

UNDER THE FHA- IS THERE A DIFFERENCE BETWEEN A REQUEST FOR A MODIFICATION AND A REQUEST FOR ACCOMMODATION AND WHO BEARS THE COST? Nicole Guralny - [NGuralny@leachjohnson.com](mailto:NGuralny@leachjohnson.com)

Under the Fair Housing Act (the “FHA”), a reasonable modification is a structural change made to the premises whereas a reasonable accommodation is a change, exception, or adjustment to a rule, policy, practice, or service. For common-interest-communities, an example of a request for a modification may be having a lift installed in the association’s pool, or a special ramp installed so that a disabled person may have wheelchair access to a certain area of the common elements. Oftentimes requests for accommodation of the association’s rules pertain to allowing service and/or emotional support animals to accompany residents in otherwise pet restricted areas.

42 U.S.C.A §3604 (3) deems it unlawful to discriminate against disabled persons in the following manner:

(A) a refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises

(B) a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling

A person with a disability may need either a reasonable accommodation or a reasonable modification, or both, in order to have an equal opportunity to use and enjoy of the common areas in an association. Generally, under the FHA, the association would be responsible for the costs associated with a reasonable accommodation unless it is an undue financial and administrative burden, while the resident is responsible for costs associated with a reasonable modification.

So in an instance where a resident were regarded as suffering from, or able to demonstrate that he/she suffered from a mobility disability, and requested that a he/she be allowed to install a special lift in the association’s pool for better access, this would be considered a reasonable modification to the association’s common elements. The FHA provides that while the association must permit the modification, the resident is responsible for paying the cost of the modification. The request for the modification should be granted by the association so as to afford the disabled resident equal use of enjoyment of the common area pool. The cost of the installation of the lift however would be borne by the resident making the request. The question then becomes “who maintains the lift after installation?”

Generally, under the FHA, the resident is responsible for upkeep of a modification that is exclusively used by the resident, or a modification to a common area that is not normally maintained by the association. In our scenario, as the modification is being done to the association's pool, which is normally maintained by the association, the responsibility to maintain the modification would belong to the association. The modification in essence thereafter becomes the association's obligation and the resident is under no obligation to remove it when he/she has moved out of the community. Therefore, once the resident leaves the community, and the modification is no longer needed, if the association were to want it removed, the association would bear the expense for any removal.

Recently there was an association that had a group of senior residents who were requesting an accommodation of the association's rules for the pool area regarding audio equipment. The association was providing water aerobics classes and some of the residents who were hearing impaired requested that the instructor be provided with some kind of microphone and/or voice loudspeaker that would enable them to hear the instructions. The association had a prohibition on audio equipment being permitted in the pool area. Clearly an accommodation of the rules would be permitted in this instance so as to afford the hearing disabled residents equal enjoyment of the facilities and the classes. Accordingly, such voice loudspeaker and/or microphones should be allowed in the pool area for those classes. The question then became "who bears the cost for the actual equipment?" Since the residents were seeking an accommodation, and the cost of the actual microphone and speaker would not be deemed to be an undue financial burden, under the FHA, the association would bear the expense.

One trick question posed to associations is whether the request for a handicapped parking spot is an accommodation or a modification. Often times the resident is requesting that a common area parking spot be changed into a handicapped spot reserved for his/her unit. This usually requires the association to change a parking spot into a designated handicapped spot with signage. At first glance it would appear that the common area is being modified as a parking spot is being changed and signage is being installed in the common area. This question is actually addressed by the U.S. Department of Justice and the U.S. Department of Housing and Urban Development, who have stated that requests for parking spaces are treated as requests for reasonable accommodations and would place the responsibility for providing the parking space on the association, even if the provision of the space results in costs to the association. Providing a parking accommodation could include creating signage, repainting markings, redistributing spaces, or creating curb cuts, the list is not exhaustive. Therefore, if an association were to grant a disabled person's request for a reserved handicapped parking space, it would be considered an accommodation and the costs incurred would be borne by the association.

Understanding the difference between a request for an accommodation and a request for a modification is clearly important because the costs associated with a modification are initially borne by the resident, whereas with a request for an accommodation, in most instances, the ancillary expenses are borne by the association.