed June 28, 2021).

<sup>4</sup> NAT'L ALL. ON MENTAL ILLNESS, <https://www.nami.org/Home> (last visited Jan. 12, 2022).

<sup>5</sup> Jonaki Bose et al., *Key Substance Use and Mental Health Indicators in the United States: Results from the 2015 National Survey on Drug Use and Health*, CTR. FOR BEHAV. HEALTH STAT. & QUALITY, SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN. (Sept. 2016), <https://www.samhsa.gov/data/sites/default/files/NSDUH-FFR1-2015/NSDUH-FFR1-2015/NSDUH-FFR1-2015.pdf>.

<sup>6</sup> Ronald C. Kessler et al., *Lifetime Prevalence and Age-of-Onset Distributions of Mental Disorders in the World Health Organization's World Mental Health Survey Initiative*, 6(3) WORLD PSYCHIATRY 168 (2007).

- Having feelings of loneliness or isolation<sup>7</sup>

Raise your hand if you know someone in your life who is currently experiencing or has past experience with one of the issues above. We imagine all hands will raise. The reality is that mental illness will either affect us personally or will affect someone close to us in some way at some point during our lives. When you consider that more than 74.1 million Americans live in homeowners' associations, condominium communities, cooperatives and other planned communities<sup>8</sup>, it follows that a great percentage of the residents living in our neighborhoods are currently suffering with either a mental illness or mental health issue. Those percentages include board members. Those percentages include managers. Heck, those percentages include the lawyers providing legal assistance to the community associations. Bottom line: This issue is a big deal and it's here to stay.

### THE COVID-19 EFFECT ON MENTAL HEALTH

Disclaimer: This next part of the paper is not intended to offer a political viewpoint on the utility of mask wearing, social distancing and/or the merit of COVID-19 vaccinations. We are talking about the COVID-19 pandemic's effect on mental health – from the 2020 isolation to the 2021 reentry into society to 2022's uncertainty as new and highly contagious strains of the virus develop and infect greater numbers of our families, friends, acquaintances and co-workers.

To say 2020 and 2021 were challenging years from a mental health standpoint would be an understatement. All of our lives were thrown into disarray in 2020 when the pandemic forced workplaces, schools, stores, restaurants, entertainment and recreational venues and community amenities to shut down. Many employees were laid off. Many became remote workers. Many of us became full-time employees plus full-time homeschool teachers. Front line workers worked tirelessly to treat COVID-19 patients – all while struggling with the stress and anxiety of trying to do their jobs while keeping the virus out of their homes and away from their loved ones. Not surprisingly, people became anxious and depressed. According to a study from Boston University<sup>9</sup>, depressive symptoms in adults jumped from 8.5% pre-pandemic to 27.8% in 2020 to

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<sup>7</sup> *Mental Health*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/mentalhealth/learn/index.htm> (last reviewed June 28, 2021).

<sup>8</sup> *About Community Associations*, CMTY. ASS'NS INST., <https://www.caionline.org/AboutCommunityAssociations/Pages/default.aspx> (last visited Jan. 12, 2022).

<sup>9</sup> Catherine K. Ettman et al., *Persistent Depressive Symptoms During COVID-19: A National, Population-Representative, Longitudinal Study of US Adults*, THE LANCET (Oct. 4, 2021), [https://www.thelancet.com/journals/lanam/article/PIIS2667-193X\(21\)00087-9/fulltext](https://www.thelancet.com/journals/lanam/article/PIIS2667-193X(21)00087-9/fulltext). The study is the first nationally representative study in the US that examines the change in depression prevalence before and then during the pandemic.

32.8% in 2021.<sup>10</sup> According to the study, the elevated rate of depression now affects 1 in every 3 US adults.<sup>11</sup>

“The COVID-19 pandemic has been associated with a substantial increase in mental illness. U.S. adults reported an estimated three-fold increase in the prevalence of elevated depressive symptoms at the start of COVID-19 pandemic relative to before it. Since the start of the COVID-19 pandemic, a number of studies have reported worsening mental health across a range of populations in the U.S. and globally, including among healthcare workers, children, and the general public. Depression is costly and increases risk for other physical and mental illness, as well as mortality.”<sup>12</sup>

With the dawning of a new year and the optimism that comes with new beginnings, people thought 2022 would bring about an end to the volleying ping pong balls our lives have become where one day we are out and about enjoying dinner in a restaurant and laughing with friends, and the next the looming threat of another new, unresearched variant lurks in the wings. Even the most mentally healthy have found the constant uncertainty to be a difficult challenge to bear.

At this point, the COVID-19 pandemic has touched every homeowner, board member, manager and even vendor in some way. No one has escaped unscathed. Neighborhood civility is on the decline. Residents have become even more demanding on management and boards. Neighbors have lost all patience with one another. Children have continued to experience the aftereffects of the isolation and lack of socialization at key developmental stages, which in turn stresses out their parents.

Keeping these issues in mind, let’s get into a legal discussion on the federal regulations and dominant case law that are directly tied to the handling of mental health and illness in our community associations.

### **FEDERAL REGULATIONS AND CASE LAW**

What sort of mental health issues come to mind after reading the introduction above? When you consider mental health, do you consider the potential for discrimination claims depending on how those with mental health issues are treated by their communities? How does discrimination against a person suffering from mental illness come into play in the community association context? What role does the community association play? What responsibility does it have to its members? To

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<sup>10</sup> Jillian McKoy, *Depression Rates in US Tripled When the Pandemic First Hit – Now, They’re Even Worse*, BOS. UNIV. (Oct. 7, 2021), <https://www.bu.edu/articles/2021/depression-rates-tripled-when-pandemic-first-hit/>.

<sup>11</sup> *Id.*

<sup>12</sup> Ettman, *supra* note 9.

thoroughly answer these questions, we offer a review of the well-established laws and clarifications impacting mental health and impairment. First, we'll review the federal protections, specifically under the Fair Housing Act, including reasonable accommodations and then we'll take a look at the key case law on the subject.

### The Fair Housing Act

The federal Fair Housing Act<sup>13</sup> ("FHA") protects individuals against discrimination in housing. Pursuant to the FHA, housing providers cannot:

- (1) make unavailable or deny a dwelling to any person because of a protected class;<sup>14</sup>
- (2) discriminate against individuals in the provision of services or facilities relating to their dwellings;<sup>15</sup>
- (3) make statements that indicate a preference or limitation or discrimination in the sale or rental of a dwelling because of a person's protected class;<sup>16</sup>
- (4) coerce, intimidate, threaten, or interfere with an individual for exercising or enjoying a right or protection granted by the Act;<sup>17</sup> or
- (5) coerce, intimidate, threaten, or interfere with an individual in the enjoyment of his or her dwelling because of the individual's protected class.<sup>18, 19, 20</sup>

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<sup>13</sup> The Fair Housing Act is codified at 42 U.S.C. §§ 3601–3619.

<sup>14</sup> 42 U.S.C. § 3604(a); 24 C.F.R. §§ 100.50(b)(3), 100.60(b)(5).

<sup>15</sup> 24 C.F.R. § 100.65(b)(4).

<sup>16</sup> 42 U.S.C. § 3604(c) (prohibiting statements indicating a preference, limitation, or discrimination with respect to the sale or rental of a dwelling); 24 C.F.R. §§ 100.50(b)(4), 100.75(a) (same); *see, e.g.*, Yazdian v. Las Virgenes Vill. Cmty. Ass'n, No. CV 11-07611 SJO (JCx), 2012 WL 13009122, at \*40–41 (C.D. Cal. 2012) (denying the defendant's motion for summary judgment on the plaintiff's § 3604(c) claim based on "No Playing" signs and a letter stating "there is no play area for children [in the subdivision]. Parents should take their children to the park to play.").

<sup>17</sup> 42 U.S.C. § 3617; 24 C.F.R. § 100.400.

<sup>18</sup> 24 C.F.R. § 100.400(c)(2).

<sup>19</sup> In addition to the anti-discrimination requirements listed in the text, the Fair Housing Act also requires community associations to (1) permit reasonable modifications to existing premises (at the disabled resident's expense) to the extent necessary to afford the resident full enjoyment of the premises, and (2) make reasonable accommodations in rules, policies, practices, and services (at the association's expense) to the extent necessary to afford a disabled resident equal opportunity to use and enjoy a dwelling. 42 U.S.C. § 3604(f)(3)(A), (B); 24 C.F.R. §§ 100.203–04.

<sup>20</sup> Although this paper specifically examines the Federal Fair Housing Act, most states have enacted their own versions of the FHA. Should a resident file a discrimination complaint through HUD, HUD's Office

The FHA, which was enacted in 1968 in response to the Civil Rights Movement and which consequently declared racially restrictive covenants in the housing market unenforceable, prohibits discrimination in housing based upon race, color, religion, sex, familial status, and national origin.<sup>21</sup> A subsequent amendment in 1988 added disability to the “protected classes” enumerated in the FHA.<sup>22</sup> A community association is considered a “housing provider” per the U.S. Justice Department which states, “any person or entity engaging in prohibited conduct - *i.e.*, refusing to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford a person with a disability an equal opportunity to use and enjoy a dwelling - may be held liable unless they fall within an exception to the FHA’s coverage. Courts have applied the FHA to individuals, corporations, associations, and others involved in the provision of housing and residential lending, including property owners, housing managers, homeowners and condominium associations, lenders, real estate agents, and brokerage services.”<sup>23</sup> As we all know, community associations fall under the umbrella of the FHA and are obligated to comply with its regulations. Essentially, under the FHA, it is unlawful to exclude or otherwise discriminate against a person because they—or someone associated with them—has a disability. Astonishingly, disability discrimination probably leads to more FHA actions against associations than any other protected class.

When we think about the term disability, we don’t always consider that it encompasses more than what is open and obvious to others. So, what is a disability? The FHA defines “disability” as a *physical or mental impairment* that substantially limits one or more major life activities.<sup>24</sup> There are three key elements to the definition:

**a. Physical or mental impairment**

US Department of Housing and Urban Development (“HUD”) regulations broadly define mental impairment to include any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.<sup>25</sup> HUD also provides examples for physical impairments.

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of Fair Housing and Equal Opportunity (FHEO), as part of HUD’s Fair Housing Assistance Program (FHAP), may refer a fair housing complaint to the state or local government agency for investigation.

<sup>21</sup> 42 U.S.C. § 3601, et. seq.

<sup>22</sup> 42 U.S.C. § 3604.

<sup>23</sup> See Joint Statement of U.S. Dep’t of Just. & U.S. Dep’t of Hous. & Urb. Dev., *Reasonable Accommodations under the Fair Housing Act*, U.S. DEP’T OF JUST. (May 17, 2004), [https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/joint\\_statement\\_ra.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/joint_statement_ra.pdf).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

The HUD regulations list examples of physical or mental impairments, which include, but are not limited to orthopedic, visual, speech, and hearing impairments; cerebral palsy; autism; epilepsy; muscular dystrophy; multiple sclerosis; cancer; heart disease; diabetes; Human Immunodeficiency Virus (HIV) infection; mental retardation; emotional illness; drug addiction (other than addiction caused by current, illegal use of a controlled substance); and alcoholism.

**b. Substantially limits**

HUD says that substantially limits means that the limitation is “significant” or “to a large degree.”<sup>26</sup>

**c. Major life activity**

According to HUD, major life activity means activities that are of central importance to daily life, including, but not limited to: seeing, hearing, walking, breathing, performing manual tasks, caring for oneself, and speaking.<sup>27</sup>

A person is considered to have a disability if he or she has difficulty performing certain functions (seeing, hearing, talking, walking, climbing stairs and lifting and carrying), or has difficulty performing activities of daily living, or has difficulty with certain social roles (doing schoolwork for children, working at a job and around the house for adults).<sup>28</sup>

We mentioned earlier that disability discrimination probably leads to more FHA actions against associations than any other protected class. How? Well, perhaps the association has inadvertently adopted a policy that facially discriminates against a person with a disability or traditionally enforces a certain policy which has the effect of adversely impacting a disabled resident. Disability discrimination can take many forms. More often than not, the basis of the claims we review are those in which the association has failed to approve a "reasonable accommodation" to its rules, policies, practices, or services when such accommodations were necessary to afford persons with disabilities an equal opportunity to use and enjoy a dwelling and public and common use areas or a "reasonable modification" to an existing premise to facilitate the use of common elements by disabled persons.<sup>29</sup>

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Census Brief: Disabilities Affect One-Fifth of All Americans*, U.S. CENSUS BUREAU, <https://www.census.gov/prod/3/97pubs/cenbr975.pdf> (last visited Jan. 3, 2022).

<sup>29</sup> See Joint Statement of U.S. Dep't of Just. & U.S. Dep't of Hous. & Urb. Dev., *supra* note 23.

Community associations need to pay particular attention to avoiding disability discrimination under the FHA, because violations of the FHA can carry hefty penalties.<sup>30</sup> Avoidance of liability can be exponentially more difficult when considering that the association may not know when or if a person is battling a mental impairment. Boards should exercise caution and consult with legal counsel whenever any doubt exists as to whether a rule is discriminatory, or a requested accommodation or modification should be approved. Two common issues that community associations frequently face involve (1) requests for reasonable accommodations related to assistance animals and (2) clauses in an association's governing documents which prohibit commercial uses of properties in residential areas, which could extend to group homes.

### Reasonable Accommodations/Reasonable Modifications

Our clients are routinely asked to evaluate reasonable accommodation or modification requests from owners who are seeking to modify their home or property in some way or seeking a variance from applicable association rules and policies. In addition to ensuring that an owner's request satisfies the applicable governing documents, the association may find itself in a situation where there are additional considerations to address under the FHA.<sup>31</sup> Under the FHA, it is unlawful for a property owners' association to refuse to permit reasonable accommodations to rules, policies, practices, or services when such accommodations may be necessary to afford persons with disabilities an equal opportunity to use and enjoy a dwelling and public and common use areas.<sup>32</sup> When dealing with mental illness, the disability is invisible or may not be immediately apparent.<sup>33</sup>

As we all know, a reasonable accommodation is a request for a change, exception, or adjustment to a rule, policy, practice, or service that may be necessary for a person

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<sup>30</sup> On March 6, 2020, HUD published new inflation-adjusted civil penalty amounts for individuals or entities that have been found to have violated the federal Fair Housing Act which apply to violations of the Fair Housing Act that occur on or after April 6, 2020. Under the revised amounts, a violator can be assessed a maximum civil penalty of \$21,410 for a first violation of the Fair Housing Act. Those who had been found liable for violations of the Fair Housing Act in the previous five (5) years could be fined a maximum of \$53,524, and those who had violated the Fair Housing Act two or more times in the previous seven (7) years could be fined a maximum of \$107,050. These civil penalty amounts are in addition to actual damages and attorney's fees and costs that may be awarded to someone who has experienced housing discrimination. Adjustment of Civil Monetary Penalty Amounts for 2020, 85 Fed. Reg. 13,041 (March 6, 2020) (to be codified at 24 C.F.R. 28, 30, 87, 180, 3282).

<sup>31</sup> Ashley Koirtyohann, *Reasonable Accommodations in POAs*, RMWBH (Jan. 3, 2022) <https://www.rmwbh.com/reasonable-accommodations-in-poas/>.

<sup>32</sup> See Joint Statement of U.S. Dep't of Just. & U.S. Dep't of Hous. & Urb. Dev., *supra* note 23.

<sup>33</sup> *What is an Invisible Disability*, INVISIBLE DISABILITIES ASS'N, <https://invisibledisabilities.org/what-is-an-invisible-disability/> (last visited, Jan. 7, 2022).

with disabilities to have an equal opportunity to use and enjoy a dwelling, including public and common use spaces.”<sup>34</sup> In the case of community associations, the most common request is for the waiver of an existing rule or policy since a certain rule or policy may have a different effect on persons with disabilities than it does on the rest of the population, resulting in disadvantages to persons with disabilities, even if those disadvantages were unintended and unforeseen when the rule or policy was adopted.

A reasonable modification, on the other hand, is a “structural change made to existing premises, occupied or to be occupied by a person with a disability, in order to afford such person full enjoyment of the premises.”<sup>35</sup> In the context of associations, most reasonable modifications will relate to common areas, as structural changes to dwellings will often fall under the reasonable accommodation definition. While an association may be required to allow a reasonable modification to a common area in certain cases, the owner requesting the modification is responsible for the associated costs.

A person will generally be entitled to a requested reasonable accommodation or modification if: (1) that person meets the FHA’s definition of a person with a disability; and (2) there is a nexus between the person’s disability and the need for the requested accommodation or modification.<sup>36</sup>

How does the community association evaluate a request for reasonable accommodation or reasonable modification? If a person’s disability is not obvious or readily apparent, the association may request documentation necessary to verify that the person meets the definition provided above.<sup>37</sup> Per HUD and the Department of Justice (“DOJ”), qualifying documentation may be provided by a doctor or other medical professional, a peer support group, a non-medical service agency, or a reliable third party who is in a position to know about the individual’s disability.<sup>38</sup> An association should not request medical records or detailed information about the nature of a person’s disability.<sup>39</sup>

Once it has been established that the request has been made by or on behalf of a person with a disability, the association must next evaluate whether there is a sufficient nexus between the disability and the requested accommodation or modification. If the connection is not obvious or readily apparent, the association may request documentation necessary to show the disability-related need for the requested accommodation or modification.<sup>40</sup> This documentation can be provided by the same

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<sup>34</sup> See Joint Statement of U.S. Dep’t of Just. & U.S. Dep’t of Hous. & Urb. Dev., *supra* note 23.

<sup>35</sup> *Id.*

<sup>36</sup> Koirtyohann, *supra* note 31.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

parties listed above. If neither the disability nor the disability-related need for the requested accommodation or modification is obvious or readily apparent, documentation of each may be requested at the same time.<sup>41</sup>

Is there ever an instance when a provider can deny a request for reasonable accommodation? Yes. According to FHA regulations, a housing provider can deny a request for a reasonable accommodation if the request was not made by or on behalf of a person with a disability or if there is no disability related need for the accommodation.<sup>42</sup> a request for a reasonable accommodation may be denied if providing the accommodation is not reasonable – i.e., if it would impose an undue financial and administrative burden on the housing provider or it would fundamentally alter the nature of the provider's operations.<sup>43</sup> The determination of undue financial and administrative burden must be made on a case-by-case basis involving various factors, such as the cost of the requested accommodation, the financial resources of the provider, the benefits that the accommodation would provide to the requester, and the availability of alternative accommodations that would effectively meet the requester's disability-related needs.<sup>44</sup>

If an association is inclined to deny a reasonable accommodation or modification request, HUD and the DOJ encourage granting an alternate accommodation if possible. However, community associations should exercise caution since an individual who disagrees with the alternate accommodation option or objects to the refusal to grant the accommodation may file an FHA complaint to challenge the decision.

Community associations must balance the requirement to promptly evaluate a request with the need to complete a thorough review and, if necessary, seek counsel. The case summary below discusses this very issue. A person who believes they have been wrongfully denied a reasonable accommodation or modification may lodge a complaint with HUD, a state or local agency, or even file suit directly against the association. Each of these scenarios can cost an association a significant amount of time and money. Associations should note that the process of evaluating a request for reasonable accommodation or modification is very rarely intuitive. There are numerous considerations at play and violations of the FHA can occur even when an association is acting with the best intentions.<sup>45</sup>

Now that we are familiar with the federal regulations and the community association's responsibility if/when it's presented with a request for a reasonable

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<sup>41</sup> *Id.*

<sup>42</sup> See Joint Statement of U.S. Dep't of Just. & U.S. Dep't of Hous. & Urb. Dev., *supra* note 23.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

accommodation or reasonable modification, let's get into the kinds of reasonable accommodation requests the association might receive and how the requests should be handled.

### *Assistance Animals*

In accordance with the FHA, "individuals with a disability may request to keep an assistance animal as a reasonable accommodation to a housing provider's pet restrictions."<sup>46</sup> More and more we see news headlines like, "Emotional Support Peacock Denied Flight by United Airlines"<sup>47</sup> or heard stories where homeowners have claimed whole coops of chickens as emotional support animals ("ESA"). But, if the FHA allows it, does this mean that associations have no way to regulate assistance animals in their communities? Do the same rules apply? Understandably, many of our clients would prefer not to have peacocks, chickens or other non-traditional domestic animals (i.e., alligators, ferrets and monkeys) running around their community. Unfortunately, the legal opinion may not be as simple as you might think.

Did you know: In the 1750s, the earliest systematic instruction of guide dogs, as helpers of the visually impaired, took place in a Paris hospital for the blind.<sup>48</sup> These dogs first appeared in the United States in the 1920s by Dorothy Harrison Eustis who bred and taught police dogs for the Swiss army.<sup>49</sup> Later, Eustis and Morris Frank founded the first American guide dog school.<sup>50</sup> However, it was Dr. Bonita Bergen, an American canine researcher, doctor, and founder/president of the Bergin University of Canine Studies, who actually pioneered using dogs for people with disabilities other than blindness<sup>51</sup>

In the United States, service dogs weren't legally recognized until the Americans with Disabilities Act ("ADA") was passed in 1990.<sup>52</sup> The ADA initially defined a service

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<sup>46</sup> Clayton Hearn & Ashley Koirtyohann, *Can POAs Follow the Airlines and Ban Emotional Support Animals?*, RMWBH (Jan. 29, 2021), <https://www.rmwbh.com/can-poas-follow-the-airlines-and-ban-emotional-support-animals/>.

<sup>47</sup> 'Emotional Support Peacock' Barred from United Airlines Plane, BBC (Jan. 31, 2018), <https://www.bbc.com/news/world-us-canada-42880690>.

<sup>48</sup> Jessica Jimenez, *Where Did Service Dogs Come From? A Brief History*, NEW LIFE K9S (Feb. 19, 2021) <https://www.newlifek9s.org/news-events/blog/service-dog-blog.html/article/2021/02/19/where-did-service-dogs-come-from-a-brief-history>.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> Under the Americans with Disabilities Act, all public and government facilities are required to comply with specific use and construction requirements to accommodate disabled individuals. However, note that the ADA applies only to "public accommodations." Therefore, an association will not be subject to the ADA unless the association is operating what can be considered a "public accommodation." A "public accommodation" is any facility that is for use by members of the general public—not solely for use by the

dog as any guide dog, signal dog or other animals individually trained to provide assistance to a person with a disability.<sup>53</sup> According to the ADA, service animals should be allowed to accompany persons with disabilities in most places including the different facilities within a property owners association.<sup>54</sup> But does that mean that community associations can prohibit emotional support animals? Not quite. Support animals are defined and regulated differently. The FHA provides legal grounds for emotional support animals in community associations, as mentioned above.

The law distinguishes the two types of assistance animals: (1) service animals and (2) support animals.

- Service Animals. Service animals are individually trained to provide support to the disabled individual.<sup>55</sup> Service animals can only be dogs.<sup>56</sup> For instance, a psychiatric assistance dog can assist an individual by reminding him/her to take his/her medications.
- Support Animals. These are animals that typically provide emotional and/or therapeutic support to a disabled individual, i.e., emotional support animals<sup>57</sup>. Unlike service animals, emotional support animals do not require training to be classified as such. Their main purpose is to provide comfort and companionship. They also help relieve loneliness, depression, anxiety, and other symptoms or effects of the person's disability.

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association's members and their guests. It is pretty rare, but there have been examples of associations being subjected to ADA requirements when: (1) an association allows members of the public to buy memberships or passes to the association's pool, (2) where an association allows other groups (like schools, church groups or clubs) to use association facilities on a regular basis, or (3) where an association maintains a rental office on the property that receives regular traffic from the general public. Thus, the ADA will not apply to all associations, but if has been determined that it does apply to your client's community, you should know and follow the use and construction requirements. Additionally, since associations are generally not subject to the ADA, associations must follow the FHA, which provides protection to both service animals and emotional support animals. People with emotional support animals also have equal access to housing. These regulations likely supersede any policies the association governing the ownership of pets in the community. Americans With Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 328 (1990).

<sup>53</sup> Americans With Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 328 (1990).

<sup>54</sup> *Id.*

<sup>55</sup> U.S. Dep't of Hous. & Urb. Dev., *Assessing a Person's Request to Have an Animal as a Reasonable Accommodation Under the Fair Housing Act*, U.S. DEP'T OF HOUS. & URB. DEV. (Jan. 28, 2020), <https://www.hud.gov/sites/dfiles/PA/documents/HUDAsstAnimalNC1-28-2020.pdf>; U.S. Dep't of Hous. & Urb. Dev., *Fact Sheet on HUD's Assistance Animals Notice*, U.S. DEP'T OF HOUS. & URB. DEV. <https://www.hud.gov/sites/dfiles/PA/documents/AsstAnimalsGuidFS1-24-20.pdf> (last visited Jan. 12, 2022).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

In terms of a request for reasonable accommodation, “reasonableness” can be interpreted differently. As a result, on January 28, 2020, HUD issued an “Assistance Animal Notice” (“Notice”) to provide guidance to housing providers who are presented with a request for an assistance animal as a reasonable accommodation under the Fair Housing Act.<sup>58</sup> The Notice provides some direction to community associations on how to respond to an individual’s request for a reasonable accommodation in the form of an assistance animal under the FHA.<sup>59</sup>

Let’s put this into context: An individual with a disability may be entitled to keep a monkey as an assistance animal, but the individual requesting the accommodation has the substantial burden of demonstrating a disability-related need for the monkey.<sup>60</sup> While HUD has not provided an example of this burden being met in the case of an ESA, the agency states it could be met in the case of small monkey because the monkey is able to open medication bottles. So, what can be done? The short answer: Not much. Ultimately, the association would likely be required to grant a waiver from its “no monkeys” rule. If the association refuses to do so, it could be accused of discrimination under the FHA. Of course, and without getting into too much detail, there are the subjective elements of determining what is “reasonable and necessary” to allow a disabled owner the full enjoyment and use of their home.

If a proper request for reasonable accommodation is made, and the request is supported by the documentation associations are permitted to seek under the FHA, the associations’ hands may be tied. Unlike airlines (which are subject to different statutes), associations may not ban an ESA unless one of the FHA’s exceptions apply.

#### Relevant Case Law – Assistance Animals and other Requests for Reasonable Accommodations and Modifications

Case law reinforces the notion that, under the FHA, an association cannot flat-out prohibit assistance animals, despite pet restrictions or policies that would otherwise disallow the harboring of such animals. In *Bhogaita v. Altamonte Heights Condominium Assn.*, a case out of New Jersey, Appellee Ajit Bhogaita, who suffers from post-traumatic stress disorder (PTSD), filed suit against Appellant Altamonte Heights Condominium Association, Inc. (“Association”) for violating the disability provisions of the Federal and Florida Fair Housing Acts, 42 U.S.C. § 3604(f)(3)(b) (“FHA”) when it enforced its pet weight policy (25 lbs.) and demanded Bhogaita remove his emotional support dog from his condominium.<sup>61</sup> The jury awarded Bhogaita \$5,000 in damages, and the district court

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Bhogaita v. Altamonte Heights Condo. Ass’n, Inc.*, 765 F.3d 1277 (11th Cir. 2014).

awarded Bhogaita more than \$100,000 in attorneys' fees. The Court determined that Bhogaita proved that (1) he was disabled within the meaning of the FHA; (2) requested a reasonable accommodation; and (3) the requested accommodation was necessary to afford him an opportunity to use and enjoy his dwelling.<sup>62</sup> The final element required to prevail under a failure to accommodate claim is that the defendant refused to make the accommodation. The facts of the case show that the Association took longer than six (6) months to respond to Bhogaita's request claiming that they were still deliberating and needed additional information. The Court held that the Association's failure to make a timely determination after meaningful review amounts to constructive denial of a requested accommodation, "as an indeterminate delay has the same effect as an outright denial."<sup>63</sup>

There are also many cases that revolve around the breed of the ESA. For example, in *Warren v. Delvista Towers Condo. Ass'n, Inc.*, a community association in Florida argued that a resident's accommodation request under the FHA to modify the association's "no pet" policy was unreasonable because the plaintiff's emotional support animal was a pit bull and pit bulls were banned by county ordinance.<sup>64</sup> The Court found that changing a no pets policy for an emotional support animal was a reasonable accommodation under the FHA. The court also found that enforcing the county ordinance would violate the FHA by permitting a discriminatory housing practice. Interestingly enough, the Court still determined that genuine issues of material fact remained as to whether the dog posed a direct threat to members of the condominium association, and whether that threat could be reduced by other reasonable accommodations.<sup>65</sup> In other words, the dog itself should have been allowed but the fact that it was a pit-bull, and a possible direct threat to others, was still at issue.

Can the association deny a request for reasonable accommodation or modification? Yes, but the association must proceed with caution. As discussed below, a Court in Plano, Texas reviewed the issue during the height of the COVID-19 pandemic.

A resident living in a deed restricted single-family community filed suit against the Willow Bend Lake Homeowners Association arising out of the association's failure to grant his request for a reasonable accommodation and modification.<sup>66</sup> The resident had requested an emergency order to allow him to fence off his yard because his disability — a compromised immune system — left him vulnerable to COVID-19 exposure from

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<sup>62</sup> *Id.*

<sup>63</sup> *Groome Res. Ltd. v. Parish of Jefferson*, 234 F.3d 192, 199 (5th Cir. 2000).

<sup>64</sup> *Warren v. Delvista Towers Condo. Ass'n, Inc.*, 49 F. Supp. 3d 1082, 1089 (S.D. Fla. 2014).

<sup>65</sup> *Id.*

<sup>66</sup> *Eastwood v. Willow Bend Lake Homeowners Ass'n, Inc.*, Civil Action No. 4:30-CV-00400, 2020 WL 3412409 (E.D. Tex. June 22, 2020).

passing strangers.<sup>67</sup> The association had previously denied the resident's request to install a new three-sided fence around the back portion of his yard between the path and the lake.<sup>68</sup> Later, the resident was diagnosed with cancer and began chemotherapy treatments<sup>69</sup>. His doctor advised him that direct sunlight was therapeutic to his physical and psychological recovery from cancer, but only the unfenced portion of his yard next to the lake got direct sunlight.<sup>70</sup> In April 2020, the resident requested a reasonable accommodation and modification to allow him to install the second fence due to his disability (an impaired immune system).<sup>71</sup> In light of the COVID-19 pandemic, the resident said his doctor now believed that it was too risky for him, due to his compromised immune system and his susceptibility to the virus, to be around people who were not part of his household.<sup>72</sup> For this reason, the resident said that he and the doctor agreed that it wasn't safe for him to use the unfenced portion of his yard. The association denied his request.<sup>73</sup>

The resident filed suit claiming that the association's denial of his request for a reasonable accommodation and modification violated the FHA.<sup>74</sup> Interestingly, the Court found in favor of the association on the grounds that the resident had failed to establish that he had a disability and failed to point to any cases to support his claim that staying away from strangers was a major life activity.<sup>75</sup> Instead, the Court held that this activity was outside the range of major life activities—those central to daily life such as walking, seeing, and breathing.<sup>76</sup>

Another key case worth discussion, which made its way to the Supreme Court of New York, examines the association's responsibility towards a resident with mental impairment as it pertains to a reasonable accommodation request for an assistance animal.<sup>77</sup> In the case, a young girl name Erica Stein, who suffered a stroke at the age of 12, lived in an apartment in a cooperative building in the city.<sup>78</sup> Stein was legally disabled and suffered from major depressive disorder and generalized anxiety disorder.<sup>79</sup> Per her psychiatrist's recommendation, Stein had acquired eight dogs and two cats to reduce her

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> 79 W. 12th St. Corp. v. Kornblum, No. 154129/2017, 2020 WL 6899348 (N.Y. Sup. Ct. Nov. 24, 2020).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

medical ailments.<sup>80</sup> The Board had received multiple complaints about the animals over the years.<sup>81</sup> In its defense, the association argued that that it had never received a request for permission to harbor pets; the pets were a violation of the cooperative's covenants; the pets created odor and noise annoyance to other residents; and the dogs and apartment lacked proper hygiene.<sup>82</sup> Finally, the association claimed that harboring eight dogs and two cats did not qualify as a legitimate reasonable accommodation under any city, state or federal disability laws.<sup>83</sup> The facts revealed that the Board had asked Erica to remove some, not all of the animals, and she refused.<sup>84</sup> Deposition testimony also provided that Erica's psychiatrist was not able to provide response when asked why four dogs instead of eight wouldn't be sufficient to support Erica's mental health.<sup>85</sup> The Court ultimately determined that Erica was not able to meet her burden to show that the harboring of eight dogs justified the granting of a reasonable accommodation which would alleviate the symptoms of her disability.<sup>86</sup> This case stands for the proposition that that while an association is certainly under obligation to honor requests for reasonable accommodations, what is "reasonable" is subjective.

As we have all no doubt experienced at this point, our clients tend to get themselves in legal trouble when they decide that a resident is "faking" the disability and seek to deny the requested accommodation or modification on that basis alone. Recently, a disabled veteran resident approached a client of ours with a request for a reasonable accommodation and modification in the form of an exception to the square footage requirements for outbuildings on lots in the community. The resident was constructing a workshop, and alleged that due to his disability, he required extra square footage in which to move around the workshop. The association's architectural review authority denied the request because it didn't believe a disability would require extra square footage. The resident submitted proof of disability from the US Department of Veterans Affairs and provided a doctor's letter establishing the nexus between the disability and the need for the requested accommodation and modification since the resident was wheelchair-bound (which was previously unknown to the association) and needed extra room for his wheelchair to move about the workshop. Although we recommended approval of the request, the association still wanted to deny the request because a board member had seen Facebook posts of the resident walking along a beach and duck hunting. Naturally, the association had no idea when those pictures were taken. We

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

advised the client that since all required information had been provided, it had little choice but to approve the resident's request. Unfortunately, until such time as additional laws are enacted to take "fakers" to task (because we all know that there are many residents out there who submit dishonest requests for accommodations and modifications), associations are obligated to comply with the FHA as currently drafted.

### *Group Homes*

Another example of a reasonable accommodation issue related to mental disability is the establishment of the group home. The FHA prohibits municipalities and other local government entities from making land use decisions or implementing land use policies that exclude or otherwise discriminate against individuals with disabilities.<sup>87</sup> Group homes fall under this limitation. As we have already determined, the FHA applies to community associations. Bottom line: an association may not enforce an outright ban on group homes. The community association must instead ensure that adoption and enforcement of its restrictions occur in a legally compliant manner that does not raise a discrimination red flag. The two major concerns that arise regarding group homes in community associations pertain to the single-family use restriction and the commercial/business use restriction.

In most cases, the community association has the general authority to restrict or prohibit the operation of commercial and business activities on properties within the community. The intent behind such provisions is to reduce the burdens placed upon association's common areas (i.e., customers/employees parking in the community association's streets or parking spaces), and to prevent commercial activities from becoming a nuisance to neighboring homeowners and the community association in general.<sup>88</sup> Certainly, the owner of a group home that accepts payments for services provided at the home is engaging in commercial activity. While a prohibition against any commercial use of homes within a community association does not expressly single out disabled persons for adverse treatment, if its ultimate effect is to prohibit the provision of residential care to disabled elderly or mentally ill persons, the covenant may violate the FHA due to its disparate impact.<sup>89 90</sup> This is true whether the restriction comes in the

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<sup>87</sup> See Joint Statement of U.S. Dep't of Just. & U.S. Dep't of Hous. & Urb. Dev., *supra* note 23.

<sup>88</sup> Christopher R. Moore, *HOAs and Group Homes: The Challenge of Developing a Fair And Compliant Policy*, HOMEOWNERS PROTECTION BUREAU, <https://www.hopb.co/blog/hoas-and-group-homes-the-challenge-of-developing-a-fair-and-compliant-policy> (last visited, Jan. 11, 2022).

<sup>89</sup> See *Broadmoor San Clemente Homeowners Ass'n v. Nelson*, 30 Cal. Rptr. 2d 316 (Cal. Ct. App. 1982).

<sup>90</sup> Courts have recognized two basic types of discrimination claims: disparate treatment and disparate impact. In disparate treatment cases, the policy at issue explicitly discriminates against a protected class. A claim arising from an association's covenant banning any "place for the care or treatment of the sick or disabled, physically or mentally" would be a disparate treatment case because the covenant expressly

form of a covenant which prevents use of a residence as a sober home or a deed restriction which prohibits homeowners from selling to buyers who intend to operate a group home to serving disabled persons. See, *United States vs. Scott*, 788 F. Supp. 1555 (D. Kan. 1992) (association's suit to block sale of home to group-home operator based on deed restriction violated FHA); *United States vs. Wagner*, 940 F. Supp. 972 (N.D.Tex., 1996) (member's suit to block sale to group home serving mentally disabled children based upon single-family restriction violated FHA).<sup>91</sup>

In addition, an association's governing documents may also contain a single-family use restriction which limits the number of unrelated persons that may reside in the home. Again, this type of restriction would exclude the operation of a group home. However, as mentioned above, provisions such as these may be unenforceable as violations of the FHA. It is important to note, however, that not all group homes house disabled persons. Assuming no other protected class is involved, a single-family restriction would likely be enforceable against a group home acting as a hostel or temporary housing for workers.

Interestingly, federal courts and the DOJ have consistently found that both "alcoholism" and "drug addiction" can qualify as a "physical or mental impairment"<sup>92</sup> but does not include impairment resulting from the current, illegal use of a controlled substance.<sup>93</sup> For example, an individual who . . . has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use.<sup>94</sup>

As previously mentioned, the association is not completely without recourse. If the request for addition of a group home would impose an undue financial and administrative burden on the association or it would fundamentally alter the nature of the association's operations, it can deny the request. An association has a strong argument that a group home has no place in a residential, single-family neighborhood

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discriminates based on disability. See *Westwood Homeowners Association vs. Tenhoff*, 745 P.2d 976 (Ariz. Ct. App. 1987). In disparate treatment cases, the reasonable accommodation required is usually non-enforcement or repeal of the covenant.

Disparate impact cases involve "facially neutral" policies that have a disproportionately adverse impact on a protected class. For instance, a single-family only covenant does not, on its face, discriminate against disabled persons, but, if enforcement of the policy prevents a group home for AIDS patients from operating within the HOA, the policy has a disparate impact requiring reasonable accommodation. See *Hill vs. Cmty. of Damien of Molokai*, 911 P.2d 861 (N.M. 1996).

<sup>91</sup> Moore, *supra* note 87.

<sup>92</sup> See 24 C.F.R. §100.201(a)(2).

<sup>93</sup> *Id.*; see also 42 U.S.C. § 12111(8).

<sup>94</sup> *Buckley v. Consol. Edison Co.*, 155 F.3d 150, 154 (2d Cir. 1998) (citing 42 U.S.C § 12114(b)(1)).

and that the allowance of such a home would fundamentally alter the nature of the association's operations. Such an allowance could also unduly burden an association from a financial standpoint because the group home's existence may force the association to obtain additional insurance. Administratively, the association may have a difficult time keeping track of the identity of the residents in the group home. Also, should the association obtain criminal background searches on the residents in the home? Depending on your state's laws, such action may not be permitted. Even if it is, does the association really want to require that information? In doing so, the association may create a duty to ensure that the residents of the group home are not felons, the breach of which may expose the association to liability.

The cases in the next section demonstrate how courts have ruled on the group home as a reasonable accommodation.

### Relevant Case Law – Group Homes

In *Rhodes vs. Palmetto Pathway Homes, Inc.*, a case out of the Supreme Court of South Carolina, a property owner filed suit to enjoin a nonprofit organization from establishing a group residence for mentally impaired adults in a residential subdivision.<sup>95</sup> The property owner claimed that operation of a group home violated the following provisions of the restrictions: "The property hereby conveyed shall not be used otherwise than for private residence purposes, nor shall more than one residence, with the necessary outbuildings be erected on any one lot, nor shall any apartment house or tenement house be erected thereon; nor shall any one lot be subdivided or its boundary lines changed from the location as shown on said map without in any one of the cases above enumerated the written consent of the grantor endorsed on the deed of conveyance thereof."<sup>96</sup> The Court disagreed and held the location and operation of a group residence for mentally retarded adults in the manner and under the conditions proposed by the appellant would not significantly alter the character of the residential community in which it is situated and would not infringe upon the plain and obvious purpose of the restrictive covenants.<sup>97</sup> Furthermore, the Court found that enforcement of this restrictive covenant would have the effect of depriving the mentally impaired of rights guaranteed under the Fair Housing Amendments Act.<sup>98</sup>

In a Texas case<sup>99</sup>, the Deep East Texas Regional Mental Health and Mental Retardation Services ("DET") proposed to build an architecturally correct structure

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<sup>95</sup> *Rhodes vs. Palmetto Pathway Homes, Inc.*, 400 S.E.2d 484 (S.C. 1990).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Deep E. Tex. Reg'l Mental Health and Mental Retardation Servs. vs. Kinnear*, 877 S.W.2d 550 (Tex. App.—Beaumont 1994)

wherein six females with mental impairment would reside and would be supervised and carefully regulated by two staff members.<sup>100</sup> The supervision would be on a 24-hour, seven-day week basis.<sup>101</sup> DET argued that the trial court erred in finding the restrictive covenants forbade DET's intended use of its lots in the Bay Meadows Subdivision and challenged the trial court's conclusion that the proposed home would not as a structure constitute a single-family residence and thereby a violation of certain restrictive covenants would result.<sup>102</sup> The Court aligned with the holding in the Rhodes case above and found that, by attempting to enforce the challenged restrictive covenants to prevent mentally handicapped individuals from residing in their neighborhood (as the uncontroverted facts before us reveal), the plaintiffs have "otherwise ma[de] unavailable or den[ied]" a dwelling or a residence to DET and the mentally handicapped or mentally retarded individuals.<sup>103</sup> The Court concluded, no restrictive covenant or deed restriction can deny or limit the ability of such disabled persons who meet and qualify under the statute to live anywhere in the State that they choose.<sup>104</sup> In view of the public policy announced and the statutes noted, we are constrained to find that the trial court did abuse its discretion in ordering a permanent injunction against the construction and operation of the proposed community home/family home.<sup>105</sup>

In *Westwood Homeowners Association vs. Tenhoff*, a community association in Arizona sought declaratory and injunctive relief to compel closing of residential facility for the developmentally disabled.<sup>106</sup> In this case, the Court agreed that the state licensed and funded residential care facility violated the restriction that "no business of any kind or character whatsoever shall be conducted in or from any residence on said lots," relying on *Seaton v. Clifford*.<sup>107</sup> However, the Court acknowledged its duty to determine whether or not enforcement of the restriction violated public policy. Ultimately, the Court found that enforcement of the restriction did not fit into the intent enunciated by the legislature and therefore could not be enforced.

The cases in this section and those related to assistance animals and other requests for reasonable accommodation above provide serve to provide insight into how various across the country might rule if an association is forced to defend itself against a claim for disability discrimination under the FHA. The second half of this paper will delve

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<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*; 42 U.S.C. § 3604(f)(1)(B).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> See *Westwood Homeowners Ass'n vs. Tenhoff*, 745 P.2d 976 (Ariz. Ct. App. 1987).

<sup>107</sup> *Seaton v. Clifford*, 100 Cal. Rptr. 779 (Cal. Ct. App. 1972).

deeper into the association's purposes and obligations to the community and best practices for how properly handle a mental health related issue in the community.

### **WHAT ARE THE ASSOCIATION'S PURPOSES AND OBLIGATIONS?**

Before discussing the association's obligations to the community and its membership, it is important to identify the purpose for which the community association model exists. Community associations are designed to do the following:

- Maintain the property's common areas
- Preserve and protect property values
- Provide services for members
- Develop a sense of community<sup>108</sup>

Interestingly, in reviewing the above purposes, one can see how mental health issues could affect every category. A mentally ill resident's actions could result in damage to common area or injury to another resident or create unsafe conditions in the common areas.<sup>109</sup> A mentally ill member's actions in failing to maintain his/her lot/unit or causing damage to his/her lot/unit could affect the property values in the community. The provision of services for members can include the provision of resources to the community regarding mental health. The development of a sense of community can be directly impacted by a mentally ill member's nuisance activity.

What are an association's obligations in advancing the above purposes? A key obligation is enforcement of the association's governing documents. Regardless of the state in which you practice, part and parcel in the enforcement of the governing documents is the obligation of the association, through its board of directors, to uniformly enforce the documents as to all members and to act in good faith and in what the board reasonably believes to be in the best interest of the community.

So, how does mental illness affect the association's ability to achieve its purposes and meet its obligations?

Consider the following story: Last year, an overwhelmed manager of a large master planned community came to us at her wit's end and on the verge of quitting her job due to a situation with certain residents in the community. Here was the situation and

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<sup>108</sup> See *An Introduction to Community Association Living*, CMTY. ASS'NS INST. (2017) [https://www.caionline.org/LearningCenter/Homeowner%20Education/Intro to CA Living.pdf](https://www.caionline.org/LearningCenter/Homeowner%20Education/Intro%20to%20CA%20Living.pdf).

<sup>109</sup> Case in point: A client came to us with the following issue: Every night, a homeowner reported that her neighbor (a mentally ill resident) would spend hours digging deep holes in his front yard. In addition to being kept up each night, the homeowner was afraid the resident might be dangerous. She was also concerned that she would be unable to sell her house due to the state of the neighboring yard. The association's prior attempts at enforcement had failed. The family had washed their hands of the resident. Social services had to become involved, and the resident was placed in assisted living.

how it had played out up to the point of our involvement: Some moms were playing with their kids at the community's park. A male resident – without a child – was also at the park. Let's call him Joe. Joe was sitting on a bench at the park with his phone out. The moms claimed that Joe was videotaping their children and started yelling at him to leave the park. One of the moms went home and told her husband what had happened. The husband, who happened to be an administrator on an unofficial association social media page and a member of its neighborhood watch committee (a lethal combo), registered a complaint with the manager. The man then took it upon himself to initiate a vicious campaign to ostracize Joe and force him out of the community. He posted Joe's name and address on the social media page, where he also accused Joe of being a pedophile. As if that wasn't bad enough, the man organized a confrontation at Joe's house and recruited a bunch of other residents to join his "mob." The date and time of the confrontation was set. The manager became aware of the details and called us in a panic. We told her to call law enforcement. Law enforcement arrived on the scene. Luckily, when the mob saw the cops, they quickly disbursed, and the confrontation didn't occur.

What if the manager hadn't found out about the proposed confrontation ahead of time? What if the cops hadn't been called? Someone could have easily gotten shot or worse (we're in Texas after all!).

Back to Joe. After the near-miss confrontation, we contacted Joe's wife to discuss the park moms' claims of Joe videotaping children. According to Joe's wife, Joe suffers from a mental illness that makes him act in socially awkward ways. Although his behavior can occasionally be perceived as odd, Joe is neither a threat to himself nor anyone else. That day at the park, Joe was just sitting on the bench reading his phone. When the moms started yelling at him, he started recording the altercation because he was scared. Joe's wife told me that ever since that day, their lives had become a walking nightmare. They had become pariahs in the neighborhood. The situation had gotten so bad that members of the anti-Joe contingent had started throwing beer bottles at their car as they drove by, which prompted them to buy a new vehicle. Shockingly, this happened in a family-friendly, upper middle class residential neighborhood in a desirable location in San Antonio, Texas.

The truth? Joe was not a pedophile. Joe was just a mentally ill resident with the same rights at peaceful enjoyment of his property and the community as everyone else. How did the situation resolve? Joe and his wife got a lawyer, who issued cease and desists and threatened legal action against all involved parties. They didn't come after the association, though. Why? They appreciated the fact that the association contacted them to obtain their side of the story before issuing a violation letter (which we still had to send, of course). The association followed its enforcement procedures as dictated by statute and its governing documents but did so with empathy and compassion. As for

the mob leader? He was removed from his position on the neighborhood watch committee and subsequently moved out of the neighborhood. Not surprisingly, there have been no issues with Joe since the rabble rouser's departure from the community.

This situation raises a lot of issues. First, the association was exposed to liability should the confrontation have gone forward, and someone had gotten hurt given that the association knew the details and location of the confrontation ahead of time. Second, the association was obligated to enforce its restrictions as to the mob leader's nuisance behavior in the bullying of Joe and his incitement of a confrontation that could have placed the health and safety of the community at risk. Third, the association was obligated to pursue Joe's alleged nuisance behavior at the park.

Joe could easily have claimed that he was being discriminated against on the basis of a disability had the association pushed the issue at the park. Joe could have also claimed that the association had failed to prevent a hostile housing environment in violation of his civil rights under the Fair Housing Act.<sup>110</sup> And what about the manager? Should a manager really have to undertake, as part of his/her job duties, the quelling of a mob? After months of dealing with the ongoing saga, this manager's mental health had been detrimentally affected. Not only was she close to quitting her job, but she experienced ongoing stress and anxiety.

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<sup>110</sup> Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 81 Fed. Reg. 63,054 (Sept. 14, 2016) (to be codified at 24 C.F.R. pt. 100). Per the Fair Housing Act, housing providers cannot:

- (1) make unavailable or deny a dwelling to any person because of a protected class;
- (2) discriminate against individuals in the provision of services or facilities relating to their dwellings;
- (3) make statements that indicate a preference or limitation or discrimination in the sale or rental of a dwelling because of a person's protected class;
- (4) coerce, intimidate, threaten, or interfere with an individual for exercising or enjoying a right or protection granted by the Act; or
- (5) coerce, intimidate, threaten, or interfere with an individual in the enjoyment of his or her dwelling because of the individual's protected class.

Pursuant to these standards, community associations and their boards and managers could be held liable if they failed to successfully address harassment of owners in their communities who were part of a protected class. In October 2016, the U.S. Department of Housing and Urban Development (HUD) publishing new interpretive regulations regarding harassment claims under the Act. Under these regulations, HUD formalized standards for evaluating claims of "quid pro quo" and "hostile environment" harassment in the housing context, and "clarif[ied] when [respondents] may be held directly or vicariously liable under the Act for illegal harassment."

The new regulations unequivocally established HUD's view that associations and managers, as well as their employees and agents, may be held liable for discrimination under the Fair Housing Act if they knew or should have known of discriminatory conduct occurring in their associations and failed to take action to address it. Under this regulation, a community association can be held liable under the Act for resident-on-resident harassment (based on a protected class) if the harassment violated the association's restrictive covenants and the association opted against enforcement of the restrictions.

The truth is that the manager wanted to help Joe. We wanted to help Joe. We all acknowledged that Joe was being bullied and no one likes bullies. As legal counsel, I had to advise the manager that she had to put emotion aside and fight the urge to rush to Joe's aide. Had she vocally sided with Joe against the mob, she may have placed the association at legal risk; put Joe or other members' safety at risk; or even inadvertently created an affirmative duty on the part of the association to take action to protect the membership's security and safety. Too often this is the difficult position in which management is placed.

So, how should we advise our managers and boards when they are confronted with mental health or illness issues in their communities? We recommend that our clients take action to avoid liability while at the same time honoring the association's obligations to the community and its membership by utilizing the following best practices when dealing with mental health issues in their community associations.

## **BEST PRACTICES**

### **1. Educate Management and Boards.**

Management and boards need to understand that their role is not to provide mental health or assisted living services to mentally ill residents. Rather, community associations operate to meet the needs of the membership on a uniform and equal basis while enforcing the community association's restrictions towards the goal of preservation and protection of property values. While the instinct is to take action to help a mentally unstable resident, the board and management must understand and appreciate the legal boundaries which exist that prevent them from taking certain actions that may ultimately create a duty on the association's part to provide security to the membership, the breach of which could expose the association to liability.

### **2. Document Everything**

Document all incidents. Keep a detailed record of all interactions with the resident. Note all homeowner complaints. Obtain witness statements. Keep the board members informed regarding any and all developments. Consider involving legal counsel at an early stage so counsel is aware of the issue and can provide guidance.

### **3. Schedule a Violation Hearing**

Follow the association's enforcement procedures and your state's statutory enforcement procedures, if any. Send the required violation letters. Hold a violation hearing. Handle the situation exactly as you'd handle any other violation – keeping in mind that you can and should act with empathy and compassion when enforcing the restrictions. Uniformity and consistency are key.

#### 4. **Take Legal Action**

If initial enforcement steps do not obtain compliance, the association may be forced to obtain a court order to stop the resident's behavior by way of a restraining order or injunction. Make sure the association knows the pros and cons involved should the Board elect to proceed with formal legal action.

#### 5. **Engage Government Assistance**

The United States Government maintains an excellent national database of state social service agencies that can be contacted to provide assistance to a mentally ill community member – whether that member is an adult or a child<sup>111</sup>. These agencies have the knowledge base, skill and authority, if needed, to take action to provide care for a mentally ill resident. Additionally, the Substance Abuse and Mental Health Services Administration within the U.S. Department of Health and Human Services leads public health efforts to advance the “behavioral health of the nation” with the goal of reducing the impact of substance abuse and mental illness in the United States.<sup>112</sup> Help is available.

#### 6. **Call the Emergency Contact or Family**

First, we recommend that the community association ask each resident to provide emergency contact information as part of the resident's registration with the community association. Second, the association should ask for and obtain the resident's consent to contact a family member or emergency contact in the event the resident requires emergency health assistance. Oftentimes, the resident's family is unaware of the extent of a resident's mental instability and will step up to assist. Unfortunately, sometimes the family cannot be located or declines to get involved. In those cases, the association should utilize governmental assistance rather than take on the job of providing care for a mentally unstable resident – which, as we've discussed, it does not have the obligation or authority to do.

#### 7. **Adopt Amendments/Policies/Procedures and Follow Them**

Adopt governing document enforcement and fining procedures to address the handling of enforcement issues. Establish a procedure to allow the membership to log complaints or report incidents involving violations of the governing documents. Adopt

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<sup>111</sup> *State Social Service Agencies*, U.S. GOV'T, <https://www.usa.gov/state-social-services> (last visited Jan. 12, 2022).

<sup>112</sup> *About Us*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN. <https://www.samhsa.gov/about-us> (last updated Sept. 17, 2021). Congress established the Substance Abuse and Mental Health Services Administration (SAMHSA) in 1992 to make substance use and mental disorder information, services, and research more accessible.

an amendment to the restrictions authorizing the eviction of a resident from a home as a result of nuisance or dangerous behavior.

8. **Make Resources Available**

Provide resources to the membership (perhaps on the association's website) where residents can obtain information on where to seek help for mental illness or mental health challenges. The tagline doesn't have to say, "Where to seek help if you're crazy." It should be more empathetically described as resources for those who are suffering from anxiety, stress or other mental illness or health issues.

9. **Host Community Activities Aimed at Mental Health**

There's a reason wellness retreats and resorts exist. These facilities and the classes they offer are aimed and are quite successful at promoting life in balance; healing the self; and engaging in the present moment. To that end, perhaps explore offering group classes for the membership aimed at fostering mental health: meditation, yoga, or even a book club. Poll the community and ask what kinds of classes they'd like to attend. Will group classes solve the mental health crisis in America? No, but it can't hurt to offer options that may offer even temporary relief from the stresses of the world.

10. **Call the Cops!**

We frequently have to remind associations who claim that various crimes are afoot and want to take matters into their own hands (again, we live in Texas after all!) that community associations aren't law enforcement agencies. When confronted with a situation in which the association sincerely fears for the safety of its membership due to the concerning actions of a mentally ill resident, the association should seek the assistance of law enforcement rather than attempt to diffuse a potentially dangerous situation by sending management or one of the association's agents into a lion's den.

11. **Call the Lawyer**

Since the actions of a mentally unstable resident can expose the community association to liability, it's important to involve legal as soon as either a pattern of behavior or conduct develops or even one outrageous and concerning incident takes place. If nothing else, forward copies of emails and incident reports to the law firm so legal can create and maintain its own file in the event legal has to get involved. If the direction given to legal is to create and maintain a file rather than review every document in that file, attorneys' fees will be insignificant, but the attorney's job will be easier down the road if the attorney does not have to chase down the file on the resident.

## FINAL TAKEAWAY IN ADDRESSING MENTAL HEALTH ISSUES IN COMMUNITY ASSOCIATIONS

These are troubled times. At the time of the writing of this paper, a new wave of COVID-19 has descended upon us. Cases of the omicron variant<sup>113</sup> are exponentially on the rise due to its highly contagious nature. Even as one of the authors of this paper writes these words, she watches for signs of respiratory distress in her four-year-old COVID-19 positive, immunocompromised, and asthmatic son.

People are feeling hopeless. Mental health is at a low point. That being the case, many of our clients will see an uptick in incidents involving mentally ill residents and will come to us for legal guidance. We recommend advising those clients – both boards and management – to lead with compassion and empathy (always compassion and empathy!) while at the same time taking steps to comply with the association’s enforcement provisions. It’s a fine line our boards and management must walk because it’s hard not to get emotionally involved in a troubled resident’s mental health struggles. We need to remind our clients of the purposes for which the community association model exists, and the obligations imposed upon boards in the furtherance of those purposes. We need to educate our boards and management regarding the legal issues at play and provide them with best practices they can and should utilize in addressing mental health issues in their communities.

So as not to end on a depressing note regarding the state of the world, we offer the following quote that always gives us hope during times of challenge:

“From crisis will come change. Without crisis, there can be no change.”

– Denise Trefry

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<sup>113</sup> *Omicron Variant: What You Need to Know*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/variants/omicron-variant.html> (last updated Dec. 20, 2021).