

# When Disability Law Meets Private Land Use Regulations:



## Understanding Emerging Constraints on Private Land Use Controls

By Marc L. Roark

**E**rica Hernandez and Paulo Regaldo filed a claim against their neighborhood homeowners' association (HOA), the Golf Course Estates Homeowners Association.<sup>1</sup> The Regaldos' daughter suffers from severe autism that makes her prone to "wander" when left alone. As a part of her Individual Education Plan, the school provided "door-to-

door" pick up service by a public-school bus. The complaint alleges that the HOA board voted to prevent access to the bus because of potential wear and tear to the neighborhood roads and because of safety concerns for residential children. Nevertheless, the complaint also alleges that the association regularly allows other large vehicles such as UPS trucks, FedEx trucks and garbage trucks onto

the neighborhood streets. The Regaldos claim that the HOA violates the Fair Housing Act because of its refusal to make a "reasonable modification" to its rules.

Cities, neighborhoods and developers generally understand that various sources of property control impact the spaces they regulate. Zoning regulations, neighborhood covenants and



other servitudes are cost-based regulatory schemes that owners and developers take into account when developing land. When these properties interact in the public sphere, such as where public accommodations are required, building schemes typically include greater access points to ensure that use is available for all persons. In Louisiana, most of the cases dealing with a property owner's interaction with disability law have dealt with public accommodations requirements,<sup>2</sup> landlord-tenant disputes<sup>3</sup> and zoning challenges.<sup>4</sup> However, private developments, such as neighborhood covenants (known colloquially as HOAs), have often flown under the radar of these requirements since the general view is that accessibility requirements found in building schemes do not apply to privately owned property.

In Louisiana, HOAs fall under the category of building restrictions. The Civil Code defines building restrictions as "charges imposed by the owner of an immovable in pursuance of a general plan governing building standards, specified uses and improvements."<sup>5</sup> These restrictions are "*sui generis real rights*" and may be enforced by the association or other landowners in the association.<sup>6</sup> They may impose requirements that impact area controls on property (such as lot size, height or square footage of buildings attached to the land); or uses of the property (such as pet allowances, vehicle allowances or whether someone can operate a business from the property).<sup>7</sup>

Yet, as cases around the country have demonstrated, there is another path towards land use restraints in the form of the Fair Housing Act's requirements that "reasonable modifications" be permitted to ensure that disabled persons are not unfairly deprived of housing. Several recent cases have demonstrated how the Fair Housing Act raises conflict with private land use schemes. Nearly 20-25% of the U.S. population has a family member with a disability that limits mobility; these issues will become even more frequent, bringing private communities into conflict with HOAs.<sup>8</sup> This article unpacks some of the points of tension that exist between HOAs and

different strands of disability law and highlights some of the ongoing cases in the United States.

## Sources of Disability Law that Impact Building Restrictions

There are three primary sources of disability law in the United States — the Americans with Disabilities Acts of 1990 and 2008 (ADA),<sup>9</sup> the Fair Housing Act and its amendments (FHA)<sup>10</sup> and section 504 of the Rehabilitation Act of 1973 (RHA).<sup>11</sup> Each of these acts work to protect persons with disabilities from discrimination if the disability falls into the definition under those acts. The ADA's definition of a disability is:

- (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment.<sup>12</sup>

The FHA uses the term "handicap" as the basis for determining whether its provisions reach a particular disadvantage and is defined as a "a physical or mental impairment which substantially limits one or more of such person's major life activities, a record of such handicap or being regarded as having such a handicap."<sup>13</sup> The definition of disability in the RHA references the definition of disability in the ADA.<sup>14</sup>

Title III of the ADA addresses the provision of "goods, services, facilities, privileges, advantages, or accommodations" of any place of public accommodation.<sup>15</sup> This applies to private communities and country clubs that provide space for public events, to residential homes that include a home office, businesses where members of the public are invited and common areas of housing facilities.<sup>16</sup> The RHA specifically prohibits discrimination by programs or activities that receive federal financial assistance from a federal agency.<sup>17</sup> The FHA prohibits discrimination in hous-

ing choice on the basis of a number of vulnerable categories, including persons with handicaps. Under the FHA, a discriminatory practice includes any "refusal to permit reasonable modifications, at the expense of the handicapped person, or reasonable accommodations in rules, policies, practices or services, and failures in the design and construct of dwellings scheduled for first occupancy."<sup>18</sup>

## Three Potential Conflict Areas for HOAs and Disability Law

One aspect of HOAs is the vast amount of control that HOA rules impose on owners of property. These rules are premised on the idea that homeowners voluntarily consent to the rules when they purchase property in the neighborhood or when they form the association with other homeowners.<sup>19</sup> However, disabilities are not planned events and can arise after individuals have invested in a home. It can impact the homeowners, their children or their parents who are living in the family home.

Still, HOAs can be particularly protective over common environments and aesthetic features of homes. These concerns generally can be grouped into three major areas dealing with persons with disabilities — vehicle access to the home; architectural features added to the home; and control over common areas of the community.

### Accommodation of Homeowner Association Rules for Persons with Disabilities — Vehicles

In *Kuhn v. McNarry Estates Homeowners Association*, the plaintiffs (the Kuhns) were parents of a severely disabled adult daughter (Khrizma) with Down Syndrome, autism, chronic digestive problems, scoliosis, who had the intellectual capacity and functionality of a 2-year-old child. In 2005, the Kuhns purchased a home in McNarry Estates, an exclusive neighborhood that imposed two distinctive sets of home ownership rules on owners.<sup>20</sup> For the first five years, Khrizma lived with the

Kuhns part-time, but, starting in 2010, she moved in with her parents full time. In 2014, complications in her conditions required the Kuhns to provide around-the-clock care, including quick access to a toilet and access to a shower for cleanup after use of the toilet. Because of the curvature of her spine, Khrizma required transportation in a prone position. Her doctors recommended that the Kuhns purchase a specially equipped RV with toilet and shower facilities and a place for Khrizma to rest. For easy access, her doctor recommended that the RV be parked in the driveway. The HOA's rules prohibited RVs from being parked in driveways within the subdivision.

Khrizma's doctor provided detailed written reasons why the family required an accommodation of the existing rules. Nevertheless, both the neighborhood board and the separate homeowners' association denied the Kuhns' request for a reasonable accommodation. The Kuhns filed a fair housing claim against both associations in 2016, after they were forced to sell their home, purchase a higher-priced home and vacate their home more than a month before closing on the new home. The extra expense caused them to sell their car and had detrimental effects on Mr. Kuhn's health. In January 2016, a federal judge sided with the Kuhns, finding that the HOAs had indeed engaged in housing discrimination. The Kuhns later settled with the HOA for \$300,000 plus other costs.

A similar dispute in Las Vegas<sup>21</sup> found an HOA liable for failure to make reasonable accommodation and permit a family to park an ambulance used to transport their disabled son to and from his doctor appointments, despite their rules prohibiting extra vehicles.

### **Accommodation of Homeowner Association Rules for Persons with Disabilities — Design Rules**

In 2012, Charles and Melanie Hollis filed a federal lawsuit against the Chestnut Bend Homeowners Association for its denial of a right to build a therapeutic sunroom onto their home.<sup>22</sup> The HOA denied the Hollises' request for a modification based on the

aesthetics of the new addition. The family first requested permission to build the sunroom in 2011 and spent a year providing information to the HOA architectural board before they were summarily denied. Eventually, the family sold their home at a loss, frustrated that the process dragged on so long. The Hollises' children required the sunroom for therapeutic play and for in-home physical therapy. Despite this fact, the HOA denied the claims, alleging that the association had an obligation to uphold "architectural standards for everyone in the neighborhood." The HOA ultimately agreed to settle the suit for \$156,000.

In a similar suit, in 2009, Cindy and Ian Block bought a townhouse in the Carriages at Allyn's Landing neighborhood and later installed a wheelchair ramp.<sup>23</sup> Cindy Block's mother was wheelchair-bound. The neighborhood association required that the Blocks paint the wheelchair ramp the same color as the siding of the home and remove the ramp if and when it was no longer needed. In September 2010, Ms. Block's mother died and the HOA sent the Blocks a letter ordering them to remove the ramp. In the meantime, Ms. Block, who is legally blind, acquired a letter from her optometrist requesting that they be allowed to keep it. The HOA then set forth additional conditions on the Blocks keeping the ramp, including that they remove the ramp prior to attempting to sell their townhouse. The Blocks brought a lawsuit claiming housing discrimination and eventually settled with the HOA for \$20,000 plus attorney's fees associated with the action.

### **Control over Common Areas of the Community**

The HOA's common areas can become a source of conflict that navigate between the territories of the association as a private actor and the extent to which the association is bound to provide access as a public accommodation. Sometimes, the common areas may interfere with the ability to access public accommodations, like transportation, bathroom access or parking. When and what the association is bound to provide

depends on who has access to the community areas. For example, if the association regularly opens its facilities to the public, its restroom must comply with public accommodation requirements. If the access is limited to members of the community, the association must not create obstacles that make it difficult for those individuals to enjoy the amenities of the community.

In 2018, the Village of Valleybrook Homeowners Association in Pennsylvania settled claims with four residents who filed a HUD complaint for failure to provide handicapped parking spaces. The residents requested the spaces in 2017, and the association told the residents that they would be required to pay for reserved spaces, per the written policy regarding handicapped parking access. The residents refused, and the association in turn refused to designate spaces.<sup>24</sup> HUD found that the refusal was a direct violation of the FHA amendments in 2009. In fact, HUD in publications produced by the department specifically identified requiring handicapped residents to pay the costs for signage relating to a handicapped parking spot to be a violation of the FHA.

## **Conclusion**

Advising an HOA can be fraught with peril. The residents and governing actors often believe the rules help maintain an orderly (and economically viable) community that they chose to live in. In many regards, they are given broad authority to enforce covenants laid out when the subdivision was created and modify those rules as needed.

However, HOAs are not immune from restraint themselves. Despite some views that HOAs are governments without limits, the various provisions designed to protect disabled persons from housing discrimination is proving to be a formidable check on an HOA's seemingly limitless power to deny homeowner use of property. Because the regulatory scheme that protects disabled persons is federal, the Supremacy Clause of the Constitution requires that HOA schemes

make reasonable adjustments. An HOA would be wise to take seriously claims by disabled persons for reasonable modifications and accommodations. If well documented and the request is a reasonable accommodation, failure to make a modification of rules for a disabled resident could cost the association and its homeowners thousands of dollars in fines, damages and attorney's fees.

## FOOTNOTES

1. *Hernandez v. Golf Course Estates Homeowners Ass'n*, 6:18-cv-00932 (D. Ore. 5/29/18).
2. *Covington v. McNeese State Univ.*, 996 So.2d 667 (La. App. 3 Cir. 2008), *writ denied*, 3 So.3d 491 (La. 2009); *London v. E. Baton Rouge Par. Sch. Bd.*, 134 So.3d 623 (La. App. 1 Cir. 2013).
3. *See e.g.*, *Mazzini v. Strathman*, 140 So.3d 253 (La. App. 4 Cir. 2014); *Renewal Homes v. Laneheart*, 2017 WL 4700825 (La. App. 4 Cir. 2017); *Foster v. Tinnea*, 705 So.2d 782 (La. App. 1 Cir. 1997); *Riser v. H.Y. Bell Mem'l Apartments*, 669 So.2d 689 (La. App. 2 Cir. 1996).
4. *See, e.g.*, *Esplanade Ridge Civic Ass'n v. City of New Orleans*, 136 So.3d 166 (La. App. 4

- Cir. 2014).
5. La. Civ.C. art. 775.
  6. La. Civ.C. art. 779; *id.* cmt. (c) ("every landowner in a subdivision is adversely affected by violations and has a substantive right as well as procedural standing to bring an action."); *Lakeshore Property Owner's Assoc. v. Delatte*, 579 So.2d 1039, 1044 (La. App. 4 Cir. 1991), *writ denied*, 586 So.2d 560.
  7. *See*, Gail Stephenson, "Good Fences Make Good Neighbors (But Only if the HOA Approves)," 2 *The Baton Rouge Lawyer* 8, 8 (Jan./Feb. 2019).
  8. Robin Malloy, *Land Use Law and Disability: Planning and Zoning for Accessible Communities* 7 (2017).
  9. 42 U.S.C. § 12101 et seq.
  10. 42 U.S.C. § 3601 et seq.
  11. 29 U.S.C. § 701 et seq.
  12. 42 U.S.C. § 12102(1).
  13. 42 U.S.C. § 3602(h).
  14. 29 U.S.C. § 705 (9).
  15. 42 U.S.C. § 12181 et seq.
  16. *Kalani v. Castle Village, L.L.C.*, 14 F. Supp. 3d 1359 (E.D. CA 2014).
  17. 29 U.S.C. § 705 (9).
  18. *Hollis v. Chestnut Bend Homeowners Assoc.*, 760 F.3d 531 (6 Cir. 2014).
  19. 4 Louisiana Civil Law Treatise § 10.3.
  20. *Kuhn v. McNary Estates Homeowners Ass'n*, 228 F.Supp. 3d 1142 (D. Ore. 2017).
  21. "Feds Announce Settlement with Las Vegas HOA," *Las Vegas Review Journal* (Oct. 30,

2018) available at: [www.reviewjournal.com/news/feds-announce-settlement-with-las-vegas-hoa-over-ambulance/](http://www.reviewjournal.com/news/feds-announce-settlement-with-las-vegas-hoa-over-ambulance/) (noting that the suit brought and settled by HUD resulted in a \$65,000 settlement in favor of the family).

22. *Hollis v. Chestnut Bend Homeowners Ass'n*, 760 F.3d 531 (6 Cir. 2014).
23. *The N.C. Human Relations Comm'n v. Carriages at Allyn's Landing Owners Ass'n, Inc.*, 13-823 (N.C. Ct. App. 2014).
24. "Valleybrook group to pay \$31k in disabled complaint," *Daily Times* (10/27/18) available at: <https://independentamericancommunities.com/2018/11/03/hoa-pays-31k-installs-handicapped-parking>.

Marc L. Roark is an associate professor and Senior Fellow at Southern University Law Center. He focuses in property law, land use and housing issues, including the law relating to homelessness public housing. He is a member of the Louisiana, North Carolina and District of Columbia Bars. (mroark@sulc.edu; 2 Roosevelt Steptoe Dr., Baton Rouge, LA 70813)



## Community Action Committee & 'WEEN DREAM Partnering for Halloween Costume Donations

The Louisiana State Bar Association/Louisiana Bar Foundation's Community Action Committee is assisting the 'WEEN DREAM program in the collection of new and/or slightly used Halloween costumes for children in need.

Law firms, attorneys and legal professionals wishing to donate should drop off costumes at the Louisiana Bar Center, 601 St. Charles Ave., New Orleans, on Nov. 1-8, during business hours (8:30 a.m.-4:30 p.m.).

Costumes may simply be placed in bags. There is no labeling or sorting process required. 'WEEN DREAM volunteers will handle the sorting process and match the costumes to children for Halloween 2020. (Costumes that were donated after Halloween 2018 are being distributed to children for 2019.)

### NEW ORLEANS

Krystal Bellanger Rodriguez  
Louisiana State Bar Association  
601 St. Charles Ave.  
New Orleans, LA 70130  
(504)566-1600

### BATON ROUGE

Baton Rouge Bar Association  
544 Main St.  
Baton Rouge, LA 70809  
(225)344-4803

### MONROE

Alicia Reitzell  
The Reitzell Law Firm, LLC  
1900 N 18th St., Ste 406  
Monroe, LA 71201  
(318) 570-4444

### SHREVEPORT

Dana Southern  
The Shreveport Bar Association  
625 Texas St.  
Shreveport, LA 71101  
(318)222-3643

### COVINGTON

Clint Hanchey  
Pugh Accardo, Attorneys at Law  
112 Innwood Dr., Ste. B  
Covington, LA 70433  
(985)246-2306

### LAFAYETTE

Pam Landaiche  
Lafayette Bar Association  
2607 Johnston St.  
Lafayette, LA 70503  
(337)237-4700

### ALEXANDRIA

Alainna Mire  
Alexandria City Hall  
915 Third St.  
Alexandria, LA 71301

### LAKE CHARLES

Shayna Sonnier  
Hunter, Hunter & Sonnier, LLC  
1807 Lake St.,  
Lake Charles LA 70601-5771  
(337)436-1600

