

Prescription Pets

Homeowners are increasingly bringing doctors' notes as they seek waivers of their associations' no-pet rules. When is a pet a medical necessity under the law?

By Gary Poliakoff and JoAnn Nesta Burnett



Old McDonald had a farm.... And these days, it looks like many pet-restricted community associations are headed in that direction. Everywhere you turn, it seems, someone is claiming they need a pet to assist with

a disability, recuperate from a heart attack or battle depression.

How do you determine if a waiver of your community's pet rules is required under the law?

Volunteers serving on association boards are generally concerned with the appearance of the community and, in many cases, unfamiliar with the legal requirements of the federal Fair Housing Act.

Recent court decisions have sided with homeowners seeking pet waivers so your board must carefully investigate all requests and balance the individual's needs with the community's best interests.

Misinterpreting the law—or ignoring it—can get an association into expensive legal trouble.

The 1988 amendments to the Fair Housing Act prohibit community associations, landlords and other housing providers from discriminating against residents “because of their disability or the disability of anyone associated with them and from treating persons with disabilities less favorably than others”

who aren't disabled. In addition, the law requires associations to make reasonable accommodations in rules, policies, practices or services when necessary to give a disabled person equal opportunity to use and enjoy a dwelling unit, including public and common-use areas.

In some situations, the association's obligation to allow a pet as a reasonable accommodation is clear; for example, a seeing-eye dog for a person who is visually impaired or a pet that can alert an individual with a hearing impairment to the doorbell or fire alarm. In these situations, the disability is evident and the service animal with special training and certification is generally accepted as reasonable under the law.

However, a request becomes more difficult when a person's alleged disability is not visibly evident and when the requested pet has no apparent connection to the disability. The first step is determining whether the requesting party is disabled as defined by the Fair Housing Act.

A person is considered handicapped under state and federal laws if he or she has:

- A physical or mental impairment which substantially limits one or more of his or her major life activities such as seeing, hearing, walking, speaking, learning, breathing, eating or performing manual tasks.

- A record of having such impairment; or is regarded as having such impairment.

In a joint statement in 2004, the U.S. Department of Housing and Urban Development (HUD) and the Justice Department explained that physical or mental impairments include, but are not limited to, such diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, HIV, mental retardation, emotional illness, drug addiction (excluding an addiction caused by current, illegal use of a controlled substance) and alcoholism.

Determining Factors

Many of these conditions are not visible to the average person, but may nonetheless require a service or emotional-support animal. To make that determination, your association board may be entitled to request and obtain additional information to substantiate the resident's disability and the disability-related need for the accommodation.

But if the person's disability and the need for an animal are evident, you are not permitted to request additional information. If the disability is evident, but the need for the animal is not, the association is limited to requesting only the specific information necessary to evaluate the disability-related need. If a disability is not obvious, such as a mental condition, high blood pressure, diabetes or other similar types of disabilities, you may request disability-related information that: 1) verifies the condition that substantially limits one or more of the person's major life activities; 2) describes the needed accommodation; and 3) demonstrates the relationship between the person's disability and the need for the requested accommodation.

You can easily verify the condition if the person receives Social Security disability insurance benefits. HUD and

various other federal enforcement agencies are much more lenient than the courts. For example, HUD and the Justice Department say that a "credible statement by the individual seeking the accommodation, a doctor or other medical professional, a peer support group, a non-medical service agency or a reliable third party who is in a position to know about the individual's disability may also provide verification of a disability."

In our view, an association should require a more credible source—such as a licensed physician specializing in that particular disability—to provide an unequivocal statement that the person suffers from a disability. The physician should be required to specifically list what those activities are and how the pet will help.

That requirement can help screen the non-medical requests, saves the association research time and helps protect the association from challenges by other homeowners in the future.

In fact, a West Virginia district court in 2001 went so far as to say that it is reasonable, in situations where the disability is not apparent, to insist upon a second concurring opinion from a qualified physician selected by the housing provider to confirm the need for a service animal. Florida state courts haven't required this level of proof, but they have agreed that a physician specializing in the specific disability who provides a written statement listing the person's disability, the need for a service or support pet and how the pet will assist with the disability will, in most cases, suffice. Recently, one Florida association received a rheumatologist's statement that his patient suffered from arthritis and severe mental conditions that required a pet as a reasonable accommodation. While the rheumatologist is able to give an opinion on the patient's arthritis, the specialist was not in a position to speak on the patient's mental condition.

That issue would be better addressed by a mental health professional.

No Skills Necessary

The most difficult decision for associations, and the most heavily debated among attorneys, is whether the request for a pet is reasonable. This requires the board to decide if the animal is necessary for the person to use and enjoy the residence. In 1995, the 7th U.S. Circuit Court of Appeals, based in Chicago, said this decision requires a cost-benefit analysis of each party's needs. But more recent court decisions, and especially HUD decisions, have eroded this requirement so that virtually anyone can obtain a pet with no discernable skills or training and without a showing that the pet is necessary to use and enjoy the residence.

This point is underscored by HUD's internal regulations governing federally assisted housing, but applied equally to private residences. HUD regulations state that allowing an assisting animal does not constitute an undue burden. Consequently, the scales of the balancing analysis are tipped in favor of allowing a pet, despite a community association's "no-pet" restriction.

A decade ago, the courts required residents to demonstrate that the requested pet was individually trained and worked for the benefit of the disabled person. While this standard remains today, the term "individually trained" provides a great deal of confusion and debate for associations and the legal community as well.

In 2003, a U.S. District Court in Hawaii denied a homeowners' discrimination complaint against the association because the owner was unable to establish that the dog was anything more than an ordinary pet. In *Prindable v. Association of Apartment Owners of 2987 Kalakaua*, the district court stated that although the

Fair Housing Act does not define the term "service animal," the Americans with Disabilities Act defines a service animal as "any guide dog, or other animal individually trained to do work or perform tasks for the benefit of an individual with a disability...."

The unit owner had sought the association's permission to keep a dog in his unit because he suffered from depression and anxiety. The court said there must be something, such as evidence of individual training, to set the service animal apart from the ordinary pet. The owner's assertion that his dog had been trained to provide emotional support and to alert him to any unusual circumstances was insufficient, the court concluded.

However, more recent cases suggest that any training will suffice. In 2005, in *Storms v. Fred Meyer Stores, Inc.*, a Washington state appeals court concluded that a dog that attended basic obedience class could be considered trained for purposes of the Fair Housing Act.

A California appeals court in 2004 took an even broader interpretation. In *Auburn Woods I HOA v. Fair Employment and Housing*, two individuals claimed their HOA discriminated against them by refusing to allow a dog as a reasonable accommodation for their mental disabilities. Because the animal at issue was not a service animal, but simply a pet, the court said there was no need for the individuals to present evidence that the dog was specially trained. Instead, the court found that "it was the innate qualities of a dog, in particular, a dog's friendliness and ability to interact with humans, that made it therapeutic...."

Moreover, many cases decided by HUD fail to indicate that there is any requirement of any special skill or training and seem to permit ordinary pets as an accommodation. Thus, whether a pet must possess special training or skills to qualify for an exemption is still being debated.

Animal House

Aside from the training issue, there are additional concerns that must be addressed when determining if a proposed accommodation is reasonable. Is the proposed dog a gentle breed? Will the owner be able to care for and clean up after the dog? Will the dog bark and create a nuisance for other owners in the community? While at least one case suggests that an association might be able to deny a request for a dog that is generally viewed as more aggressive than other breeds, such as a Rottweiler, and allow more gentle breeds, this doesn't seem to be the norm.

Courts prefer to allow the pet and determine if it is a nuisance if a problem arises in the future. However, just because a pet is permitted based on a disability, the association isn't prevented from enforcing its nuisance provisions if a dog barks constantly or the owner fails to clean up after the dog.

While most requests for waivers involve traditional pets such as dogs or cats, there are cases involving rather unique such as birds, miniature horses, monkeys, ferrets, snakes and even pot-bellied pigs. Miniature horses have been recognized as therapy animals and have the ability to act as mobility aids, pulling wheelchairs and steadying those who could not walk without external support.

In fact, many visually impaired individuals are opting for miniature horses instead of seeing-eye dogs because the horses have substantially better eyesight and peripheral vision. The miniature horses also outlive most dogs, as their life-span is typically 25 to 35 years. Pot-bellied pigs are touted as loyal companions, much like dogs that can be trained in the same manner. There have been reports of at least two disabled individuals who were granted requests to keep pot-bellied pigs as service animals.

These types of requests require the association to balance the needs of the requesting individual against the burden that would be placed on the association. A strong argument can be made that, at the very least, some of these animals fundamentally change the nature of the housing. Further, many of the requests for unique and exotic animals may run afoul of certain local ordinances, which limit these animals to certain locations. However, it is easy to see how a community association may soon be in need of its own barn.

To avoid a discrimination complaint, a community association must realize that all requests for pet waivers must be treated with great care and due diligence, and a complete analysis must be done in every case. Grant a temporary waiver for every request while the association's investigation is underway. It shows the association is making its best effort. Develop a standardized process to ensure that all homeowners' requests are treated the same.

If you determine that a resident is handicapped, as defined by law, associations are required to allow the animal unless the request imposes an undue financial or administrative burden or requires a fundamental change in the nature of the housing. Such a finding won't prevent the association from continuing to restrict pets for owners without a handicap, assuming the restriction is uniformly enforced. Granting the pet waiver would not be considered selective enforcement. If you are unsure of the disability or whether the accommodation is reasonable, contact your association attorney for guidance.

If you reject a pet-waiver request, be prepared for in case a unit owner files a complaint with HUD and the local county civil rights division or files a civil action seeking damages. While board members shouldn't feel pressured into approving every request out of fear of legal reprisal, they should raise their standards for reviewing those requests.

Gary A. Poliakoff, J.D. is managing shareholder of Becker & Poliakoff, P.A. in Fort Lauderdale and a member of CAI's College of Community Association Lawyers. JoAnn Nesta Burnett also is also an attorney with Becker & Poliakoff.

RESOURCES: For more information about the Fair Housing Act, visit http://www.usdoj.gov/crt/housing/housing_coverage.htm.

Pet Policies: How Community Associations Maintain Peace & Harmony, by Debra Lewin. Retail: \$25. CAI members: \$15. To order, visit CAI's bookstore at www.caionline.org/bookstore.cfm or call CAI Direct at (888) 224-4321.

AT-A-GLANCE

More homeowners are bringing doctors' notes when they seek waivers from their associations' no-pet rules. When are pets a medical necessity under the law?

Determining Factors. Many physical and mental disabilities, including blindness, epilepsy, muscular dystrophy, heart disease and emotional illness, are protected under the federal Fair Housing Act.

No Skills Necessary. Recent court decisions have loosened the standards for pets to be considered "trained" to meet the needs of a disabled person and, thus, protected by law.

Animal House. Miniature horses, monkeys and pot-bellied pigs might be considered service or support animals. Before granting a pet waiver, boards must weigh the needs of the individual against the burden that would be placed on the association. ■