

# The Death of the Pet Restricted Community

By Dane E. Leitner, Esq., Ward Damon Posner Pheterson & Bleau PL, West Palm Beach, Florida  
on behalf of the Condominium & Planned Development Committee



D. LEITNER

For many years condominium associations and homeowner associations (collectively, "Associations") have been able to implement and enforce no pet restrictions in their communities. The rationale behind creating a no pet restriction is that a majority of the residents agree that their community would be benefited by not having pets. Typically, the reasons are because residents do not want to hear their neighbor's dog barking in the early hours of the morning, or to walk in the common area lawn and step in a warm surprise. The concept of community living was best stated in *Hidden Harbor Estates, Inc. v. Norman*, when Florida's Fourth District Court of Appeal stated that:

"It appears to us that inherent in the condominium concept is the principle that to promote the health, happiness, and peace of mind of the majority of the unit owners since they are living in such close proximity and using facilities in common, each unit owner must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property. Condominium unit owners comprise a little democratic sub society of necessity more restrictive as it pertains to use of condominium property than may be existent outside the condominium organization."<sup>1</sup>

The little democratic sub society ideology is under increased attack because of new laws and policies that affect no pet restrictions. The Americans with Disabilities Act of 1990 (ADA), the Fair Housing Act (FHA), Section 504 of the Rehabilitation Act of 1973 (Section 504), and all amendments thereto, require exceptions to be made to no pet restrictions should certain criteria be met. Moreover, the U.S. Department of Housing and Urban Development (HUD) is tasked by Congress with the duty to make rules and enforce the FHA. Amendments to these Acts, judicial interpretation, and new HUD policies have seemingly caused the death of pet restricted communities.

## FHA and the Request for Accommodation

The FHA is the authority that individuals predominately use to obtain an exception to a pet restricted community so their dog Fido can live in their home notwithstanding the restriction. The FHA makes it illegal to discriminate against handicapped individuals in providing housing.<sup>2</sup> Under the FHA, discrimination includes "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling."<sup>3</sup> The decision of whether an Association is

required to make a reasonable accommodation is highly fact-specific, and requires a case-by-case determination.<sup>4</sup> To prevail on a claim alleging a violation of the FHA, the plaintiff must establish:

- That he/she is handicapped within the meaning of the FHA, and that the defendants knew or should have known of the fact;
- That the defendants knew that an accommodation was necessary to afford him/her equal opportunity to use and enjoy the dwelling;
- That such an accommodation is reasonable; and
- That the defendant refused to make the requested accommodation.<sup>5</sup>

An Association may not deny a reasonable accommodation request because it is uncertain whether or not the person seeking the accommodation has a handicap related need for an assistance animal.<sup>6</sup> The Association may ask the applicant, whose handicap is not readily apparent or known to the Association, to submit reliable documentation of a handicap and his or her handicap related need for an assistance animal.<sup>7</sup> For example, the Association may ask the person seeking the reasonable accommodation for an assistance animal that provides emotional support to provide documentation from a physician, psychiatrist, social worker, or other mental health professional that the animal provides emotional support that alleviates one or more of the identified symptoms or effects of an existing handicap.<sup>8</sup>

To show that a requested accommodation may be necessary, there must be an identifiable relationship, or nexus, between the requested accommodation and the individual's handicap.<sup>9</sup> Caution must be used though when requesting documentation from applicants. Associations may not ask an applicant to provide access to medical records or medical providers, or request extensive information or documentation of a person's physical or mental impairments.<sup>10</sup> If an Association determines a reasonable request for accommodation should be granted, the Association must modify or provide an exception to its no pet restriction.<sup>11</sup> The individual with a handicap would be permitted to live with and use an assistance animal in all areas of the premises where persons are normally allowed.<sup>12</sup>

## Emotional Support Animals

A majority of the requests before Associations today involve non-apparent issues such as anxiety, depression, panic disorder or other mental impairments. Associations ask, "what is it about Fluffy that alleviates one or more of the identified symptoms or effects of an existing handicap?" The ADA requires that a "service animal" be trained, and

*continued, next page*



was amended to specify that emotional support animals are not considered "service animals."<sup>13</sup> However, unlike the ADA, the FHA does not specifically state that the animal must be trained. In fact, there are cases and HUD notices that state an emotional support animal does not need to be trained.<sup>14</sup> One court even stated it is "the innate qualities of a dog, in particular a dog's friendliness and ability to interact with humans, that make it therapeutic."<sup>15</sup>

### Type of Animal

The ADA was amended to define "service animal" narrowly as any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability.<sup>16</sup> It is worth noting though that while trained dogs are the only species of animal that may qualify as "service animals" under the ADA, there is a separate provision provided for in the ADA regarding trained miniature horses.<sup>17</sup> The FHA is broader and does not limit assistance animals to only dogs.<sup>18</sup> Also, under the FHA, breed, size, and weight limitations may not be applied to an assistance animal.<sup>19</sup> Therefore, if an Association has limitations on the types of animals that are allowed and restricted, or weight requirements for dogs, the Association may not apply those restrictions to an individual with an assistance animal. Moreover, Associations may not condition an approval of a reasonable accommodation on the applicant paying a deposit for the assistance animal.<sup>20</sup>

### Conclusion

Pet restricted communities are facing an increased number of individuals seeking reasonable accommodations to the Association's no pet restrictions. The ADA and FHA were implemented to help disabled and handicap individuals that truly need assistance. However, due to the broadness of the Acts, and especially HUD's policies regarding the FHA, many individuals are using the Acts for the purpose of circumnavigating no pet restrictions in communities when no such disability truly exists. While Associations may be skeptical of an applicant's request for a reasonable accommodation, it is imperative that they analyze the request in accordance with the law, or face a claim for discrimination. This is why it is important to educate Associations on this issue and implement policies and procedures for reviewing requests for reasonable accommodation, even though applicants may not be bound by them.<sup>21</sup> **A**

**Dane E. Leitner** is a litigator at Ward, Damon, Posner, Pheterson & Bleau, P.L. in West Palm Beach, Florida. Dane received a B.S. in political science and criminology

from Florida State University, and a J.D. from the Shepard Broad Law Center at Nova Southeastern University. His practice focuses on community association law, real estate litigation, and commercial litigation. Dane is on the Palm Beach County Community Association Law CLE Committee, is a Board Member with the Palm Beach County Young Lawyers, and provides presentations on community association law at functions throughout Florida.

### Endnotes:

- 1 *Hidden Harbor Estates, Inc. v. Norman*, 309 So.2d 180, 181-182 (Fla. 4th DCA 1975).
- 2 42 U.S.C. § 3604(f)(1) & (f)(2)(1988); see *Overlook Mut. Homes, Inc. v. Spencer*, 666 F. Supp. 2d 850 (S.D. Ohio 2009).
- 3 *Id.* at § 3604(f)(B).
- 4 *Hawn v. Shoreline Towers Phase I Condo. Ass'n.*, 347 Fed. App'x 464, 467 (11th Cir. 2009).
- 5 *Id.*
- 6 U.S. Department of Housing and Urban Development, Service Animals and Assistance Animals for People with Disabilities in Housing an HUD-Funded Programs, FHEO-2013-01, 3 (April 25, 2013).
- 7 *Id.*
- 8 *Id.* at 4.
- 9 U.S. Dep't of House. & Urban Dev., Reasonable Accommodations Under The Fair Housing Act, 6 (2004).
- 10 U.S. Department of Housing and Urban Development, Service Animals and Assistance Animals for People with Disabilities in Housing an HUD-Funded Programs, FHEO-2013-01, 4 (April 25, 2013); see also, *Bhogaita v. Altamonte Heights Condominium Ass'n., Inc.*, 2012 WL 10511 (M.D. Fla. 2012) (finding that three detailed requests regarding the homeowner's mental and physical conditions far exceeded that permitted under the FHA).
- 11 U.S. Department of Housing and Urban Development, Service Animals and Assistance Animals for People with Disabilities in Housing an HUD-Funded Programs, FHEO-2013-01, 3 (April 25, 2013).
- 12 *Id.*
- 13 *Id.* at 4.
- 14 *Falin v. Condominium Ass'n. of La Mer Estates, Inc.*, 2012 WL 1910021, 3 (S.D. Fla. May 28, 2012); *Auburn Woods I Homeowners Ass'n v. Fair Emp't & Hous. Comm'n*, 18 Cal. Rptr 3d 669, 682 (Cal. App. 3d Dist. 2004); U.S. Department of Housing and Urban Development, Service Animals and Assistance Animals for People with Disabilities in Housing an HUD-Funded Programs, FHEO-2013-01, 4 (April 25, 2013).
- 15 *Auburn Woods I Homeowners Ass'n v. Fair Emp't & Hous. Comm'n*, 18 Cal. Rptr 3d 669, 682 (Cal. App. 3d Dist. 2004).
- 16 U.S. Department of Housing and Urban Development, Service Animals and Assistance Animals for People with Disabilities in Housing an HUD-Funded Programs, FHEO-2013-01, 4 (April 25, 2013).
- 17 *Id.*
- 18 *Id.* at 1.
- 19 *Id.* at 3.
- 20 U.S. Dep't of Hous. & Urban Dev., Reasonable Accommodations Under The Fair Housing Act, 9 (2004).
- 21 *Id.* at 10 (stating "However, housing providers must give appropriate consideration to reasonable accommodation requests even if the requester makes the request orally or does not use the provider's preferred forms or procedures for making such requests").