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MODIFICATION REQUESTS IN COMMUNITY ASSOCIATIONS: DO WE KNOW WHAT'S REASONABLE?

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ABSTRACT

The Fair Housing Act ("FHA")[1] as well as the New York State Human Rights Law ("HRL")[2] provide, *inter alia*, that qualifying individuals shall be granted reasonable modifications or accommodations to afford such individuals either full enjoyment of the premises or an equal opportunity to enjoy their dwelling, respectively. Both laws likely extend to common areas of the development but arrive at this protection in different ways. Namely, through the FHA's implementing rules ("Rules") and with guidance from the Department of Housing and Urban Development ("HUD"), courts have easily interpreted the FHA to extend to common areas but stop short at expecting the community to pay for modifications. However, the HRL is less explicit, and at least one court has held that it does not even apply to condominiums or homeowners associations.[3]

This article will briefly explain the significance of the community association governing documents and the business judgment rule within the context of reasonable modifications and discrimination. It will analyze whether modifications and accommodations are viewed as mutually exclusive; discuss general

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[1] Fair Housing Act, 42 U.S.C. §§ 3601-3619, 3631.

[2] N.Y. EXEC. LAW §§ 290-291, 296 (McKinney 2022).

[3] *See* Rodriguez v. 551 W. 157th St. Owners Corp., 992 F. Supp. 385, 387 (S.D.N.Y. 1998).

rights and obligations under the FHA and HRL concerning modifications to common areas.[4] Furthermore, it will also address the application of the modification requirement to condominium and homeowners associations; explore some relevant case law; and examine the reasonableness standard.

[4] Note: This Article does not consider the New York City Code or Rules under which these issues may see different results.

I. PRELIMINARY MATTER: COMMUNITY ASSOCIATION GOVERNING DOCUMENTS AND THE BUSINESS JUDGMENT RULE

The governing documents of a condominium or homeowners association amount to a contract between the homeowner and the association and govern the rights and obligations of each.[5] As is relevant here, a homeowner is generally precluded from altering the community's common elements without first obtaining written consent of the board of directors or managers, as the case may be.[6]

The business judgment rule extends protections to boards of community associations, and removes board decisions from judicial scrutiny provided the "actions of corporate directors [are] 'taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes,'" and are made within its authority,[7] and which are not arbitrary or malicious or tainted by discriminatory considerations.[8] Logically, the business judgement rule will not protect a board if it acts in a discriminatory manner, since "those types of abuses are incompatible with good faith and the exercise of honest judgment."[9]

II. ACCOMMODATION AND MODIFICATION – MUTUALLY EXCLUSIVE?

Some courts have refused to conflate the two provisions, while others take cues from litigants and pleadings. Meanwhile, other courts have expressed that absent alleging violation of both subsections, an action arising from failure to agree to modify public or common areas

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[5] *See* Schoninger v. Yardarm Beach Homeowners' Ass'n, Inc., 134 A.D.2d 1, 6 (N.Y. App. Div. 2d Dep't 1987).
[6] *See* Ives v. Fieldpoint Cmty. Ass'n, Inc., 197 A.D.3d 1248, 1249 (N.Y. App. Div. 2d Dep't 2021).
[7] *See In re* Levandusky v. One Fifth Ave. Apartment. Corp., 553 N.E.2d 1317, 1320 (N.Y. 1990); 40 W. 67th St. Corp. v. Pullman, 790 N.E.2d 1174, 1181 (N.Y. 2003).
[8] Fletcher v. Dakota, Inc., 99 A.D.3d 43, 48 (N.Y. App. Div. 1st Dep't 2012).
[9] *Id.*; *Pullman*, 790 N.E.2d at 1182; *accord Levandusky*, 553 N.E.2d at 1320; *In re* Steinberg-Fisher v. N. Shore Towers Apartments, Inc., 149 A.D.3d 848, 851-52 (N.Y. App. Div. 2d Dep't 2017); Maun v. Edgemont at Tarrytown Condo., 156 A.D.3d 873, 874 (N.Y. App. Div. 2d Dep't 2017); Pelton v. 77 Park Ave. Condo., 38 A.D.3d 1, 9 (N.Y. App. Div. 1st Dep't. 2006).

is separate and distinct from an action alleging failure to grant an accommodation.[10] Yet at least one other court stands for the proposition that, absent a finding of wrongdoing by the defendant board, the need to distinguish the two is moot.[11]

Nonetheless, the FHA clearly delineates between modifications and accommodations.[12] Yet, the HRL includes "modification to common use portions of the dwelling" as an accommodation,[13] while also retaining a separate modification provision.[14] These variations appear to lend themselves to different results and are discussed in Part V.

III. GENERAL RIGHTS AND OBLIGATIONS UNDER THE FHA AND HRL CONCERNING MODIFICATIONS TO COMMON AREAS

One of the more-commonly sought-after accommodations is permission to maintain a comfort animal in a pet-free community, which is clearly an accommodation in rules or practices. Other examples of accommodations are extension of time to complete renovations;[15] permission to move to a different unit within a rental building;[16] and granting a parking stall in contravention of a first-come, first-served policy.[17]

Although some courts recognize that accommodation requests extend to common areas (e.g., parking garage, other units within the

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[10] *See* Rodriguez v. 551 W. 157th St. Owners Corp., 992 F. Supp. 385, 387 (S.D.N.Y. 1998); Reyes v. Fairfield Props., 661 F. Supp. 2d 249, 260 (E.D.N.Y. 2009) (holding that "modifications of existing premises [are] not mandated by the reasonable accommodations provision" especially since plaintiffs are tenants of a rental building, and not shareholders in a housing corporation)*; see* United Veterans Mut. Hous. No. 2 Corp. v. N.Y. City Comm'n on Human Rights, 207 A.D.2d 551, 552 (N.Y. App. Div. 2d Dep't 1994). Of important note is that there the court did not recognize that a shareholder tenant in a "coop" is, in essence, the functional equivalent of a landlord-tenant relationship. *Id.*

[11] *Pelton*, 38 A.D.3d at 9 (accepting that the installation of a lift in the common area at a cost of $13,000 was an "accommodation").

[12] 42 U.S.C § 3604(f)(3)(A); *cf.* § 3604(f)(3)(B).

[13] N.Y. EXEC. LAW § 296 (18)(2) (McKinney 2022).

[14] *Id.* § (18)(1).

[15] *In re* Steinberg-Fisher v. N. Shore Towers Apartments, Inc., 149 A.D.3d 848, 850-51 (N.Y. App. Div. 2d Dep't 2017).

[16] Bentley v. Peace & Quiet Realty 2 LLC, 367 F. Supp. 2d 341, 346 (E.D.N.Y. 2005).

[17] Shapiro v. Cadman Towers, Inc., 51 F.3d 328, 334 (2d Cir. 1995).

development),[18] it is unclear whether requests to modify common elements pursuant to either § 3604(f)(3)(A) or § 296(18) must be borne by the boards of condominiums and homeowners associations.[19] Tangentially, there is no apparent case law determining whether the boards of these communities may require the covered individual to return the altered area to its original condition after the intended use period ends.

Together, the FHA and its rules require that covered individuals are entitled to make reasonable modifications to their exclusive dwelling unit (the interior of their unit) — as well as to common use areas — both at the covered person's expense.[20] Indeed, the Department of Housing and Urban Development ("HUD") defines "interior" as the individual dwelling unit[21] and – unlike the definition of "premises"[22] — does not include "public and common use areas" in the relevant Rule.[23] What's more, HUD has expressly and unconditionally stated that the cost to perform modifications is to be borne by the resident seeking the modification.[24] However, when saying so, HUD makes no express statement as to modifications to common areas.

Modifications to common areas are not easily effectuated. In the case of either a condominium or homeowners association, a modification to an individual unit and its reasonableness are generally non-issues since, assuming the modification is not structural,[25] there is likely no Board of Managers or Board of Directors approval required.[26] What's more, if a unit owner usurps the limitations in the governing documents by making modifications *sua sponte*, he likely opens himself to additional costs associated with remedying his wrongful acts. Common areas in these communities include, with slight variations, areas outside the four walls of the unit.

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[18] *Bentley*, 367 F. Supp. 2d at 345; *Shapiro*, 51 F.3d at 328.
[19] 42 U.S.C § 3604(f)(3)(A); *cf.* § 296(18).
[20] *See* 24 C.F.R. § 100.203 (2022); 24 C.F.R. § 100.201 (2022) (defining "Interior"); 24 C.F.R. § 100.201 (defining "Premises").
[21] 24 C.F.R. § 100.201 (2022).
[22] 24 C.F.R. § 100.201.
[23] 24 C.F.R. § 100.201 (2022); *cf.* 24 C.F.R. § 100.201.
[24] DEP'T OF JUST. & DEP'T OF HOUS. & URBAN DEV., REASONABLE MODIFICATIONS UNDER THE FAIR HOUSING ACT (Mar. 5, 2008).
[25] N.Y. REAL PROP. LAW § 339-k (McKinney 2022).
[26] *See* N.Y. REAL PROP. § 339-j (McKinney 1999) (requiring compliance with governing documents and creating cause of action for such failure).

Confusing matters is the FHA rental carve-out whereby a landlord may condition a modification on reasonably requiring restoration of the interior of the premises when the use is no longer required.[27] Yet at the same time, HUD states that the modification of a common area, made by a resident owner of a unit within a condominium or homeowners association may remain even after the use is no longer needed by the installing resident.[28] That is, though not thoroughly fleshed out, in codifying the rule, HUD expressly developed the opinion that once installed, it is not reasonable to remove a modification made to a public or common use area since that modification "may be of benefit to other persons with or without a handicap."[29] What likely comes from this then, according to HUD's point of view, is that once a homeowner, in either a condominium or homeowners association, makes a modification to a common element, the homeowner is then absolved of any future obligation to remove it. There is, however, no obvious case law interpreting this guidance.

As for the New York Human Rights Law ("HRL"), in 1991 the state legislature amended § 296 to add subsection 18,[30] which preliminarily mirrored the FHA, to wit: a resident must be permitted to make modifications at her expense, and must be afforded reasonable accommodations in rules, policies, etc. As is pertinent here, the statute was amended in 2010 by adding to § 296(18)(2) that a *reasonable accommodation* includes "*reasonable modification to common use portions of the dwelling.*"[31]

What seemingly results then are two different laws. In addition to and considering the case law from the federal district and circuit courts sitting in New York and the New York state courts, it appears that we have differing interpretations.[32]

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[27] 24 C.F.R. § 100.201 (defining "Premises"); *id*. § 100.203; *see generally* 42 U.S.C. § 3604(f)(3)(A). Notably, a landlord may also require a deposit of funds so as to ensure that the costs are covered upon the tenant's surrender of the premises.

[28] Exec. Order No. 11,509, 24 C.F.R. § 14 et al. (1989).

[29] Exec. Order No. 11,509, 24 C.F.R. § 14 et al. (1989).

[30] N.Y. EXEC. LAW § 296, *amended by* ch. 368, §§ 3-5 (1991).

[31] N.Y. EXEC. LAW § 296, *amended by* ch. 196, §§ 2-4 (2010).

[32] *See infra* Section V (discussing courts' different interpretations).

IV. THE FHA AND THE HRL: APPLYING THE MODIFICATION REQUIREMENT TO CONDOMINIUMS AND HOMEOWNERS ASSOCIATIONS

Though the FHA and its Rules do not expressly delineate between the types of housing accommodations covered by the Act (e.g., rentals, cooperatives, condominiums, homeowners associations), and perhaps create confusion in this regard,[33] a lawful request for a modification clearly applies to a condominium board or managers and homeowners association board of directors under the federal law. HUD, together with the Department of Justice, set forth an official statement that condominiums and homeowners associations are housing providers as contemplated under the FHA and Rules, particularly with respect to modification requirements, and therefore, are required to comply.[34] This opinion is supported by several holdings that stand for the proposition that the accommodation and modification provisions of the FHA apply to community associations.[35]

However, at least one state court has stated that § 296(18) does not apply to condominiums and homeowners associations.[36] Clearly, the HRL expressly limits the prohibition of discriminatory acts to "the owner, sub-lessee, assignee, or managing agent of, or other person having the right of ownership of or possession of or the right to rent or lease housing accommodations."[37] Yet, in the case of a condominium or homeowners association, although the board has exclusive right to control common areas, ownership is held by the unit owners together

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[33] *See* 24 C.F.R. 100.203 (referring to "in the case of a rental"); *see also* 24 C.F.R. § 100.204 (referring to "dwelling units"); 42 USC § 3602(b) (defining "dwelling").

[34] DEP'T OF JUST. & DEP'T OF HOUS. & URBAN DEV., REASONABLE MODIFICATIONS UNDER THE FAIR HOUSING ACT 6 (Mar. 5, 2008).

[35] Pelton v. 77 Park Ave. Condo., 825 N.Y.S.2d 28, 33 (N.Y. App. Div. 1st Dep't 2006); Fletcher v. Dakota, Inc., 948 N.Y.S.2d 263, 267 (N.Y. App. Div.1st Dep't 2012); *In re* Steinberg-Fisher v. N. Shore Towers Apartments, Inc., 51 N.Y.S.3d 585, 589 (N.Y. App. Div. 2d Dep't 2017); United Veterans Mut. Hous. No. 2 Corp. v. N.Y.C. Comm'n on Human Rights, 616 N.Y.S.2d 84 (N.Y. App. Div. 2d Dep't 1994); *In re* Sussex Condo. III v. Cnty. of Rockland Fair Hous. Bd., 923 N.Y.S.2d 166, 168 (N.Y. App. Div. 2d Dep't 2011).

[36] Yusin v. Saddle Lakes Home Owners Ass'n Inc., 48 N.Y.S.3d 268 (Sup. Ct. Suffolk Cnty. 2016).

[37] N.Y. EXEC. LAW § 296(18) (McKinney 2022).

in common.[38] Nonetheless, one broad interpretation of the statute might be that, since the entire community owns the common area, it is in fact subject to § 296(18). This is despite that the term "housing accommodation," as defined in the HRL, is "the home, residence or sleeping place of one or more human beings."[39]

V. COURTS' INTERPRETATIONS

Court interpretations are leading to mixed results. For as many cases as there are interpreting the reasonableness of an accommodation (e.g., dogs, parking spaces, etc.)[40] there are just as few decisions related to reasonable modifications of common areas in a condominium or homeowners association.

In *United Veterans Mutual Housing No. 2 Corp. v. N.Y.C. Commission on Human Rights*,[41] the court determined that pursuant to 3604(f)(3)(B) (accommodations) "the [cooperative Board] petitioner's policy of refusing to expend corporate funds to construct, modify, maintain, or insure any improvements to the common grounds or other common areas . . . to accommodate the needs of its residents with disabilities clearly violates . . . the Federal Fair Housing Act."[42] However, this is not in accord with the court's determination in *Reyes v. Fairfield Properties*,[43] where, in holding that a rental housing provider need not make renovations or reconstruction since those activities do not constitute an accommodation in the Rules, policies, practices, or services within the meaning of the FHA,[44] a distinction between claims for accommodation and modification is inferred. Relying on *Rodriguez v. 551 W. 157th St. Owners Corp.*,[45] the *Reyes* court reasoned its decision on the failure of the FHA to include the

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[38] *See* Murphy v. State, 787 N.Y.S.2d 120, 124 (N.Y. App. Div. 2d Dept. 2004).
[39] N.Y. EXEC. LAW § 292(10) (McKinney 2022).
[40] *See* Salute v. Stratford Greens, 918 F. Supp. 660, 666 (E.D.N.Y. 1996) (citing *Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328, 335 (2d Cir. 1995)).
[41] 616 N.Y.S.2d 84 (N.Y. App. Div. 2d Dep't 1994).
[42] *Id.* at 85.
[43] 661 F. Supp. 2d 249, 260 (E.D.N.Y. 2009).
[44] *Id.* at 259, 261 (citing Shapiro v. Cadman Towers, Inc., 51 F.3d 328 (2d Cir. 1995)).
[45] 992 F. Supp. 385 (S.D.N.Y. 1998).

term "facilities" in either the accommodation or modification provisions.[46]

Adding to the uncertainty, at least one court has expressly exempted condominiums and homeowner associations from the definition of a landlord or housing provider which would otherwise be governed by the HRL.[47]

Yet, there are still nuanced issues yet to be heard. Here, we have established that under the FHA a covered person is likely entitled to make modifications to common use areas at her expense, but since there is no landlord tenant relationship in this context, may the Board still collect restoration fees? Additionally, what if such a modification is not permitted under the governing documents? Is an amendment to the documents a cost attributable to the covered person? These points appear yet to be decided.

Ultimately, however, it seems that boards are likely required to allow a resident to modify common elements for her benefit and at her expense.[48] Except for the HUD guidance stating that a modification to the common area for one person benefits the entire community, practitioners are still unsure what will happen once the modification is complete.

VI. REASONABLENESS STANDARD

Whether brought under the FHA or the HRL, a board's obligations extend only as far as what is "reasonable."[49] Whether a

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[46] *Id.* at 387.

[47] Yusin v. Saddle Lakes Home Owners Ass'n, Inc., 48 N.Y.S.3d 268 (N.Y. Sup. Ct. Suffolk Cnty. 2016).

[48] *In re* Sussex Condo. III v. Cnty. of Rockland Fair Hous. Bd., 84 A.D.3d 965, 966 (N.Y. App. Div. 2d Dep't 2011).

[49] *Shapiro*, 51 F.3d at 335 (relying on U.S. DEP'T OF HOUS. AND URB. DEV., SECTION 504: FREQUENTLY ASKED QUESTIONS, https://www.hud.gov/program_offices/fair_housing_equal_opp/disabilities/sect504faq#_Reasonable_Accommodation (last visited Mar. 1, 2022)):

> Whether a particular accommodation is reasonable depends on a variety of factors and must be decided on a case-by-case basis. The determination of whether a requested accommodation is reasonable depends on the answers to two questions. First, does the request impose an undue financial and administrative burden on the housing provider? Second, would making the accommodation require a fundamental alteration in the nature of

request is reasonable depends on the facts specific to the circumstances,[50] including the expense associated with fulfilling it.[51] That is, would the cost present an "undue burden?"[52] Thanks to the Rules, we have some guidance as to what is "reasonable" as it applies to an occupant making the modification to her unit.[53] We also know from case law how reasonable accommodations look. Yet, just as we are unclear as to how far the FHA extends to Boards, we are equally unclear as to what tips the fiscal scale from reasonable to unreasonable. What is for certain, though, is that while a board is mandated to provide a reasonable accommodation, it need not do so according to the covered person's preference.[54]

> the provider's operations? If the answer to either question is yes, the requested accommodation is not reasonable.

Id. (explaining how to determine if a request for a certain accommodation is reasonable).

[50] *Shapiro*, 51 F.3d at 335; *see also* Bentley v. Peace & Quiet Realty 2 LLC, 367 F. Supp. 2d 341, 344 (E.D.N.Y. 2005) (setting forth the factors to be used in that case which shall determine whether the housing provider will suffer an undue burden if required to accommodate the covered person, whether the request is reasonable).

[51] *Shapiro*, 51 F.3d at 335; *Bentley*, 367 F. Supp. 2d at 344.

[52] *See Shapiro*, 51 F.3d at 335.

[53] 24 C.F.R. § 100.203(c) (1989).

[54] Resnick v. 392 Cent. Park W. Condo., No. 07 Civ. 1988, 2007 U.S. Dist. LEXIS 60232, at *6 (S.D.N.Y. Aug. 14, 2007).