August 2016

HOT TOPIC ALERT

Homeowner Associations

Over half owner occupied households in the U.S. are part of a homeowner association (HOA). One estimate says that there are 351,000 homeowners' or community associations, representing more than 40 million households.

HOAs can serve a variety of functions. In a condominium or cooperative, where the homes are all in the same building or complex, the association takes care of basic maintenance of the building and of the common areas or amenities, such as swimming pools or fitness centers. In a planned community of detached single-family homes, the HOA may act more like a city government than as a group of neighbors. An HOA may provide amenities such as parks or community swimming pools, but will also enforce a set of rules. These rules can cover everything from requirements that yards be kept up, to more particular restrictions on what color a house may be painted.

Being a part of an HOA has a number of advantages. As noted above, a condominium association will have the responsibility of maintaining a building and its common areas, leaving residents with one less thing to worry about. There are also intangible benefits. Many homeowners say they welcome the sense of community that comes from being a part of an association. Others appreciate the uniformity of home appearance in a community with restrictive rules on design and decoration, as well as the enhanced value of a home in a neighborhood with aesthetic standards.

However, the uniformity that appeals to some is a major drawback to others. Some HOAs may be extremely detailed in what is allowed or prohibited, to the extent of having a rule regarding how long a garage door may be left open. Others may find that paying an additional fee over and above a mortgage payment makes living in an association less attractive, particularly if they don't use the amenities offered like a pool or a gym.

Must love dogs?

Many HOAs have rules regarding the pets residents may have. Common restrictions are limits on the number or size of pets, or requiring pets to be leashed or restrained. Some limit the types of pets: dogs or cats will be

allowed, but dwarf horses, for example, are not. If dogs are allowed, some breeds may be prohibited. Some HOAs may even prohibit having any pets. Reasons for restrictions vary. Pets may be limited because of the noise or mess that they can cause, or to protect other residents from aggressive or dangerous animals. Protecting residents with animal allergies or phobias is also a consideration.

Bans on pets may become less popular, as more and more buyers turn away from "no pets allowed" properties. As a general rule, an HOA's restrictions or bans on pet ownership are legally enforceable. Problems arise when an association changes the rules on pets and tries to evict animals that have been properly living in a building or development before the change. Inconsistent or selective enforcement may also be an issue. A homeowner may be able to defend against enforcement of a no-pets policy if the HOA is applying the rule arbitrarily, by letting some residents keep pets that violate the rules, but enforcing the rule strictly against others.

A no-pets policy may not, however, be used to keep out a service animal. Section 804 of the Fair Housing Act, requires housing providers, including homeowners' associations, to make reasonable accommodations in rules, policies, practices, or services to allow a person with a disability the equal opportunity to use and enjoy the housing. The U.S. Department of Housing and Urban Development (HUD) issued a statement that this law may mean that service animals are to be allowed, even if the provider has a "no pets" policy.

HUD is careful to note that service animals are not pets. A service animal must be allowed if a person has a disability (a physical or mental impairment that limits one or more major life activities), and if that person has a disability-related need for a service animal. The pivotal question is, "[D]oes the animal work, provide assistance, perform tasks or services for the benefit of a person with a disability, or provide emotional support that alleviates one or more of the identified symptoms or effects of a person's existing disability?" If so, a particular animal may be excluded only if that animal is dangerous or would cause property damage.

Note that the definition of "service animal" in the housing laws is broader than the definition in the

Property Management Perspective

*According to the **Institute of Real Estate Management (IREM-NAR affiliate)**, in 1980 the Uniform Condominium Act was enacted which provides for a limited six-month association lien for common expense assessments prior to all liens and encumbrances except for those recorded before the date of the declaration. The lien is also prior to any mortgage or deed of trust for common expense assessments assessed against all of the units in proportion to their common expense liability, and due during six months immediately preceding institution of an action to enforce the lien. The adoption of the super priority assessment lien strikes a balance between the protection of the lenders and the need to enforce collection of assessments.*

*Therefore, **IREM** supports state legislation which authorizes the recovery of up to six months of community association assessments through a lien of first priority. The priority lien should apply only to monthly or periodic common expense assessments made by an association, pursuant to an annual operating budget, and due during the six months immediately preceding institution of an action to enforce the lien. Such a provision will strike a balance between the protection of the security of the lenders and the need to enforce collection of assessments.*

Americans with Disabilities Act (ADA). The ADA, which applies to buildings or spaces open to the public, defines a service animal as a dog trained to accomplish a specific function. Animals kept for emotional support or comfort are excluded from that definition. HUD, on the other hand, says that any species of animal could be a service animal. Emotional support animals are included in that definition if the emotional support is related to a person's disability.

Over one-third of all households in the U.S. own one or more pets. As more and more of those households become subject to the rules of homeowners' associations, it seems likely that more and more of the rules against pets will start to disappear.

Comparison of Service Animals or Assistance Animals
Fair Housing vs. Americans with Disabilities Act

	Fair Housing Act	ADA
Real Estate coverage	Dwellings, common spaces in residential buildings such as lobby, laundry and pool/gym	Places of public accommodation, businesses that serve the public, including leasing offices and spaces in residential buildings required for access to places of public accommodations, for example the lobby and access to a convenience store in a residential building
Animals covered	any animal that assists including emotional support or alleviates identified symptoms of a disability	Dogs and miniature horses trained to work and perform tasks. Not covered are emotional support animals
Request required?	Yes - A request to allow an animal as an accommodation to existing rules limiting animals	No
How is right determined?	Two questions – If not readily apparent, may ask if the person making the request have a disability and does the person have a disability related need for the animal. If yes, animal must be allowed.	Animal need only meet the definition to be allowed into a facility. If not readily apparent, may ask if the animal is required because of a disability and what work or tasks has the animal been trained to perform
Documentation	May request documentation only that there is a disability and that the person has a disability related need for the animal.	None
Exceptions	If the specific animal (not general assumption about breed, size or weight) poses a direct threat to others, or would cause substantial physical damage, and only if risk cannot be reduced through an additional accommodation. May limit size of miniature horses.	Animal out of control and handler does not take action to control, animal not housebroken, direct threat to health and safety that cannot be reduced through additional reasonable accommodation

Chart provided by Fred Underwood, NAR Director of Diversity

Foreclosure by Neighbors

In a traditional city or town, necessary services, such as refuse hauling, street maintenance, and public areas, are provided by the municipal government and paid for by taxes. In many condominium or cooperative developments, and in many planned residential communities, some or all of these services are provided by a homeowners' association. HOAs get their financial support from fees or assessments paid by members. The amount of these assessments or fees will vary, depending on the location of the property and the amenities or services provided by the association, but the U.S. Census Bureau says that the average annual assessment for a single-family home is $420, and the average annual fee for a condominium is $2,400.

Unlike property taxes or insurance, HOA assessments are seldom included in a monthly mortgage payment. If payments are not made as required, many states say that the association has a lien on the property for the unpaid assessments. The HOA may then foreclose on the home, just as a bank or other lender might.

A HOA will be able to foreclose even if the property is subject to a mortgage. In many states, HOAs are allowed to claim "super liens" for unpaid assessments. These super liens are allowed in 21 states and the District of Columbia. Super liens have priority over all other liens on the property, including all or part of a first mortgage. In Nevada, for example, a super lien will have priority over a mortgage for up to nine months' worth of delinquent fees. The Nevada Supreme Court has interpreted this law as giving the association lien priority over all other liens, so that foreclosure by the association will extinguish a first mortgage, even though the mortgage was in place before the HOA's lien. The District of Columbia Court of Appeals reached the same conclusion, saying that a HOA's "super lien" in the District had priority over a lender's mortgage lien.

On August 12, 2016 the 9th US District Court determined the law in Nevada has been interpreted as allowing the HOA foreclosure to extinguish the First Deed of trust without giving notice to the lender, is unconstitutional. There are cases lined up in Federal and State courts that will be affected by this ruling.

The number of foreclosures by HOAs has been increasing, even as the number of other mortgage foreclosures has declined. Associations have been criticized for moving too quickly to foreclose, even when the delinquency is comparatively small. A California study is often quoted as finding that the median amount owed in foreclosures by associations in that state is just over $2,000. A more recent study of 200,000 homes with owners who owe delinquent association assessments (about one-fifth of the homes in HOAs nationwide) says that the average delinquency is $7,200.

HOAs will also move swiftly on delinquencies to protect the marketability of homes in the community. Fannie Mae guidelines say that a project is ineligible for financing if more than 15% of the units in the project are 60 days or more past due on their association fees. Letting too many delinquencies go for even a relatively short amount of time can cut off a source of financing for future purchasers. New homeowners will be less likely to purchase, and current owners could see the value of their homes drop, as the market for homes in their development dwindles.

Home foreclosures are unfortunate occurrences, but where some see misfortune, others see opportunity. Investors are eager to buy properties foreclosed on by HOAs. In many states, HOAs are prohibited from making a profit, so when a property is sold at auction, the successful bid may be often at an extremely low price. The property can then be resold by the buyer for a substantial profit. Yes, this is a bit shocking!

There are some limitations on an HOA's power to foreclose. In California, an HOA may not collect a delinquent assessment by foreclosure unless the total assessment, excluding late charges, interest, or the costs of collection, is at least $1,800. Alternately, an HOA may pursue foreclosure if assessments are more than 12 months overdue. HOAs in Delaware may not start a foreclosure unless assessments are at least three months overdue, and unless the executive board of the HOA votes to foreclose. Foreclosure is not allowed solely for fines or related sums unless the HOA first gets a judgment against a homeowner. In North Carolina, a condominium association or community

association may use non-judicial foreclosure only if assessments are at least 90 days overdue. Judicial foreclosure must be used if only fines or attorney's fees are overdue.

Amateur Radio Parity Act of 2015

HOA rules usually have restrictions on what a homeowner can build or install in the yard around the home. For example, an HOA may restrict whether or where an owner can place a swing set or a garden shed. These restrictions are common, and disputes about them are left to the HOA and the homeowner to resolve. They certainly are not federal issues, but legislation now pending before Congress could change that. The Amateur Radio Parity Act of 2015 (HR 1301/S 1685) would require HOAs to make "reasonable accommodations" for homeowners who wish to erect antennas for amateur (ham) radio at their homes.

As you may know, a ham radio antenna can be a fairly substantial structure. Except for portable units, antennas are visible, and there is no way to disguise them. Although most of us think of ham radio as just a hobby, operators also provide important backup communications in emergencies. This emergency function has led the FCC to adopt rules that preempt local zoning rules that ban antennas. The FCC has not moved against restrictions by HOAs, but the bills before Congress would allow rules that would override most bans against ham radio antennas.

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White Papers: Comprehensive reports prepared for NAR on issues directly impacting the real estate industry. Examples include: Rental Restrictions, Land Banks, Sales Tax on Services, State and Local Taxation, Building Codes, Hydraulic Fracturing, Foreclosure Property Maintenance, Climate Change, Private Transfer Fees.

Growth Management Fact Book: Analysis of issues related to land use and modern growth management topics include: density— rate of growth, public facilities and infrastructure, protection of natural resources, preservation of community character, and affordable housing.

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