COMPANION ANIMALS IN MULTI-FAMILY PROPERTIES

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IREM® Legislative White Paper

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Introduction

This paper includes background information on the issue of companion animals in multi-family housing, the challenges property managers face, and other pertinent information, including litigation across the nation.

Background

Pets in Conventional Housing

IREM does not have a position on companion animals; however, it does have a policy on Pets in Conventional Housing. It states owners and managers of multi-family properties should have the right to set pet policies on a property-specific basis, and that such policies should not be mandated by municipalities or other governmental bodies. A number of reasons exist for owners to forbid or limit pets on their properties. Common household pets increase the normal wear and tear on a rental unit. Secondly, tenants do not always control their pets and properly dispose of animal waste. Even the most carefully controlled and well-behaved pets increase the maintenance costs of a residential rental unit and increase the incidence of fleas and other pests, both during habitation and after the resident has moved. Additionally, many people have allergies to pets, such as cats and dogs, and cannot live in an environment permitting pets. Lastly, some pets can be a nuisance to other tenants.

In addition to maintenance and health concerns, pets present increased liability risk and challenge property rights issues. The most pressing concern is the cost of liability incurred by a property owner or manager because of the possibility of injury to a resident or visitor to the property by a pet. In the past, tenants, guests, and others have sought damages from the property owners and managers whom they allege know, or should have known, of a pet's vicious behavior tendencies. Injury to a pet may need to be covered by the property owner or manager's insurance.

The presence of pets in rental housing can result in increased tort risks to the owner and manager; therefore they should be allowed to make the decision of whether or not to allow pets in their facilities without the worry of legal battles.

While IREM acknowledges the positive affect a pet can have on one's life and emotional well-being, it strongly believes in the legal right of the property owners to determine whether or not to allow pets in a multiple unit rental property. IREM opposes any legislation requiring owners or managers of rental property to allow pets in their units. It should be fully voluntary.

Comparison of Service and Companion Animals

The Americans with Disabilities Act (ADA) provides protection to persons with disabilities who require service animals. Under current law, "service animals" are defined as "dogs that are individually trained to do work or perform tasks for people with disabilities." The ADA stipulates that in order to change a dog's status to "service animal," thus entitling the disabled person to public access rights, the following criteria are necessary:

1. The dog's partner must have a disabling condition severe enough to impair one or more major life functions.
2. The dog must be trained to perform identifiable physical tasks to mitigate the disability. Service animals must be harnessed, leashed, or tethered, unless these devices interfere with the service animal's work or the individual's disability prevents using these devices. The rationale for granting public access rights to disabled persons is that their guide, hearing, or service dogs function as assistive devices. Refusing to allow disabled people to rely on their service dogs in public places and on public transportation is comparable to depriving the disabled of their wheelchairs, hearing aids, or canes when they venture out into public, according to the law. A service animal that is individually trained to perform tasks to mitigate a disability cannot be treated like a pet by those operating public accommodations. A service animal has been officially classified as a form of assistive technology and not as a pet.

If a situation arises in an establishment where it may be unclear what service an animal provides to an individual, only certain limited inquiry are allowed. Only two questions are allowed to be asked by staff:

1. Is the dog a service animal required because of a disability, and
2. What work or task has the dog been trained to perform.

Staff cannot ask about the individual's disability, request any type of documentation, require a special identification card or training documentation for the dog, or ask that the dog demonstrate its ability to perform the work or task. If the individual's disability, or the service animal's ability to perform tasks to assist a disabled individual, is readily apparent, staff cannot ask these questions.

It is important to note that when the ADA was revised in 2010, the Department of Justice decided to allow miniature horses as an acceptable animal to do work or assist people with disabilities (dogs are still the only animal considered a "service animal" as of March 15, 2011 under titles II and III of the ADA). These horses measure from 24 to 34 inches tall (to the shoulder) and typically weigh roughly 70 to 100 pounds. The ADA set out four key assessment factors to qualify as a service miniature horse:

1. The miniature horse must housebroken;
2. The miniature horse must be under control by the owner;
3. If the facility can accommodate the miniature horse's measurements; and
4. If the miniature horse's presence will not compromise legitimate safety requirements necessary for safe operation of the facility.

Both service animals and companion animals can provide comfort, stress relief, increased social interactions, and other therapeutic benefits; however, that is not enough to legally compel businesses to make an exception to their "no pets allowed" policies.

Companion animals are not service animals; they are typically for individuals with mental disabilities, such as depression, anxiety, or those in need of emotional support. These animals receive no specialized training.

Please see the Americans with Disabilities Act link with commonly asked questions and answers regarding service animals.

Housing and Urban-Rural Recovery Act
The Housing & Urban-Rural Recovery Act of 1983 protects the rights of tenants in federally assisted housing for the elderly or persons with disabilities to have a pet, and further provides that the property owner or manager is entitled to charge a deposit for that pet to cover any resulting damage to the property. However, if a pet is more properly characterized as a "service animal," the tenant should be exempt from the deposit. To view this legislation, please see this link.

Fair Housing
The Federal Fair Housing Amendments Act of 1988 defines disability as a physical or mental impairment of a person that substantially limits one or more major life activities, a record of having had such an impairment, and being regarded as having had such an impairment. The term "physical or mental impairment" includes such diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, Human Immunodeficiency Virus infection, mental retardation, emotional illness, and alcoholism.

Handicapped persons may require the use of service and/or assistive animals. Under the law, an individual who is disabled and whose doctor determines that a service/assistive animal is needed may ask their housing provider for a reasonable accommodation to "no pets" policies. To deny the reasonable accommodation, the landlord must prove that such an accommodation is not reasonable or causes an undue burden to the landlord.

A growing number of property managers are faced with tenants who claim they need a companion animal to reside with them in their apartments for a health reason. There are tenants and attorneys who interpret the Fair Housing Amendments Act of 1988 to prohibit property owners and managers from refusing to rent to persons who need a companion animal in their homes for mental or physical health reasons. They argue that property owners and managers should be required to make reasonable accommodations in their pet policies. To read more on reasonable accommodations under the Federal Fair Housing Amendments Act of 1988, please see this link.

In April of 2013, HUD issued a notice explaining some of the obligations of housing providers under the Fair Housing Act and Section 504 of the Rehabilitation Act.

Regarding what constitutes an assistance animal as opposed to a pet, the issue states that assistance animals “works, provides assistance, or performs tasks for the benefit of a person with a disability, or provides emotional support that alleviates […] a person’s disability.” The Fair Housing Act and Section 504 do not require an assistance animal to be trained or certified.

In determining whether or not to provide a reasonable accommodation for an assistance animal, housing providers are advised to consider the following questions:

"Does the person seeking to use and live with the animal have a disability – i.e. a physical or mental impairment that substantially limits one or more major life activities?"

And,

"Does the person making the request have a disability-related need for an assistance animal? In other words, does the animal work, provide assistance, perform tasks or services for the benefit of a person with a disability, or provide emotional support that alleviates one or more of the identified symptoms or effects of a person's existing disability?"

If the answer to either one of these questions is yes, then the Fair Housing Act and Section 504 require a housing provider to modify their policies and accommodate an assistance animal.

Exceptions include if the animal poses a direct threat to the safety of other tenants, or can cause substantial physical damage to the property.

Under the ADA, FHA, and Section 504, residents cannot be required to pay security deposits.

Litigation Around the Nation

In the 2004 case of *Auburn Woods I Homeowners Association v. Fair Employment and Housing Commission, et al* a couple purchased a condo in which the Association permitted two pet birds or house cats, but specifically prohibited dogs. Despite the ban on dogs, the owners bought a small terrier to help them with the depression they suffered. The husband had been in an auto accident which caused severe brain damage, leaving him with a bipolar disorder and depression. The wife also suffered from depression. Their physicians wrote that the presence of the dog had substantially improved their emotional well-being. The Association argued that since the owners could have a cat, there was no need to have a dog and would impose penalties if the dog were not removed. The owners put their condo up for sale in response.

The couple filed a complaint with the Department of Fair Employment and Housing on the ground that the condo association had violated the Fair Employment and Housing Act by refusing "to make reasonable accommodations in rules, policies, practices, or services when these accommodations may be necessary to afford a disabled person equal opportunity to use and enjoy a dwelling." The administrative law judge found a violation by the association and awarded emotional distress damages to the owners. A writ of mandate was filed and the trial court found that there was no evidence that a companion dog was a necessary reasonable accommodation. The appellate court reversed the trial court, finding that denying a disabled residents' request to keep a companion dog on the premises constituted a violation of the Act. The court made it clear that each case is fact-specific and requires a case-by-case determination.

The October 29, 2004 edition of the *Housing Affairs Letter* highlighted a recent settlement of a lawsuit between an apartment management company and a tenant who argued the company's pet

policy was unjust. A mentally disabled female tenant submitted three physicians' notes to her landlord stating her pet provided a "therapeutic benefit." The apartment tenant claims the property management company refused to allow the pet and would ask her to move out of the building if the pet was not removed.

The tenant's attorney argued the company violated federal fair housing and disability laws when its management refused to waive its no-pet policy and grant a reasonable accommodation. Current law provides a landlord has a right to exclude pets and set other lease terms to assure sanitary and safe conditions for tenants; however, he or she must give good faith consideration to reasonable accommodation requests when a handicapped tenant has provided certification of a statutorily covered handicap and need for the animal.

A settlement was reached; however, the property management company did not admit liability or misconduct. The property management company will pay the tenant $185,000. The company has also agreed to begin using reasonable accommodation forms and guidelines prepared by the Fair Housing Council of Orange County. Further, the company's employees will attend fair-housing training annually. Sanctions of this magnitude are disproportionate with the alleged offense and have a chilling effect on landlords who might believe they have bona fide grounds to deny a reasonable accommodation request for allowable reasons.

This case has been precedent-setting in that it allowed property managers to see the potential cost of such a lawsuit. In 2011 a North Dakota court granted a summary judgment for a tenant whose landlord refused to make a reasonable accommodation for a service animal. The court stated:

> *Imposing a requirement that only animals with specialized training can be deemed "a reasonable accommodation" in the housing context has the effect of discriminating on the basis of disability. Under such an interpretation, landlords would be required to make a reasonable accommodation for individuals with physical disabilities, such as those that are blind or hearing impaired, but would not necessarily have to accommodate those with a mental disability-related need for support, such as depression or anxiety. A determination that animals need not have specialized training to fall within the purview of the FHA ensures the equal treatment of all persons with disabilities who need assistance animals in residential housing. Such an interpretation is consistent with the plain language of the statute, HUD's regulations and the DOJ's position.*

From 2002 to 2010, the Department of Justice has filed ten lawsuits in federal courts against property managers for their failure to make reasonable accommodations for tenants who require service or companion animals. The cases were resolved with a consent decree, a jury verdict, or a settlement. With regard to claims from private citizens as well as from fair housing organizations and interest groups received similar results.

As recently as July 1, 2013, the DOJ filed a lawsuit against the owners and managers of rental units in Washington State. The lawsuit accused the defendants of discriminating against people with disabilities and thus violating the Fair Housing Act. The lawsuit states that various personnel engaged in activities that denied individuals rights protected by the FHA. The allegation include the staff would only waive the tenants $1,000 pet deposit but only for service

animals who had received specialized training, not including companion animals giving emotional support. Senior Counsel and Special Counsel for Fair Lending in the Civil Rights Division's, Eric Halperin, said, "the rights of our disabled citizens need to be protected and landlords should not engage in conduct that makes their lives more difficult." The lawsuit's aim is to prohibit discrimination again in the future by the defendants, financial damages for those harmed by the actions, and a civil penalty. See the press release here.

Property Managers' Dilemma

The core question at hand is whether there is a reasonableness standard property managers and owners can rely upon for the total number of companion animals a residential landlord is obligated to allow a handicapped individual to harbor in their dwelling unit. While there is good availability of overviews and guidance on how a handicapped individual meets the threshold qualifications to have a service or companion animal, there is a lack of guidance on how to address the issue of the maximum number, size, or type of such animals in an apartment.

The range of problems some IREM property managers have faced, include:

1. No broadly accepted standards as to the maximum number of service or companion animals in a household have been promulgated by the Department of Housing and Urban Development (HUD) Fair Housing/Equal Opportunity (FHEO) division or other enforcement entities. Some professionals in the real estate industry have suggested that the reasonable number could be assessed by limits in local health or building codes as to limitations. Others reply with concern that the maximum domestic animal count under zoning and/or health would be far in excess of animal occupancy standards for pet policies maintained by apartment owners and the reasonable number of animals that would be compatible with a multi-family environment considering lifestyle and normal wear and tear expectations. Abnormal wear and tear and housekeeping problems could be the outcome if code limitations were to be the standard.

2. Property managers have also been concerned with a practice some refer to as "forum shopping," which represents situations where tenants in "no pet" apartment communities become aware through a neighbor that a medical practitioner has a propensity to loosely interpret the definition of "handicap" and prescribe companion animals on a wholesale basis to anyone claiming stress, depression, or other maladies, but not meeting the statutory and clinical definitions of mentally handicapped.

No apartment owner or management company wants to be a test case on issues such as described above. It is clear, however, that the system is currently subject to abuses and unreasonable expectations by some tenants and medical practitioners. Multi-family property managers are reluctant to contest physician's letters or question the medical necessity of companion animal(s) because of the risk of severe financial and/or legal sanctions.