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REPRESENTING COMMUNITY ASSOCIATIONS

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New Owner and Tenant Approval Process – Fair Housing Act Considerations

Condominium and homeowner associations are often eager to monitor and screen prospective tenants in their communities. The screening process typically requires submission of an application with information necessary to conduct background and credit checks. Should the applicant "fail" the screening process, usually as a result of criminal history or poor credit, the application is denied. While the rationale for these screenings may seem legitimate on their face, denying prospective purchasers and tenants may subject an association to liability and costly litigation.

Condominium and homeowners associations are housing providers under federal law and therefore governed by the Fair Housing Act ("FHA"). The FHA forbids housing providers from discriminating against prospective purchasers or tenants on the basis of race, color, religion, sex, familial status, or national origin. 42 U.S.C. § 3604(a). Discrimination against those with a disability is prohibited as well, and includes those assisted by service and emotional support animals. In addition to federal law, Florida Statutes have adopted and incorporated these provisions of the FHA into law. Fla. Stat. § 760.23(1).

Although intentional discrimination is easily spotted, associations must be careful not to engage in unintentional discrimination, which is also a violation of the law under the "disparate impact" theory. Disparate impact discrimination occurs when a rule or policy that appears unbiased and neutral on its face results in a disproportionately negative impact on a protected class of people. For example, an association with a neutral policy forbidding prospective tenants with criminal convictions may be liable under a disparate impact claim if those who are denied are more frequently members of a protected class.

Practical Tips for Purchaser and Tenant Approval Process

Associations that wish to engage in an approval process for sales and leases must pay careful attention to their governing documents, Florida law, and federal law. As a preliminary matter, an association's Declaration of Covenants ("Declaration") must provide the authority for the board of directors to request applicant information. In condominium associations, an application fee of no more than $100.00 may be charged if the Declaration specifically permits charging of such a fee. Fla. Stat. § 718.112(2)(i). Homeowners associations are not limited to a $100.00 application fee, but best practice is to not exceed that amount.

If the board of directors intend to deny an applicant, the Declaration must explicitly authorize denials and provide proper guidelines. Background and credit checks must be dictated by objective and highly specific guidelines as to what will constitute an application denial. Applicants may not be denied simply for having "bad" credit, or for having a criminal history. Proper guidelines make distinctions between arrests and convictions, refer to the types of crimes that are forbidden, and limit scope. For example, a guideline forbidding applicants with a "conviction of a violent crime within the past five years" stands a better chance of success against a discrimination claim.

With regard to credit checks, the same principles apply. Guidelines should clearly spell out what will constitute a denial by detailing a reasonable minimum credit score. That being said, credit checks are a very poor indicator of a prospective purchaser or tenant's ability to follow association rules and timely pay assessments. If a bank is willing to loan a prospective purchaser thousands of dollars, what justification does an association have requiring a more stringent credit history? The argument against credit checks is even greater when applied to prospective tenants. The association's privity lies solely with the unit or homeowner who is responsible for paying assessments. Regardless of whether or not the tenant pays rent to the owner, the association is still due its assessments from the owner. The financial justification to deny a prospective tenant based on credit is weak.

Even if associations have the authority to deny applicants, and objective guidelines for doing so have been enacted, an association is not immune from a discrimination or disparate impact claim. Associations that overreach the authority provided to boards in their governing documents, or fail to enact rules that comply with Florida and federal law risk incurring costly discrimination claims. Although boards of directors have a fiduciary duty to protect the health, safety, and welfare of their communities, it must be done so with careful consideration of the law. The Tankel Law Group is equipped to assist your association navigating these complicated waters to find the right balance between applicant screening and Fair Housing laws.

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