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4 CIVIC PLAZA  
SUITE 300  
NEWPORT BEACH CA  
92660  
PHONE: 949.729.8002  
FAX: 949.729.8012  
1888-HOA-LAW2  
1-888-462-5292  
WWW.CAHOALAW.COM

## RESTRICTING CHILDREN'S PLAY HAS ITS HAZARDS

By Tay Lu Riley

**D**rownings, skateboarding crashes, bike riding accidents, roller blading injuries, and damage to the common areas. These are all liability concerns an association may face if its residents include children. To avoid liability, some associations may feel they can adopt rules that restrict children from playing in common areas by providing "children are not allowed to play in the common areas." This sounds simple enough, until Mr. & Mrs. Parents unhappily realize that the rule is confining their Timmy to their unit, (and them too, since they must now watch him at home while other residents are freely enjoying use of the common area). The problem, "rule" gets more serious when Parents conclude that the community has become inhospitable to them and their Timmy, and they decide to file a complaint with the Department of Fair Employment and Housing. Mr. & Mrs. Parent may allege that Association is discriminating against children or families with children by restricting their rights to equal use of the common areas.

Though residents' safety ought to be something an association should address, discrimination is unlawful. It is a fine line to tread, but there are precautions an association can take to avoid a discrimination suit and still be able to address the special risks of liability that children bring to the community.

### CC&R's, Rules and Regulations May Not Discriminate

*California's Fair Employment and Housing Act* prohibits discrimination against familial status. Discrimination includes restrictive covenants, i.e., an association's CC&R's, and also applies to the Rules and Regulations an association adopts. Under FEHA, the Parents

in our scenario would have to prove that the covenants or rules discriminate against children, in effect discriminating against homeowners with children, thus discriminating on the basis of familial status. The Parents may simply show that the regulations have a discriminatory effect, (i.e., the rules have the effect of favoring or discriminating one type of familial status over another). Association then would have to show that there is a legitimate justification for the "discriminating" rule.

Generally, any rule that expressly prohibits children from using the facilities and common areas will be considered facially discriminatory, which means the language itself is discriminatory. For example, a rule that states, "No children are allowed in the common areas" is facially discriminatory. The Parents would not need to do much more to prove that the rules discriminate. Such rules have little chances of surviving a discrimination complaint, even when an association can provide a reasonable justification for that rule. The most successful rules that have withstood discrimination attacks are those supported by safety justifications and are narrowly tailored to address specific safety risks. For example, rules that require adult supervision of all children (up to age 18) at all times were not justified. In contrast, rules requiring adult supervision of very young children during specified activities such as swimming or riding bikes were held to be justified.<sup>1</sup>

Rules that ban activities that children are known to engage in, such as skateboarding, biking, roller blading, etc., may have the effect of discriminating against children, which is also illegal. However, courts have determined that these types of restrictions are not necessarily

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<sup>1</sup> *U.S. v. Westland*, CV 93-4141, Fair Housing-Fair Lending P15,941 (HUD ALJ 1994), at P15,941.2- 4.



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discriminatory since they merely ban activities, particularly if the list of activities includes those that adults also engage in. An association would make a good case in arguing that restricting these recreational activities is reasonable because they forbid certain activities that could be considered dangerous for the residents. Adults as well as children are prohibited from engaging in these activities. One particular case involved a rule prohibiting skateboarding or bike riding in the common area of a condominium. The rule was considered not objectionable in light of many reported near accidents with pedestrian tenants unloading groceries or on the way to their laundry chores.<sup>2</sup> Thus, if an association is to restrict certain dangerous activities, it ought to include those activities that adults as well as children typically participate in. Restrictions merely aimed at reducing the noise of children playing to maintain peace and quiet in the community for its residents are never justified.

An association may exercise more caution and eliminate the use of the general terms “minor” and “children” in their CC&R’s and Rules. For example, some associations have as a rule, that “**minors or children** must be accompanied by an adult at the swimming pool.” Clearly, the purpose of this rule is to prevent small children from drowning, a very legitimate justification. However, use of these terms do not provide for a distinction between a four year old and a seventeen year old, two very different beings who fall under the same rubric, “minor” and “children”. Courts have ruled that such pool limitations are too broad and thus invalid since it could in effect prevent a “minor”, who happens to be 17 and is a

certified lifeguard, from swimming in the pool. The association has a very legitimate reason in prohibiting a four year old from use of the pool, because this child bears a high risk of drowning if he is unsupervised. On the other hand, the association can no longer offer the same justification to the rule as it applies to the 17 year old certified lifeguard for apparent reasons.

Many association Board members are aware of a law that requires an association to post a sign that prohibits unsupervised children under the age of 14 from using the pool or jacuzzi. Doesn’t this constitute discrimination under FEHA and the Unruh Act since it could prohibit a 14 year old swimming phenom from using the pool? If so, an association is now caught between a rock and a hard place. Which law should it risk violating? The law regarding children under 14 years old and swimming pools is part of Title 22 of the California Administrative Code, which states:

“Where no lifeguard service is provided, a warning sign shall be placed in plain view and shall state **“Warning–No Lifeguard on Duty”** with clearly legible letters at least 10.2 centimeters (4 inches) high. In addition, the sign shall also state **“Children Under the Age of 14 Should Not Use Pool Without an Adult in Attendance.”**<sup>3</sup> (Emphasis added)

The Administrative Code requires an association to post a sign that includes certain warning information. An association does not need to do anything more than post the sign to be in compliance with this law. So by all means,

<sup>2</sup> *Llanos v. Estate of Coehlo* (1998) 24 F. Supp. 2d 1052. The court only determined that such a rule was discriminatory inasmuch as it forbids children from playing (even engaging in safe play) anywhere in the adult areas, which made up a large portion of the complex.

<sup>3</sup> 22 California Administrative Code §65539(c).



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“there are  
precautions an  
association can  
take to avoid a  
discrimination  
suit”

post the sign. In fact, an association **must** post a sign containing the above warnings. If an association does no more than post the sign, it should not worry about a discrimination attack since the precise language in the posted sign does not “prohibit” unsupervised children under the age of 14 from using the pool. It merely states that they **Should Not** use the pool without an adult in attendance. If parents choose to ignore this sign and send their kids to the pool unsupervised and an injury results, they are likely to bear the risk. If an association wants to include such a rule in its rules and regulations, it should use the exact quoted language in the Code.

#### **Board Members May Not Discriminate**

The *Unruh Civil Rights Act* prohibits business establishments from discriminating.<sup>4</sup> Courts have construed “business establishments” very loosely to include homeowners associations, even though homeowners associations are nonprofit.<sup>5</sup> Discrimination claims that accuse members of a Board, or representatives of an association of discrimination fall within this Act. The Complainant must prove that these members *intentionally* discriminates on the basis of familial status. An association that enforces discriminating rules are also subject to liability under Unruh. Once it is established that an association intentionally discriminates, that association then would have to prove that there is a legitimate and reasonable justification for the discrimination.

Thus, an association's Board members and managers must be careful about making any oral or written statements resembling a statement of preference for families with or without children, particularly in describing the

nature of the community. FEHA §12955(c) also makes it unlawful for *any person* to make statements with respect to rental of a housing accommodation that indicates any preference, limitation, or discrimination based on familial status. When providing notice to a family that has allegedly violated a particular rule, associations should quote the precise language of the CC&R's or rules (that are presumably non - discriminatory). Otherwise, it could appear that the members are arbitrarily interpreting the rule and applying it in a discriminatory manner. The notice should also state enough of the facts and circumstances to reveal that the conduct involved was dangerous, thus reiterating a justification consistent to that relied upon in implementing such a rule.

The Unruh Act prohibits only unreasonable, arbitrary, or invidious discrimination, not ***differential treatment based on actual characteristic differences or differences in the needs of users***. There exists a case that involved a condominium development's regulation that specified areas as either adult or family areas. The association involved restricted children under the age of 16 years to residence in Family areas and recreation in Family facilities only. This was held not to constitute an unreasonable or arbitrary age discrimination because there was no blanket exclusion of children. Furthermore, the court was persuaded by additional policy concerns such as reduced risks of injury to children playing in the streets, and promotion of children's welfare and health by prohibiting them from using the jacuzzi in the Adult area.<sup>6</sup>

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<sup>4</sup> *Cal Civ Code §51(b)*

<sup>5</sup> *O'Connor v. Village Green Owners Association* (1983) 33 Cal. 3d 790.

<sup>6</sup> *Sunrise Country Club Ass'n v. Proud* (1987) 190 Cal. App. 3d 377.



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In sum, when an association reviews its CC&R's, and Rules and Regulations in the context of FEHA and the Unruh Act, it should flag those that are vulnerable to a discrimination complaint. As a preemptive measure, associations should revise existing restrictions that are related to children or even consider entirely removing some of the restrictions from their governing documents if there are no legitimate justifications for those rules. The rule of thumb to adopt is - blanket bans are bad. Rules and Regulations are relatively safe if they restrict dangerous activities, not children. Where they address

children, they should be narrowly tailored and address a specific safety risk. In addition, Board members and managers should be cautious in their communications and actions that might be construed as discrimination. They should also enforce the rules contained in the governing documents in a fair manner. Granted, that children may require more restrictive rules to keep them safe. However, courts have determined that their safety is an issue that should be left in the control of the parents, not to homeowners associations with paternalistic tendencies. An association can only do so much. ■