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THE COSTS OF OWNERS "AGING IN PLACE"

by Sandra L. Gottlieb www.LawforHOAS.com Dec 6, 2017

and Robert M. Nordlund, PE, RS www.reservestudy.com

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With an ever-aging baby boomer population, there is a growing need for community associations to recognize and prepare for difficult issues that may accompany aging residents in the community.

In this webinar, Sandra L. Gottlieb, Esq, CCAL and Robert Nordlund, PE, RS discuss the accommodation and modification issues that might soon be affecting your association and how to responsibly prepare for the issues and expenses related to more and more owners "Aging in Place". The "Aging in Place" trend is real, and associations aware of its issues, risks, liabilities, and costs are going to be more successful setting their association up for an improved future by embracing these changes and making appropriate adjustments. As Sandra explains, there are some significant problems looming if your association is unprepared and handles these sensitive issues poorly.

But no worries, you don't have to do this yourself. Association Reserves and SwedelsonGottlieb are here to help you build peaceful and productive communities, guiding your association towards an improved future!

The Costs of Owners "Aging in Place"

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Baby Boomers – Increased # of Retirees

- Association boards and managers can and should prepare for these potential issues by being aware of the potential issues by being aware of the potential implications and liabilities for their association.
- Where do you turn for assistance?
- Why boards need to be prepared.
- What is your legal obligation and why!

Legal Related Issues

- In ability to keep their units clean (hoarding & unhealthy environment)
- Disturbing surrounding residents/neighbors
- Pests, water intrusion, or mold that may affect surrounding units or the building as a whole.

Other Legal Concerns

- Maintenance the exterior of the property
- Dementia
  - Forgets they had something on the stove
  - Water running

Reasonable Modification Requests

- Federal & State Fair Housing
  - Americans with Disabilities Act
  - What type of modification requests to anticipate:
  - Parking accommodation
  - Installation of handrail or ramp
  - Flooring
  - Handicap pool lifts
  - Accommodations for the deaf or blind

How Should an Association Deal With Potential Issues as they Arise?

- From a disciplinary standpoint, it is important to address the issue on the resident's *conduct*, rather than based on the *person.*
- Specifically address violations of the governing documents.
- Enforce the governing documents against *all* owners, and treat aging or elderly residents neither more strictly nor more leniently than others.

Maintenance Agreements for Accommodations

- Avoid potential liability
- Who is responsible for the the maintenance and repair of the component?
- Who will remove the component once the owner no longer requires it or moves?

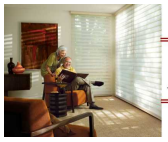
Other Options

- Obtaining emergency contact information.
- Is there a caregiver?
- Building relationships with other local organizations who assist in elderly care.
- Seek advice from legal counsel.

nearly

90%

of seniors want to stay in their own homes as they age*



Baby Boomer Guide to Aging-in-Place

National Aging in Place NAIPC Council

NEW HAMPSHIRE

What costs $, and Who Pays?

- Ongoing Operational vs Physical Changes?
- Common Areas vs Separate Interest?
- Reserves vs Capital Improvement?

What costs $, and Who Pays?

Operational Costs

- Administrative (contact info, assemble resource list, rules review…)
- Communication (meeting additional assistance)

Should be a gradual and minimal increase in costs

What costs $, and Who Pays?

Physical Changes

- Common Areas vs Separate Interest?
- If Common Areas:
  - Reserves vs Capital Improvement?

What costs $, and Who Pays?

Separate Interest

- Generally the unit owner pays
  - Restore to original configuration?

What costs $, and Who Pays?

Common Areas – serving only the Separate Interest

- Responsibility (but not requirement) to restore – may boost home's value
- Association sets the architectural design standards
- Paid by Separate Interest

What costs $, and Who Pays?




What costs $, and Who Pays?

Common Areas – Serving All Owners

- Reserves vs Capital Improvement
  - Reserves – fund from Reserve Fund
  - Capital Improvement – fund from Op, Special Assmt, Loan
  - May boost home values…

What costs $, and Who Pays?


What costs $, and Who Pays?

Common Areas – Serving All Owners

- Reserves vs Capital Improvement – *not always clear*

Reserve Component Attributes	Capital Improvement Attributes
The component/project is currently a common area maintenance responsibility	The component/project is currently <u>not</u> a common area maintenance responsibility
Incidental Cost	Discretionary
Natural Evolution of existing project/asset/system	Entirely new purpose, use, or capability
Integral part of a system, not reducible into separate components.	Assets are fundamentally reducible into smaller or separate component parts.

What costs $, and Who Pays?

Common Areas – Serving All Owners

- Reserves vs Capital Improvement – *not always clear*
- Fortunately, you can seek wise counsel
  - Reserve Study professional
  - Attorney

"Aging in Place" is Happening

- The association is not <u>required</u> to accommodate the changing needs of owners – but it may be a good idea
- There will be associated costs
- Consider these changing demographics – and consider that physical changes to the association may boost home values.

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Webinar Questions Asked by Attendees

Q: Can you address if the obligations of the Association vary for an age-restricted (over 55) condo Association vs. non-age-restricted?

A: In general, the laws governing homeowners associations are laws of general applicability. This means that an Association, and its Board and managing agent have the same general duties toward all homeowners—namely, to act in the best interests of the Association as a whole, to not put particular residents' interests (including their own) above those of the Association, and to avoid engaging in disparate treatment of owners. That being said, state laws allow for certain communities to be age-restricted (for those of retirement age, generally 55 or older). In such communities, there may be specific restrictions or provisions regarding who may live in the community resulting in the Board having to enforce the policies and procedures that are in addition to the requirements at law. That said, however, the general principles of law and the duties of the Board to owners in the community still remain the same. Remember also that specific obligations for the Association/Board will vary by community, based on the specific language in the Association's governing documents, so specific obligations like who may reside in a community or what alteration can be made will change, but things determined by law (e.g., fair housing accommodation requests) would be the same.

Q: Please give more examples of "Accommodation" requests vs "Modification" requests.

A: The distinguishing factor between an accommodation and a modification is that a modification involves an alteration to a physical structure, whereas an accommodation implies a change—generally a relaxation or non-enforcement—of an Association rule or policy because enforcing such rule/policy against the requesting person (with a disability) could interfere with their equal right to use their property in the same manner as able bodied persons. Here are some more examples, but there are many more possibilities:

Reasonable Accommodation—allowing service animals in locations where pets may not be allowed (e.g., a roof area, pool area, elevator, etc.) or allowing a resident to maintain a service animal where that resident would otherwise be restricted from doing so; permitting a live-in care provider to live with the resident where that would otherwise be restricted; exchanging or reassigning parking spaces; moving a meeting to a location accessible to a person with a disability or allowing attendance by telephone; allowing a member to have a representative attend a meeting in their place pursuant to a power of

attorney or to have a non-member accompany them for assistance or to provide some service (like sign language translation for a deaf member).

Reasonable Modification—allowing an owner to widen the doorway to his or her residence to accommodate a wheelchair, or to common area facilities such as a gym or recreation room; approving modifications in an owner's residence involving the moving of common area pipes to lower or modify plumbing fixtures for persons in wheelchairs; allowing the alteration of a common area path or walkway at the requesting owners cost and expense; permitting a sidewalk to be modified to provide wheelchair access to the street level.

Q: What recourse does an owner have that is impacted by an approved accommodation such as excessive noise created by a hard-surface floor approved above the impacted unit?

A: This is actually a difficult question, and Boards can be put in difficult positions where they are required by law to grant an accommodation which may negatively impact other owners and/or residents. In general, the fact that a person is entitled to an accommodation of a particular rule or policy does not mean that that person may then violate ANY rule or policy of the Association. So, just because a person may be allowed to have a service animal, for example, that animal can still be prohibited by the Association if it creates a nuisance through excessive barking/noise, or if it poses a danger to other residents (e.g., if it bites a resident). The same can affect the flooring example raised in the question—an owner who has been granted an accommodation for hard surface flooring to accommodate a disability may still be responsible for excessive noise transference resulting in a nuisance to neighboring owners. If another resident is impacted, that resident should certainly let the Association know that he or she is being negatively impacted, so that action may be taken to address the issue as appropriate, but this is a difficult issue for Association Boards who may be stuck between fair housing obligations and the needs of other owners in the community. That being said, if an accommodation is causing significant problems for others in the community, an investigation is certainly warranted as to what steps the Association could take, or if the impacted resident needs to address their concerns directly with the homeowner who was granted the accommodation.

Q: When it comes to a condo, wouldn't it make sense to leave a disability modification for future use?

A: It depends on where the modification is, but often that is the case. For example, the installation of a handicapped ramp on common area would generally stay, because

that ramp could be used in the future by others with a disability (plus it would likely be expensive to remove). But there are some modifications that may make sense to remove, like a second, lower handrail along a stairwell that may not look particularly nice, and could thus be removed when it is no longer necessary. Those modifications within condominium units themselves would also likely remain, and subsequent owners would be responsible for the maintenance and/or removal of the modification. Generally, this would be addressed in a recorded covenant to run with the land, which an Association should require an owner to execute at the time of approval of a reasonable modification.

Q: How does an association deal with situations where real estate agents are selling property to individuals who are not able to age in place?

A: The Association really has very little say in who can and cannot live there (unless it is an age restricted community, or perhaps a stock co-op with income requirements). And, an Association would likely not want to be involved in such decisions as this brings up issues of discrimination and disparate treatment, which may expose the Association, the Board, and/or the managing agent to liability. In general, you never really know how long owners will live in a property (if they even intend to live there at all) and how their health or well-being may change in the future. If you notice that significant numbers of older residents are moving into the Association and that this may raise potential issues in the future, that may be a good time to begin implementing policies for things like emergency contact information, or having additional keys provided to management for emergencies (though we are not big on this policy given other obvious concerns this could raise) or making contacts with local organizations who may be able to assist with elder care should the Association run into issues in the future. In short—you can't keep people from buying property (except in certain limited situations), but you can plan ahead for potential issues.

Q: How does "Aging in Place" apply to co-ops?

A: Everything we discussed in the presentation would also apply to stock cooperatives. When we refer to "Associations" we are including condominium associations, planned unit development homeowners associations, stock cooperatives, and community apartment projects. All of these are common interest developments, and are generally treated the same under the law in terms of obligations of the Association and how they interact with owners and residents.

Q: Issues can come up when an over-55 active senior community is part of a master community and the seniors have specific mobility issues within their single-family homes. Issues such as hillside homes with narrow walkways for access to side and rear yards and slanted driveways needing railings in inclement weather.

A: Agreed—these would certainly be issues that would need to be addressed, likely as reasonable modification requests to make exterior alterations to the home/yard. Remember, the costs for such modifications are generally borne by the requesting owner (as opposed to the Association in a reasonable accommodation request). Also note that the fact that an Association cannot deny a reasonable modification to someone who purchases a home knowing that modifications would be required. In other words, it is not acceptable under the law to deny a modification under the argument that the person should not have bought the home if they knew they would need modifications to be able to use/enjoy it.

Q: May we assume a unit that is rented by the owner is under the same rules?

A: Yes. In general, all residents within an Association are bound by the Association's governing documents whether they are an owner of record, family member, or tenant. All residents are also covered by fair housing and discrimination laws, and are entitled to the protection of those laws. That means that Associations are required to grant reasonable accommodations and modifications to non-owner residents as well as to owners. There are issues that come into play with regard to the Association enforcing rules or restrictions against non-owner residents, however, as well as for reasonable modification requests affecting the separate interest, as these would necessarily require the Association to deal with the owner of the separate interest, who is bound to the Association through the recorded covenants and restrictions (or occupancy agreement for a stock co-op).

Q: The association has had requests to add a stair chair lift to the exterior stairs which can serve one or two units. How should this be handled in the cases where 2 units would be impacted? Written consent from the party not requiring the lift?

A: This would honestly depend on the circumstance of the specific Association in question. This sounds like it would be a request for a reasonable modification under the fair housing laws. However, since this would likely be on common area, the Association would have a significant say as to what is constructed and whether that would be reasonable or required. Just because an owner has requested a modification does not mean that it is automatically granted (for example, what if the owner wanted an elevator installed where one does not currently exist??). This sounds like a significant

modification that could have significant implication on the structure of the building itself. It may be that there is a less intrusive, alternative modification that could also accommodate the requesting owners. In terms of consent, generally the consent of other owners would not be required for a reasonable modification of Association common areas (which are controlled by the Association). Such a consent requirement would undercut the purpose of the fair housing laws in that other owners could effectively prevent the Association from granting a required accommodation or modification to a disabled person who requires the accommodation or modification to have the full use and enjoyment of his or her property. That being said, other owners who are being impacted should certainly be advised of the situation (though the Association must be careful in what information it discloses about the requesting person and his or her disability if such information is not readily apparent or generally known).

Q: How do Associations handle pool lift accommodation requests? Do associations have to allow the installation of a lift if requester pays for the lift and cost of installation?

A: The installation of a pool lift is better described as a reasonable modification than a reasonable accommodation as it would involve the installation of special equipment to a common area pool facility. Generally, the requesting owner would be responsible for the cost of the lift and the installation of same; however, since this would be installed in a common area generally used by all residents and maintained by the Association, the Association may be responsible for the ongoing maintenance and upkeep of this improvement. The specifics as to responsibilities should be spelled out in a covenant to run with the land executed by the Association and the requesting owner to minimize future disputes.

Q: I want to add an electric chair rail system on our front stairs in front of condo & better rails for a senior co-owner who is & aging in place. I am HOA President. Can I require our HOA of 4 units to pay for or contribute to installing items? Is there a law I can use? Can HOA be liable for any injuries for refusing to do it? In San Francisco.

A: Can you require the Association pay for this?—probably not. If an owner or resident makes a reasonable modification request, the Association may be required to allow the modification (this would generally be conditioned on it being structurally sound, as evidenced by stamped engineering plans and an architect's design, and performed by a licensed contractor), at the requesting resident's cost. However, you as the Board president cannot unilaterally decide that all owners must pay for this. If you think that such installation is in the best interests of the Association, the Board may decide to undertake such installation, but there may be restrictions in the Association's

governing documents regarding expenditures on capital improvements that require a member vote, in which case you would need a vote of the membership to expend such funds. In terms of whether the Association could be liable for refusing to do this, that depends on the situation. Generally, there would not be liability where the Association had no duty or obligation under the governing documents or at law. So, if no request was made for a modification and there was no other legal obligation on the Association to modify the entrance, then there would likely not be liability for injuries. If, on the other hand, a reasonable modification request was made, and the Association unreasonably denied such request, it is possible and even likely that the Association would face liability for injuries that result (not to mention liability from HUD or state agencies for claims of discrimination).

Q: Our HOA is comprised of individual, stand-alone single family homes with no HOA responsibility for the physical home structure. I presume in this context, one possible impact of "aging in place" may be homeowner requests for variance for installation of exterior home access ramps? Any other situations you think we might anticipate?

A: Requests for reasonable modifications or accommodations relating to architectural standards would likely come up. There could also be requests related to parking (on the street, in the driveway). There are also other, less obvious things that may come up. Where are Board meetings held? Are they held in a Board member's home where a disabled member of the Association may not be able to access/attend? If so, it may need to be moved if an accommodation request is made. There may be requests for telephonic access to meetings by members who cannot attend in person (some of our larger communities actually televise their meetings). It is not always easy to anticipate these issues, and the Association does not have to make accommodations that are not requested. The important thing to remember is that when the Association is made aware of a disability-related request, whether formal or less so (there is no specific form required, as long as it is clear that the person is requesting an accommodation based on a disability he or she has), to take that request seriously and reach out to the Association's legal counsel for assistance, because these issues can quickly turn into problems and liabilities if not addressed properly.

Q: Another question from the over-55 co-op board member: When members begin asserting that this or that common areas or feature is a safety hazard, how does a board go about assessing how big a hazard the feature really is? You can't protect everyone from everything, and some things are doubtless more dangerous than others. We currently are dealing with a coffee table which our Design Committee has

put in place. A member has charged that it is dangerous. The Design Committee replied with photos of coffee tables in other senior independent living facilities. We are also contemplating self-opening doors and improvements to the walking paths that ring our property.

A: When the Board is made aware of possible safety issues, it has a duty to investigate the matter. That does not mean that the Board is required to take action, it means that the Board has evaluated the concern and made a decision. We have a maxim we use and tell all of our clients—"doing nothing is not the same as choosing to do nothing." In other words, if the Board has evaluated the issue and determined that it is not, in fact, a safety concern and made the business decision to do nothing (which should be documented in Board minutes), then it has protection in the event that something were to happen (of course, the decision should still be reasonable given the circumstances). This is different from the Board simply ignoring the complaints, where, if something were to happen, the Board and Association would be subject to liability for failure to investigate and breach of the Board's duties.

The Association does have a duty to correct known safety issues and to perform maintenance on the common areas, but as you said, the Association cannot guarantee the safety of all residents. Its duty is to act reasonably given the circumstances, which would mean investigating and acting to correct legitimate safety concerns.

Sandra L. Gottlieb appreciates the assistance of Kevin F. McNiff in drafting these written responses.