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ATTORNEYS AND PROFESSIONAL COUNSEL

COVENANT
ENFORCEMENT AND
THE FAIR HOUSING ACT

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What is the Fair Housing Act?

- **FAIR HOUSING ACT OF 1968**

Title VIII of the Civil Rights Act of 1968, better known as the Fair Housing Act (FHA), made it unlawful to discriminate in any aspect relating to the sale, rental or financing of housing, or in the provisions of brokerage services or facilities in connection with the sale or rental of a dwelling.

- **FAIR HOUSING AMENDMENTS ACT OF 1988**

The Fair Housing Amendments of 1988 strengthened the administrative enforcement provisions of Title VIII and added prohibitions against housing discrimination based on disability and familial status. It also provided for the award of monetary damages where discriminatory housing practices are found.



How is the Fair Housing Act Applied?

- **Federal Law**

The Fair Housing Act of 1968 and The Fair Housing Amendments of 1988

- **State Law**

Florida Statute 760.23 – adopts Federal Law

What is the Purpose of the Fair Housing Act?

IN WITNESS WHEREOF, I have hereunto set my hand and seal, this seventeenth (17th) day of July, A. D. 1939.

Signed, sealed and delivered
In presence of Anna Alexa (SEAL)
Frank C. Alderman
P. C. Alderman Jr.
STATE OF FLORIDA
COUNTY OF DEK.

I hereby certify, that before me, the undersigned authority, this day personally appeared Anna Alexa, a widow, to me well known, and known to me to be the person described in and who executed the foregoing power of attorney, and acknowledged the execution thereof to be her free act and deed for the uses and purposes therein mentioned.

Witness my hand and official seal at Fort Myers, Florida, this 17th day of July, A. D. 1939.

N. P. SEAL Frank C. Alderman Jr.
NOTARY PUBLIC in and for Florida
My commission expires August 5, 1939.

Filed and duly recorded this the
17th day of July, A. D. 1939
Eather Draughon, Clerk Circuit Court
By J. Johnson P. C.
#88790

KNOW ALL MEN BY THESE PRESENTS:
That we, JAMES D. NEWTON and HARRY E. WHITCOMB, the owners of certain lots in Block Twenty-four (24) of that certain Subdivision known as EDISON PARK, (which lots front on Euclid Avenue and lie between Clifford Street and Cleveland Avenue), in consideration of the sum of One (\$1.00) Dollar and other valuable considerations, to us in hand paid, do covenant and agree that said lots shall be subject to the following conditions and restrictions which shall run with the land:

Said lots shall be used solely for private residential purposes and only one single family residence and customary out-buildings with an aggregate cost of not less than Thirty-Five Hundred (\$3500.00) DOLLARS shall be erected on any one of said lots.

2. Said lots shall never be sold to any person of African or Asiatic descent.

WITNESS our hands and seals this 14 day of July, A. D. 1939.

Signed, sealed and delivered
In the presence of: (JDN) James D. Newton (SEAL)
Harry E. Sandler (HEW) Harry E. Whitcomb (SEAL)
Donald G. Higdon
At to James D. Newton
Mary J. Hibour
Gertrude V. Scott
At to Harry E. Whitcomb
STATE OF NEW YORK) SS
COUNTY OF NEW YORK)

Before me, the undersigned authority, this day personally appeared JAMES D. NEWTON, to me well known and known to me to be one of the persons described in and who executed the foregoing instrument, and he acknowledged before me that he executed the same freely and voluntarily for the purposes therein expressed.

#88790

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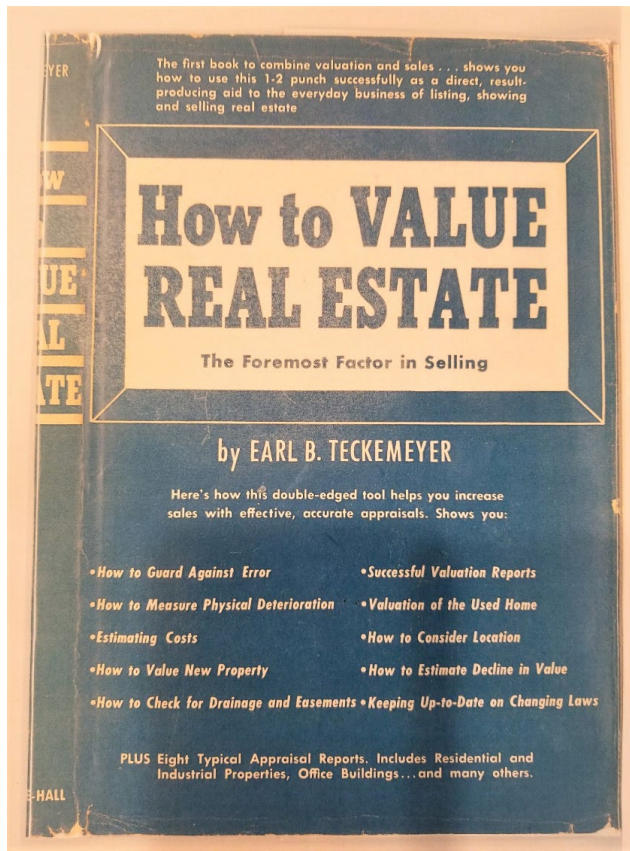
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Restrictive Covenants for Edison Park (1939)

What is the Purpose of the Fair Housing Act?



credit, probably does more than any other one thing to bolster value and keep it up in the face of the factors that tend to retard it. Look around the area—not just at the one house you are trying to list and sell—and note all the things which can be pointed out to sustain your sales price to when your sales efforts start.

4. Be able to explain neighborhood characteristics. Who lives on both sides of the house you are selling and across the street? What do they do? What nationality are they? How many in the family? How do the children like their school? Know it all, so that your buyer will not have to assume, or wonder, or find

How to Value Real Estate by Earl B. Teckemeyer (1963)

Who Must Comply with Fair Housing Laws?

Any person or entity involved in the provision of housing must comply with fair housing

Landlords and their staff

Real estate brokers, agents, and their staff

Savings & loan associations, mortgage lenders, banks or other financial institutions

Apartment managers, superintendents, and staff

Rental agents

Builders, contractors and developers

Homeowners advertising and selling their own home

Condominium and homeowners associations

Government agencies



What are the Classes of People Protected by the Fair Housing Act?

- Race
- Color
- Religion
- Sex (may include orientation)
- National Origin
- Disability
- Familial Status

Who is Included Within the Protected Classes?

Race/Color

Can apply to skin tone

ex) Landlord can't rent to light-skinned African Americans but not dark-skinned African Americans

Religion

Discrimination not prohibited in housing operated by religious organizations

Sex

May include sexual orientation

Federal Supreme Court held that landlord discriminated when woman who was a lesbian was harassed by roommates because of her sexual orientation and landlord failed to act

National Origin

Hispanics are the nation's fastest growing segment of the population; HUD has taken increased enforcement action against housing providers who are attempting to reduce or limit Hispanics in housing.

Who is Included Within the Protected Classes?

Disabled/Handicapped

Disability is determined by meeting one of the following criteria:

1.) Does the individual have a physical or mental impairment that substantially limits one or more major life activities?

-Life activities may include walking, breathing, hearing, seeing, performing manual tasks, caring for oneself, speaking, learning or working

2.) Does the individual have a record of having such impairment?

3.) Is the individual regarded as having an impairment?

(Note: the definition of disabled does not include the illegal use of, or addiction to a controlled substance; however, if an individual is in recovery from addiction, then the individual will be considered disabled)

Who is Included Within the Protected Classes?

Familial Status

Protects families with children under the age of 18

Protects women who are pregnant

Protects families who are in the process of adopting/fostering children

Exception

55+ Communities

- 80% of residents must be 55+
- Must advertise 55+ status
- Must perform census every two years to maintain 55+ status

Prohibiting Children from Amenities

Familial Status Discrimination:

- Banning children from using one of the community pools or all of the pools
- Banning diapered children from the pool (also applies to incontinent individuals- discriminates against disabilities)
- Banning children from clubhouse

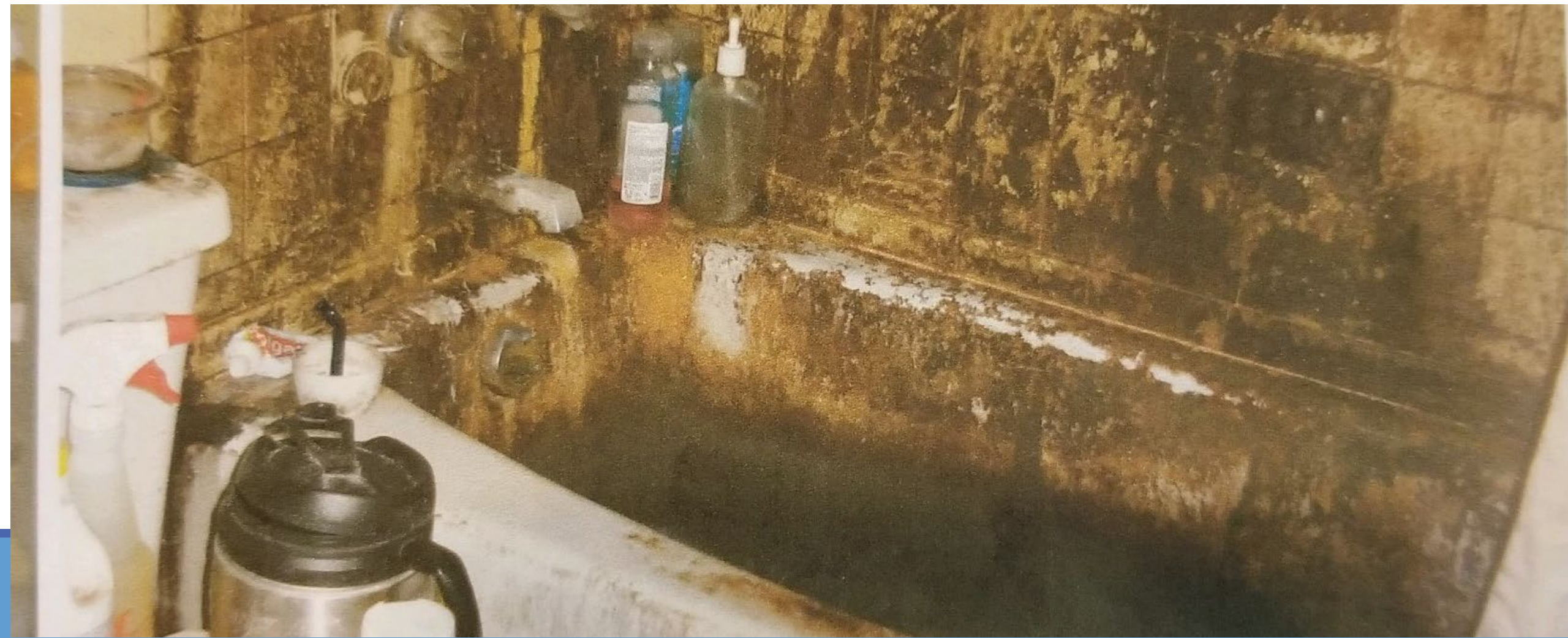




Who is Included within the Protected Classes?

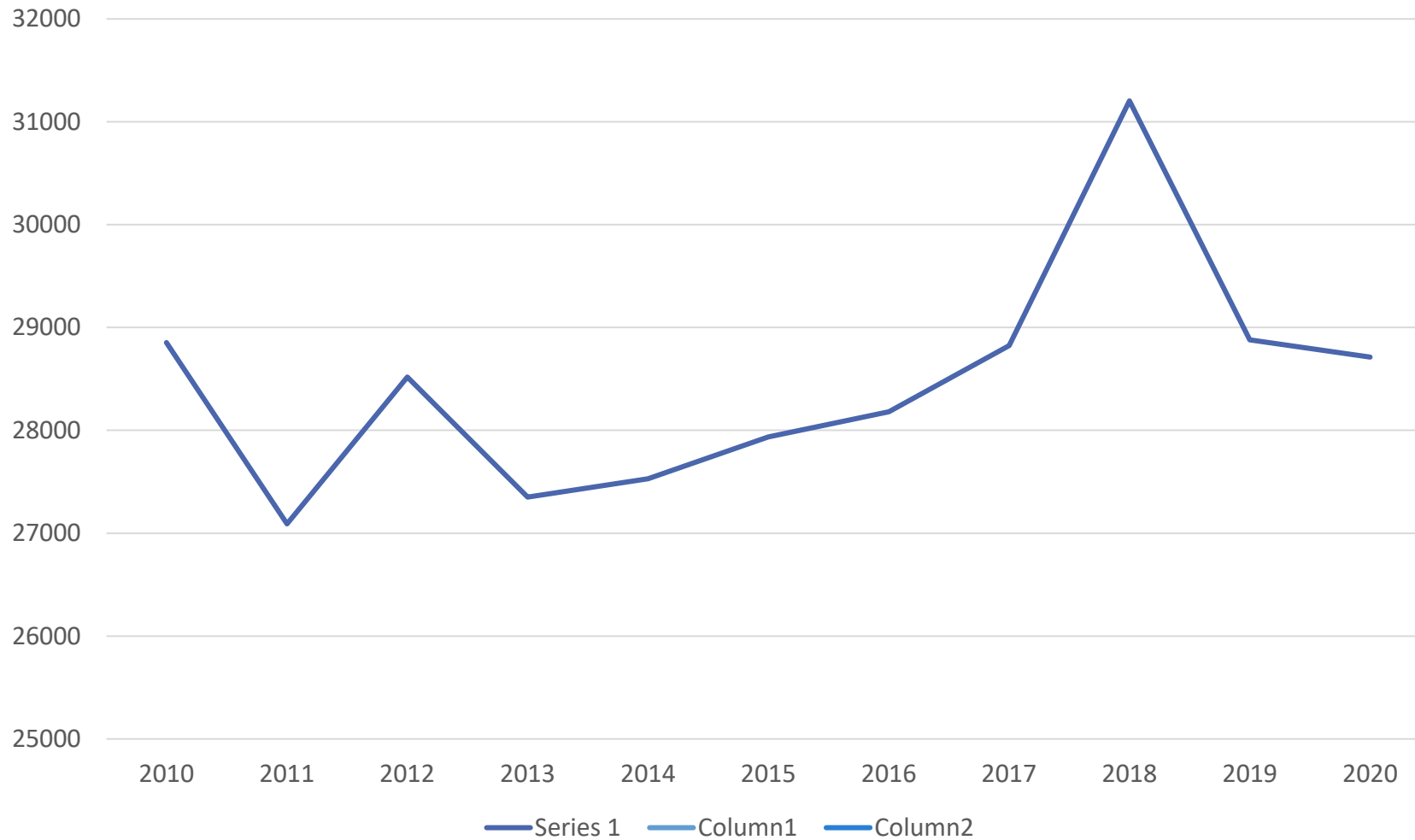
- Hoarding is considered a disability
- Housing provider is not allowed to evict hoarder based on living situation, rather they should allow accommodations for clean-up





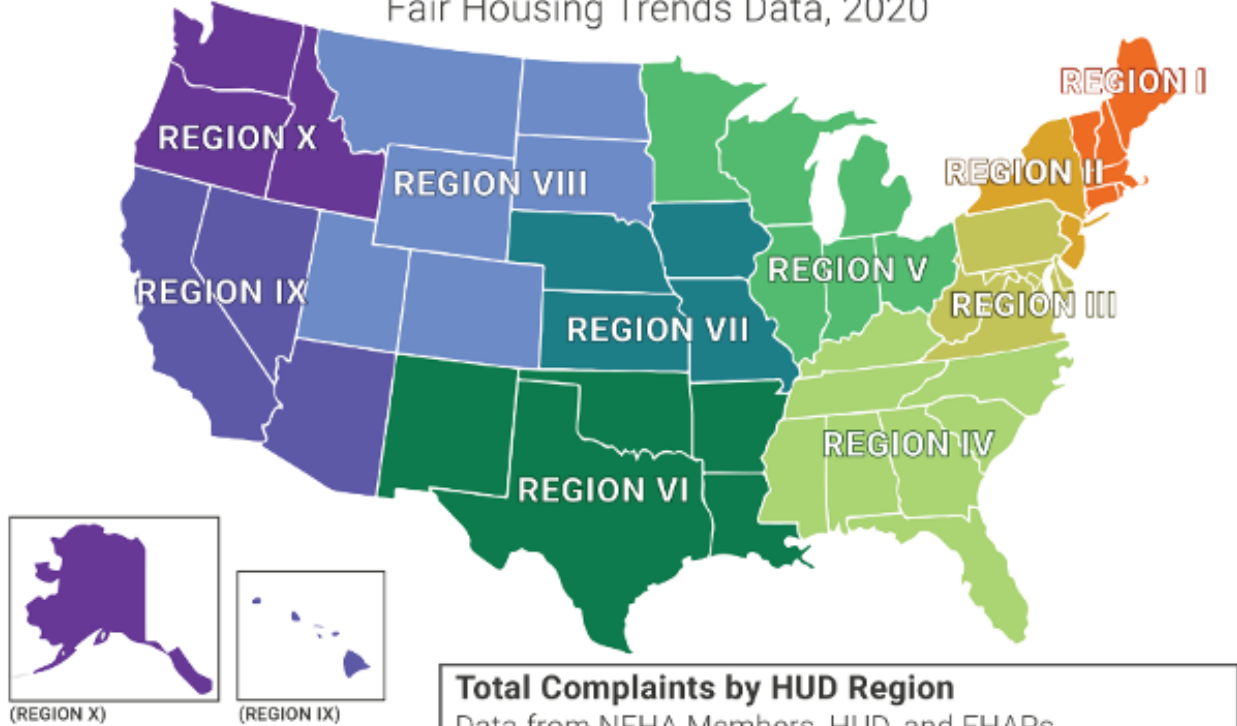


Fair Housing Complaints 2010-2020



Total Fair Housing Complaints by HUD Region

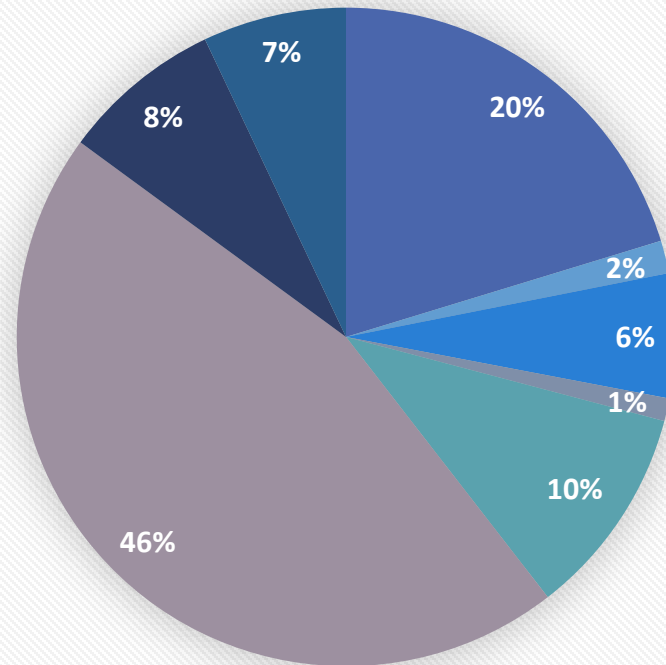
Fair Housing Trends Data, 2020



Total Complaints by HUD Region	
Data from NFHA Members, HUD, and FHAPs	
Northwest/Alaska - 2,347	Midwest - 5,263
Pacific/Hawaii - 8,639	Southeast/Caribbean - 3,265
Rocky Mountain - 1,180	Mid-Atlantic - 1,522
Great Plains - 906	New York/New Jersey - 1,430
Southwest - 2,501	New England - 1,660

Source: National Fair Housing Alliance
Madeline McBride

Housing Discrimination Complaints Reported to HUD in 2020

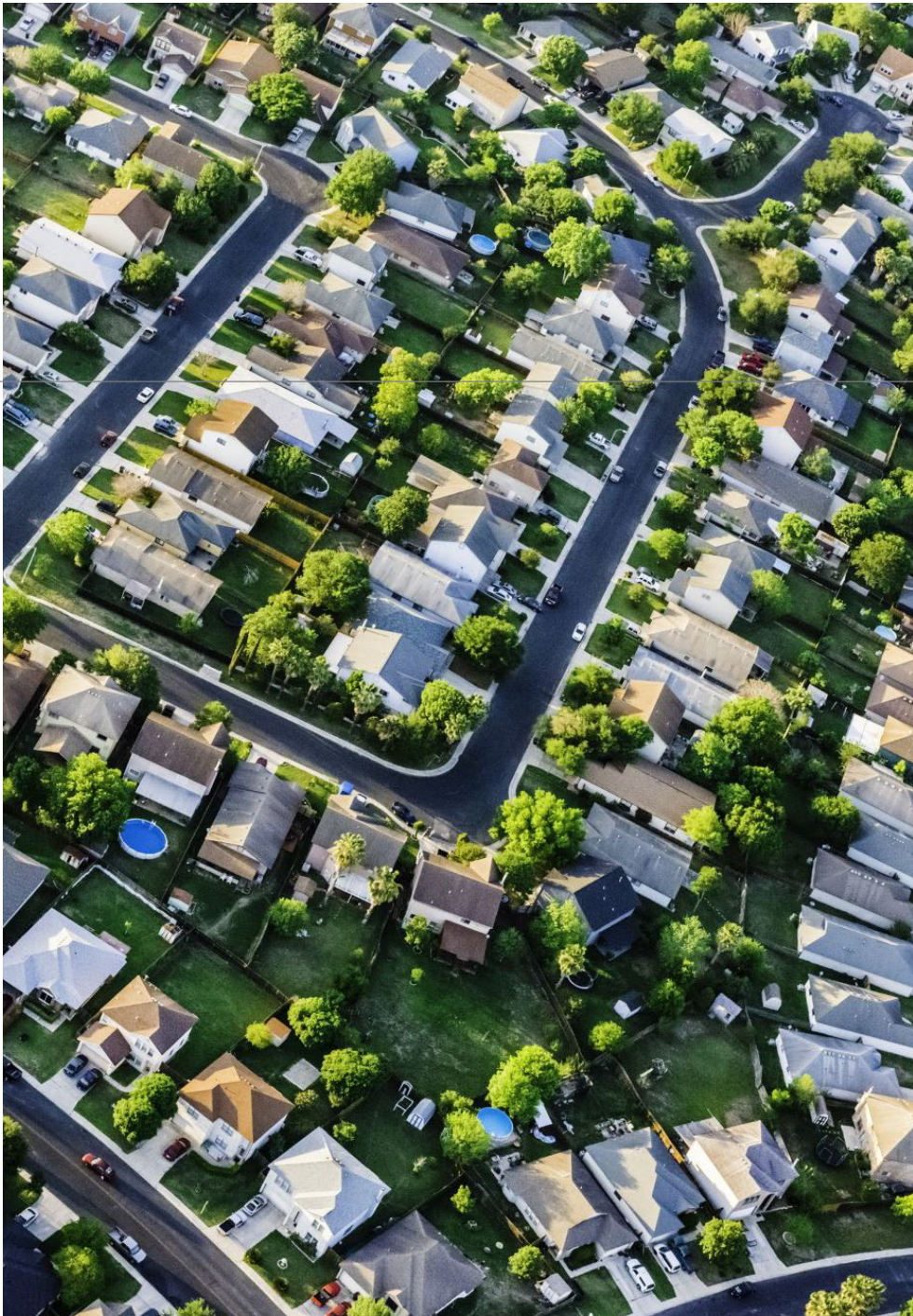



- Race
- Color
- National Origin
- Religion
- Sex
- Disability
- Familial Status
- Retaliation

What Type of Housing is Covered by The Fair Housing Act?

Any place of abode to which a person intends to return
Any dwelling is covered under the Fair Housing Act

Apartments	Any dwelling is covered by The Fair Housing Act	Long-Term Motel Stay
Homeless Shelter	Transitional Housing	Raw Land
College Dormitories	Condominiums	Single Family Homes
Mobile Homes	RV Parks	Campsites





How is the Fair Housing Act Applied in Florida?

- Several counties throughout Florida apply classes that are in addition to the 7 classes protected by Federal Law
 - Miami-Dade County
 - Broward County
 - Lee and Collier Counties follow Florida Statute with no additional protected classes

What are Additional Protected Classes Protected by Local Ordinances Throughout Florida?

Ancestry

Pregnancy

Age

Gender Identity

Gender Expression

Sexual Orientation

Source of Income

Domestic Violence Victim

Marital Status

Military Service

Political Affiliation

Woman in California Listed her home was for sale - but not to any Trump supporter (*took home off market to turn down sale*)

Does
discrimination
under The Fair
Housing Act
have to be
intentional?

No! Housing providers can be held liable for discrimination, even if the discrimination was not intentional.

In 2015, the Supreme Court upheld and established that the Fair Housing Act allows lawsuits based on disparate impact, meaning a law or practice can be determined to have a discriminatory effect even if it wasn't based on a discriminatory purpose.

A policy may appear harmless on its face, but nonetheless unfairly limit some renters' or buyers' choices when it comes to housing. There must be a legitimate business reason for such a policy, and no viable alternative.

If Complainant makes out a claim for discrimination, Courts look to Respondent to show there is some legitimate grounds for policy or practice

Does discrimination
under The Fair
Housing Act have to
be Intentional?

Examples

- Requiring full-time employment on application
 - May discriminate against those who are disabled and receiving assistance
- Occupancy limits can make it hard for families to afford a place to live. The 2-person per bedroom rule may not be advisable if it limits choices for larger families or those with young children. Should adhere to county ordinances.

Does discrimination under The Fair Housing Act have to be Intentional?

Examples

- Charging rent based on the number of occupants, which is common with student rentals, can more adversely impact families with children, making housing unaffordable or more burdensome.
- Some landlords sidestep restrictions on late fees by adding a surcharge to each month's rent, and then offering that amount back as an "incentive" for on-time rent payments. This practice could result in minority tenants paying higher rent for the same units.



How does the Fair Housing Act Apply to Housing Providers?

Housing Providers are prohibited from taking the following actions based on a protected class:

- Refuse to rent or sell housing after a bona fide offer
- Refuse to negotiate housing for sale or rental
- Set different terms, conditions or privileges for the sale or rental of a dwelling
 - Example- Cannot charge a higher security deposit if they have children or an emotional support animal
 - Example- Cannot grant move-in specials to only certain individuals
- Falsely denying that a dwelling is available for inspection, rental or sale

What if a property does not accommodate the disabled?

The disabled person can request a reasonable accommodation or modification from the housing provider.



- Reasonable Accommodation

A reasonable accommodation is a change, exception, or adjustment to a rule, policy, practice, or service that may be necessary for a person with disabilities to have an equal opportunity to use and enjoy a dwelling, including public and common use spaces, or to fulfill their program obligations.

- Reasonable Modification

A reasonable modification 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. Reasonable modifications can include structural changes to interiors and exteriors of dwellings and to common and public use areas.

What is a Reasonable Accommodation or Modification?

What are Examples of Reasonable Accommodations?

Assistance Animals

(Service Animals and Emotional Support Animals)

- Service Animals
 - Regulated by the American with Disabilities Act (ADA), Dept. of Justice
 - ADA only applies to places of public accommodation, only applies to communities that hold themselves open to the public for events
 - Applies to only dogs and miniature horses
 - Must be professionally trained (certified)
 - Must be able to perform a task

What are Examples of Reasonable Accommodations?

Assistance Animals

(Service Animals and Emotional Support Animals)

Emotional Support Animals

- Regulated by The Fair Housing Act (FHA), Housing and Urban Development
- ESA MUST be approved if Owner can provide letter from certified provider who has the ability to prescribe an ESA. Certified professional must state:
 - 1.) Person has a disability (should not provide details of disability)
 - 2.) The animal ameliorates the symptoms of the person's disability
- Applies to any type of DOMESTICATED animal
 - HUD statement as of January 28, 2020 no longer allows exotic or farm animal unless animal does a specific task
 - Cannot place restrictions on breed or size on domesticated animals
- Does not require professional training
- Only needs to provide emotional support to owner
- Owner can have a separate pet for each disability (depression, anxiety, etc.)
- Restrictions on pets do not apply to assistance animals (except nuisance or aggressiveness)



ALLOWED ACTIVITY	SERVICE DOG	EMOTIONAL SUPPORT ANIMAL (ESA)	CERTIFIED THERAPY PET
Legal right to be in all public places with the person they are assisting.	✓	✗	✗
May live with disabled owners regardless of pet policy.	✓	✓	✗
May accompany disabled owners on commercial airlines.	✓	* ✓	✗
Specifically trained to assist one individual.	✓	✗	✗
Provides emotional support to a person with a psychological disability.	✗	✓	✗
Provides companionship and emotional comfort to many people.	✗	✗	✓
Must be trained to tolerate a wide range of environments and people.	✓	✗	✓

What are Examples of Reasonable Accommodations?

- Allowing caregiver who is under 55 to reside in 55+ community
- Reserving parking spaces near dwelling if mobility issue- even if cost is incurred by housing provider
- Resident has trouble walking and requests maintenance man to carry garbage to dumpster (Reasonable if maintenance man on staff, not reasonable if community does not have maintenance man)
- Assisting person with visual disability to complete application for housing
- Allowing a tenant with mobile disability to move to a unit on the lower level

What are Examples of Reasonable Modifications?

- Building a larger deck or dock area to accommodate a wheelchair
- Installation of a ramp
- Widen doorways to accommodate wheelchairs
- Installing chair lift in community pool
- Installing grab bars in bathrooms
- Lowering or removing cabinets



How is a Reasonable Accommodation or Modification Requested?

Individuals who are disabled may request a reasonable accommodation or modification from the housing provider

Request can be oral or written

Request does not have to specifically mention “Reasonable Accommodation” or “Reasonable Modification” but must be reasonably understood to be a request for an accommodation or modification.

Housing provider must provide response to request in timely manner, any undue delay could be considered a denial of the request

What information can a Housing Provider Request when Considering the Request for a Reasonable Accommodation or Modification?

- A housing provider may not ordinarily inquire as to the nature and severity of an individual's disability.
- However, in response to a request for a reasonable modification, a housing provider may request reliable disability-related information that:
 1. is necessary to verify that the person meets the Act's definition of disability (i.e., has a physical or mental impairment that substantially limits one or more major life activities)
 2. describes the needed modification, and
 3. shows the relationship between the person's disability and the need for the requested modification.

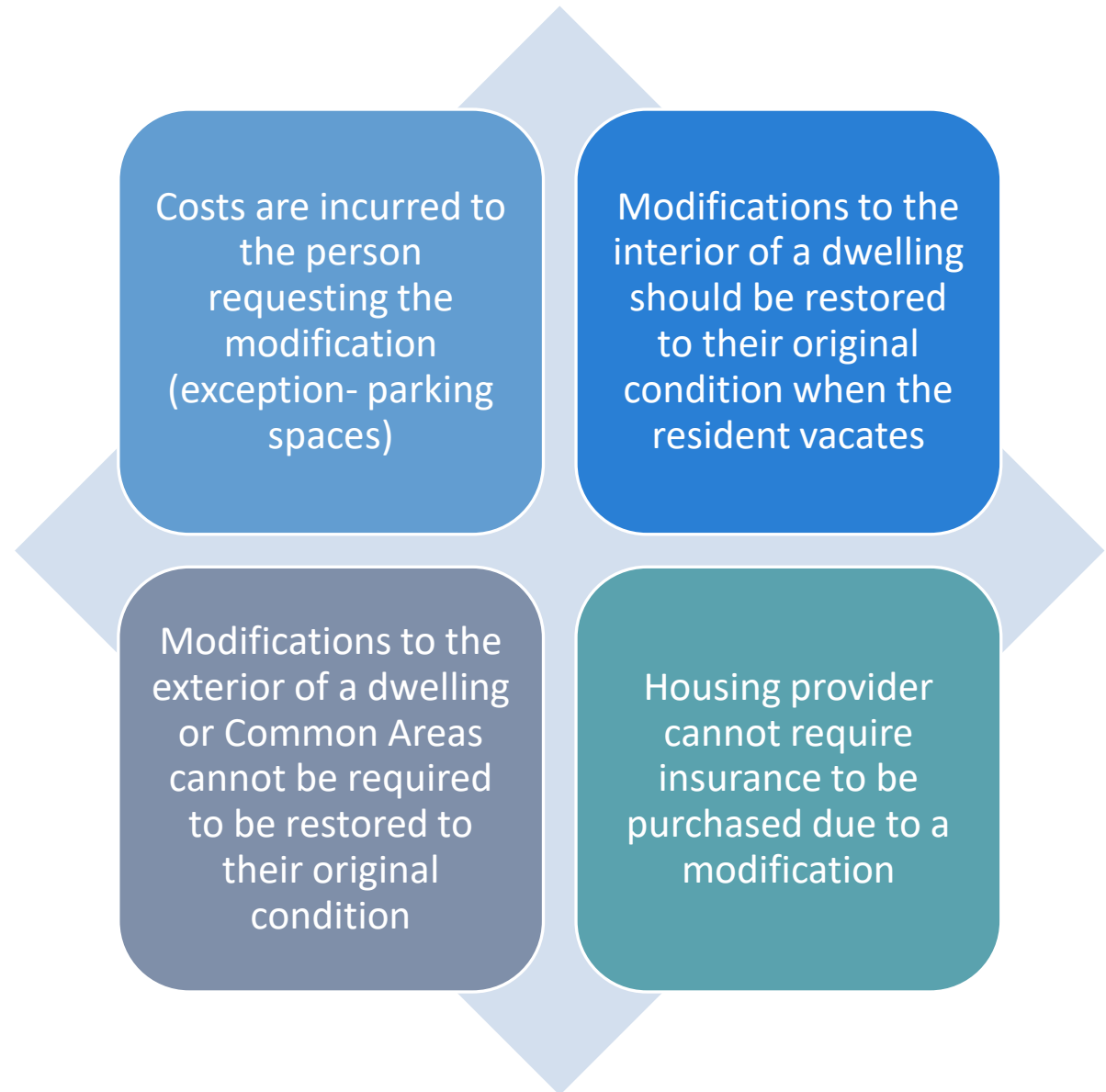
When should a Reasonable Accommodation or Modification Request be Approved/Denied?

- Request should be approved if person meets the criteria for an individual with a disability under the Fair Housing Act
- The request must show a nexus between the requested accommodation or modification and the person's disability

Examples:

- Approve- Person with arthritis requests to replace doorknobs with levers in her dwelling
- Deny- A homeowner with a mobility disability asks the condominium association to permit him to change his roofing from shaker shingles to clay tiles and fiberglass shingles because he alleges that the shingles are less fireproof and put him at greater risk during a fire.
- Requests should be reasonable

Who is Responsible for Payment and Restoration of a Reasonable Modification?



Who is Exempt from the Fair Housing Act?

- Buildings with four or fewer units, where landlord resides in one of the units
- Private owners of single-family housing that sell or rent without the use of a broker (and who do not own more than 3 single-family homes)
- Housing operated by organizations & private clubs can give preference to members, if they don't discriminate in their membership

How is a Fair Housing Complaint Handled?

COMPLAINT IS FILED

- Alleged Illegal Act must have occurred or terminated within the last year

DETERMINATION: IF PROVEN, WOULD ALLEGATIONS CONSTITUTE ILLEGAL DISCRIMINATION?

- No. Case ends. You may not even know about it
- Yes. Complaint and Initial Document Request will be sent to the offender

AGREE TO CONCILIATION?

- Agreement Reached – Case Ends
- Agreement Not Reached – Investigator will continue Investigation
 - Finding of No Reasonable Cause - Case Ends
 - Finding of Reasonable Cause - Case Continues

Why enforce the Fair Housing Act?

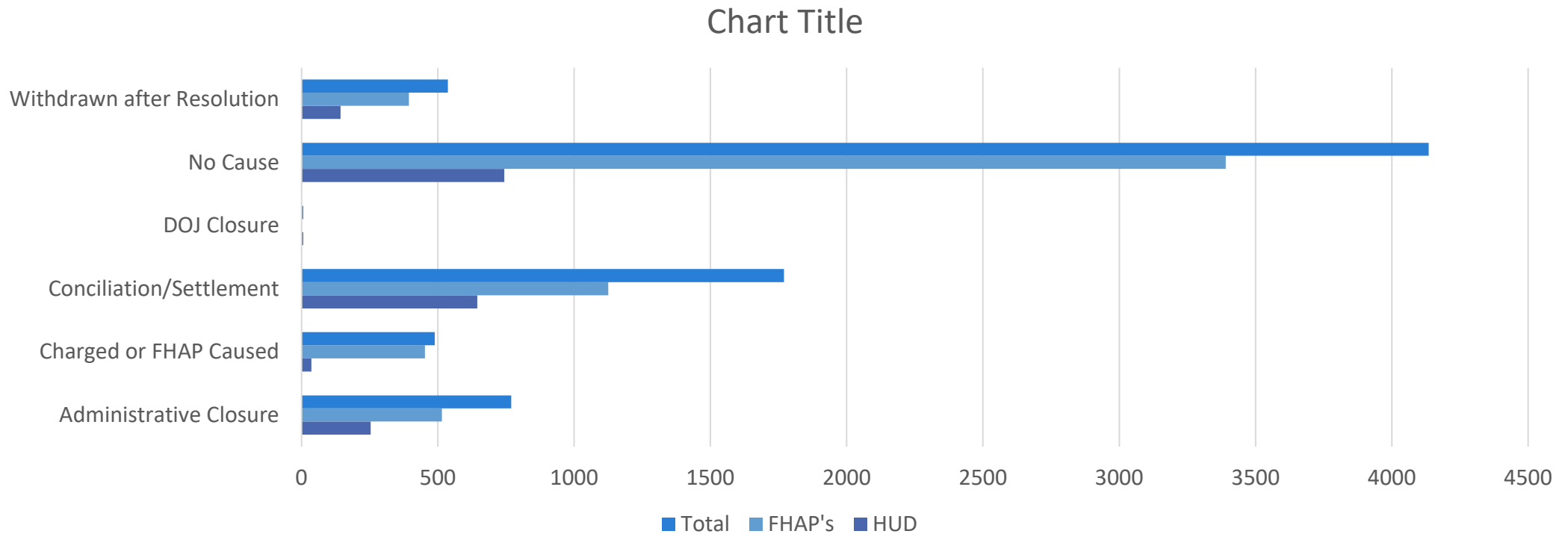
It's the right thing to do

It's required by law and federal regulations

Possibly severe consequences for non-compliance

- Monetary Damages – Compensatory & Punitive
- Equitable Relief
- Loss of Reputation
- Loss of Property or Exclusion From Housing Business

HUD/Fair Housing Assistant Programs* Case Completion



**HUD funds state and local agencies that administer fair housing laws that HUD has determined to be substantially equivalent to the Fair Housing Act*

Background Checks

- Denying housing to anyone with a prior arrest or any kind of criminal conviction could violate The Fair Housing Act.
- HUD released statement specifically on this topic stating that because African Americans and Hispanics are disproportionately arrested, convicted and incarcerated, any policy refusing to sell or rent homes based on criminal record could be discriminatory.
- Housing provider has to prove good reason to exclude an applicant based on criminal history
- HUD made the statement “ [b]ald assertions based on generalization or stereotypes that any individual with an arrest or conviction record poses a greater risk than any individual without such a record is not sufficient to satisfy any burden.”
- Federal law does allow landlords to deny housing to anyone convicted of drug manufacturing or distribution

Recommended Practices of Realtors to Comply with The
Fair Housing Act



Covenant Enforcement

Hierarchy of Governing Documents

1. Federal and State Statutes and Laws
2. Recorded Map, Plan or Plat
3. Declaration, Covenants Conditions & Restrictions, Master Deed, Proprietary Lease
4. Articles of Incorporation
5. Bylaws
6. Rules, Regulations and Resolutions



PROPERTY VALUES



FIDUCIARY DUTY OF THE
BOARD



HARMONY AND THE
PRECISE REASON
RESIDENTS CHOOSE TO
LIVE IN COMMUNITIES

Importance of Covenant Enforcement

Two Types of Rules/Restrictions

BOARD ADOPTED RULES

Hidden Harbour Estates, Inc. v. Basso, 393 So. 2d
637 (Fla.4th DCA 1981)

- Must be reasonable
- Must be related to health, safety and welfare
- Must not contradict a right found in recorded documents or right reasonably implied therefrom
- Must not discriminate between owners and renters
- Must be recorded

Two Types of Rules/Restrictions

RECORDED COVENANTS ADOPTED BY MEMBERS

Woodside Village Condominium Ass'n, Inc. v. Jahren
754 So. 2d 831 (Fla. 2d DCA 2000)

- Do not have to be reasonable.
- Do not have to be related to health, safety and welfare.
- Strong presumption of validity.
- Can discriminate between owners and renters.
- Must be recorded.

Appointing Enforcement Committee

Florida Condominium Act defines a committee as “a group of board members, unit owners, or board members and unit owners appointed by the board to make recommendations to the board regarding the proposed annual budget or to take action on behalf of the board.” Fla. Stat. § 718.103(7).

Florida HOA Act does not define committee.

It is important to understand that committees do not have the power of the board of directors and, except for a couple of limited circumstances, committees do not take final action.

A committee’s only role is to provide recommendations to the board of directors on whatever topic is assigned to that committee unless the Board delegates a limited authority to take specific actions

Enforcement committees can report back to Board on violations reported or found in the community

Establishing Enforcement Policy

- Determine Tone of Community
 - Be selective on who is appointed to committee
- Publish Policy with Hierarchy of Enforcement
 - Friendly Reminder
 - First Warning
 - Final Warning
 - Fine
 - Suspension of Use Rights
 - Attorney
 1. Warning
 2. Mediation
 3. Suit



Warning Letters

- Identify Problem
- Identify Rule
- Demand
Correction/Compliance
- Provide Reasonable
Deadline
- Warn of Future Consequences
- Create Paper Trail
- Send Via Regular and Certified Mail and note
tracking information on letter

Establishing Enforcement Policy

Fines and Suspension of Use Rights

- **Fining Process**
 - 14 days' notice
 - Board meeting to levy fine
 - Fining committee must be appointed
 - Should be at least 3 members
 - Cooperatives and COA's- Must be unit owners, HOA has no such requirement.
 - Cannot be directors, officers, employees of the Association, or the spouse, parent, child or sibling of an officer, director or employee of the Association.
 - Board must allow an opportunity for a hearing before the fining committee with at least 14 days notice
 - The committee can only vote to approve or deny the levy of the fine, cannot change the amount
 - Unit Owner must have chance to argue his case
 - Hearing should occur even if owner does not attend
 - If imposed, 5 days to pay
 - Fine may be levied for each day of a continuing violation up to the amount allowed by law or the governing documents
- Authority to fine comes from statute but can be limited by governing documents
- Fine may not exceed \$100 per day or an aggregate total of \$1,000 unless authorized by governed documents (HOA only)
- Fines in excess of \$1,000 may become a lien on the property, if authorized by the governing documents
- If not authorized, typically not worthwhile to collect, may potentially include on estoppel letter

Establishing Enforcement Policy

Fines and Suspension of Use Rights

- **Suspension of Use Rights**
 - Use rights may be suspended, for a reasonable period of time, to use common areas and facilities
 - Does not apply to utility services to the parcel and cannot prohibit ingress and egress from the parcel, including the right to park
 - Process
 - Similar to fining process with 14-day notice and committee hearing requirement
- **Delinquency**
 - If member is more than 90 days delinquent in paying any monetary obligation to the association, the association may suspend the rights of the member, or the member's tenant, guest, or invitee, to use common areas and facilities until the fee, fine, or other monetary obligation is paid in full.
 - Notice and Hearing requirements do not apply for delinquencies
 - Voting rights may be suspended for member who is 90 days delinquent in payment of monetary obligation

Self-help

- Check documents for authority and no-trespass language or easement
- Consider self-help under two circumstances otherwise seek Order from the Court:
 - i. Emergency
 - ii. Abandoned/Vacant property
- Check documents for right to lien for charges incurred
- Recent implications against Association for self-help provisions when pursuing injunctions

Condominiums (718) and Cooperatives (719)

- Mediation or non-binding arbitration

Homeowner's Associations (720)

- Mediation

Pre-suit Mediation/Arbitration

Required for Certain but not all disputes. F.S. 718.1255/719.1255 refers to 718.1255

Only for Disputes Involving:

Authority of Board to Require an Owner to take or not take any action involving Unit or appurtenance.

Authority of Association to Alter Common Elements.

Failure to Properly Conduct Elections

Failure to Give Proper Notice of Meetings.

Failure to Properly Conduct Meetings.

Failure to Allow Inspection of Records.

Key Components to Successful Rule Enforcement Policy

Clarity of Rule

Notice

Timeliness

- 1 year limit recommended
- 5 years- Statute of Limitations

Consistency

Documentation

- All communication in writing
- Pictures with dates

Too much due process is a recipe for disaster

Arbitration and Mediation Considerations



Affective and much less expensive than litigation



Arbitrator can order mediation first



Arbitrator has no enforcement authority

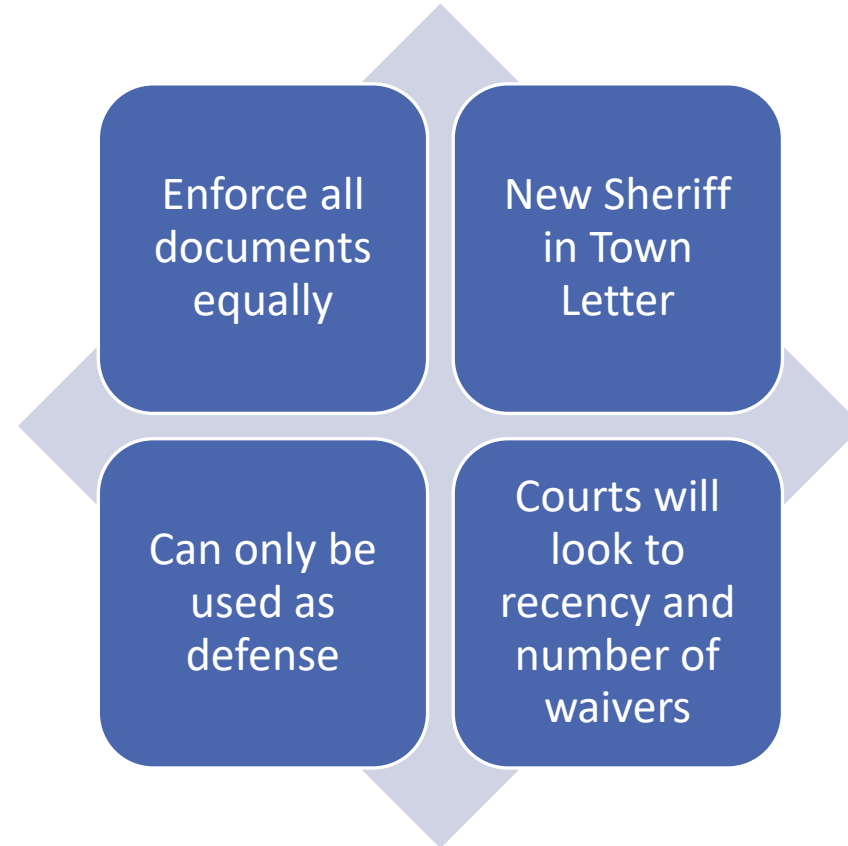


Condominium arbitration decisions are very valuable resource



Attorney's fees must be awarded to prevailing party

Selective Enforcement



Waiver/Latches





Additional Consequences for Failure to Enforce Covenants

Reduced Property Values

Estoppel- Previous Board Provide Approval?

Violation of Fiduciary Duties



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