
AVOID DIVING OFF THE DEEP END WITH DISCRIMINATORY RULES

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With summer beginning and the temperature rising, San Diegans will perform their yearly ritual of basking in the sun and enjoying their association's pool. Imagine waking up excited for a relaxing day in a lounge chair and cooling off with a refreshing dip in the pool. Sun-

screen applied, earbuds in (we have to be considerate of other residents), and that new bathing suit delivered by Amazon (Prime delivery of course), you take a quick stroll to the pool. As you approach the entrance, you see a sign posted that reads: "NEW POOL RULES: Children may use the pool at mid-day and adults shall swim in early mornings and evenings."



This hypothetical association's attempt to allow members to enjoy the pool has in fact created a restriction on pool use that is discriminatory in

nature and a violation of several state and federal fair housing laws based on familial status (e.g. those with children versus those without children).



Associations can find themselves in the deep end of the pool without a life preserver if rules discriminate or appear to discriminate against a protected class of persons. This can lead to fair housing claims against an association through the California Department of Fair Employment & Housing (“DFEH”).

While DFEH has compiled statistics related to housing discrimination claims dating back to 2001, the most recent report publicly available is from 2018¹. While DFEH complaints decreased from 1,524 cases in 2014 to 784 cases in 2018; this trend will not likely remain as we have seen the number of DFEH complaints filed against associations increase in the past year.

Avoiding discrimination complaints appears simple enough but in practice can prove to be challenging. Civil Code section 4350 states that rules are enforceable if the following conditions are fulfilled:

- The rule is in writing.

- The rule is within the authority of the board conferred by law or by the declaration, articles of incorporation or association, or bylaws of the association.
- The rule is not in conflict with governing law and the declaration, articles of incorporation or association, or bylaws of the association.
- The rule is adopted, amended, or repealed in good faith and in substantial compliance with the requirements of this article.
- The rule is reasonable.

Contrary to the presumption that CC&Rs are deemed reasonable until proven otherwise², rules are not afforded the same deference. Reasonableness of rules is not reviewed to facts specific to a single person; rather they are reviewed in “reference to the common interest development as a whole.”³ In addition, Government Code Section

12955 makes it unlawful “to discriminate against or harass any person because of the race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, national origin, ancestry, familial status, source of income, disability, veteran or military status, or genetic information of that person.” If a rule or proposed rule is unreasonable as to the association as a whole or violates any of these enumerated protected classes of persons, the rule is likely discriminatory. Hence, an association could easily find itself in deep water!

So, what is an association to do? Rules should generally apply to all persons, not just a specific group. If an association answers the questions of “who”, “what”, “where”, “why” and “how”, it will be better positioned to address whether a rule or proposed rule is reasonable or discriminatory:

- **WHO:** Who does the rule help and/or harm?
- **WHAT:** What is the rule’s goal or purpose?
- **WHERE:** Where will the rule apply?
- **WHY:** Why is the rule being pursued?
- **HOW:** How will the rule be interpreted?

For example, consider a rule that restricts children from jumping in the pool. WHO – the rule specifically hurts children in that not all children jump in pools and in fact some adults jump in pools. WHAT – the rule’s purpose could be to allow persons to enjoy the pool without getting wet. WHERE

– the rule would apply to the association’s common area, which appears on its face to be a legitimate concern and within the association’s purview. WHY – the rule may have been drafted to prevent complaints of nuisance / quiet enjoyment, which again appears to be reasonable. HOW – children that violate this pool jumping rule are subject to enforcement by the association vis a vis the property owner; however, adults that violate this rule have no repercussion. Based on these factors, while the association wants to ensure its residents can use the pool free from the next cannonball dive, the rule is almost surely discriminatory toward children and an undue restriction on familial status / age. The above rule could be written in a non-discriminatory manner as follows: No persons may jump in the pool at any time.



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The board of directors should actively participate in the rule drafting process along with its management company and then have all rules reviewed by legal counsel before the membership review process. Following these basic guidelines will assist in a successful rule implementation for your association. 🏡

¹ See <https://www.dfeh.ca.gov/legalrecords/?content=reports#reportsBody>

² Nahrestedt v. Lakeside Village Condominium Assn. (1994) 8 Cal.4th 372

³ Sui v. Price (2011) 196 Cal.App.4th 933, 939

