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HUD and Fair Housing... Rulings That May Impact Your Community's Current Policies

This week there have been no fewer than 4 or 5 blogs, newsletters and updates from various legal firms about the new HUD (Housing and Urban Development) ruling. As HUD and the Fair Housing Act apply nationally as federal mandates this information may impact an association's ability to screen tenant occupancy and/or in the case of Fair Housing rulings, may seriously impact the Rules and Regulations you may have promulgated for use of and in and around your common areas or common elements, such as pool rules that may place a restriction on a child's ability to use the pool unless accompanied by an adult...yes, like that.

So, we'll talk about the HUD Ruling first. The first thing obviously is the association's actual ability to screen tenants. Most screenings include credit, criminal background, and former housing history. If your association has the ability to screen and/or approve tenant applications, most likely the Board has adopted a policy and procedure for this process.

On April 14, 2016 HUD issued a memorandum that will drastically affect a landlord's or property owner's ability to screen for criminal history. While criminals are not a protected class, HUD feels that "minorities are arrested, convicted and incarcerated at rates disproportionate to their share of the general population". It is HUD's opinion that criminal screening of prospective tenants will likely have a disproportionate or disparate impact on these racial groups. Disparate impact is when there is a policy or practice that is neutral on its face, but is still found to have a discriminatory effect against a protected class. It looks at not just the intent of a policy, but the consequences of it as well.

When your board is presented with a background check that reveals a criminal history, there is more to consider than just the fact that the applicant has a record. If a background check reveals that the applicant has previously been arrested or convicted of a crime, there are some questions that must be asked:

- Did the crime involve theft or violence?
- Was the applicant charged with a misdemeanor or felony?



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- How long ago was the crime committed?
- Did the crime involve an attack on a minor?
- Did the crime result in a conviction?

Certainly, an applicant who committed a white-collar crime 20 years ago, presents less of a security concern for your association than an applicant who was arrested for rape or another violent crime within the last five years. Denying applications for any reason requires a conversation with association legal counsel. Denying applications based on criminal background is an even more compelling reason to have that conversation. This does not mean your board should discontinue the responsible screening of potential purchasers or tenants. But you need to be prudent and avoid liability for the association.

Now, about that Fair Housing ruling.

We all know the Fair Housing Act prohibits discrimination on the basis of race, religion, sex and disability. But the law is much broader. It also prohibits discrimination on the basis of "familial status". Familial status applies to children that live with a parent or other guardian. However, a recent case "Iniestra v. Cliff Warren Investment, Inc., an apartment complex, whose pool rules said "children under the age of 18 are not allowed in the pool at any time unless accompanied by their parents or legal guardian". Sounds reasonable enough. However, the Iniestra children went to the pool without an adult. The manager saw the children in the pool and fined the parents. Iniestra sued. In the complaint, the Iniestra argued that the rule discriminated against their children and thus violated the "familial status" portion of the FHA, i.e. prohibited their children who were competent swimmers, but not adults, who may not have ever swam a day in their life. The court agreed and found the rule to be facially discriminatory in that it "treated the children and families with children, differently and less favorably than adult only households".

It was explained that the Court ruled this way, because they did not feel the rule strictly promoted safety. The rule prohibited children, even competent swimmers from entering the pool. Conversely, it allowed any adult, even the non-swimmers, to enter the pool. As it turned out, one of Iniestra children (17-year-old) was a certified lifeguard; but the 34-year-old father had never swam a day in his life.



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Another example of this issue would be "Children are prohibited from riding bicycles in the parking lot". Also, seems to be a safety and liability issue. However, an adult doing the same thing, would not be prohibited. "Children are prohibited from playing in the common area", but it leaves the door open to say that an adult could play in the common area.

FHA is saying that the rule has to apply the same standards to children as it does to adults.

So again, it may be beneficial to review those Rules and Regulations and if there is a question, to consult your association's legal counsel.

