

## IN PRACTICE

## REAL ESTATE

# Defeating Pet Restrictions In Residential Developments

By Stephen Hankin

Dogs are not our whole life, but they make our lives whole."

"There are two means of refuge from the misery of life: music and cats."

"Dogs' lives are too short — their only fault, really."

The underlying philosophy of these and similar sayings motivates this article.

Household pets — dogs and cats mostly — from time immemorial have provided companionship and protection of life and property. Currently, service and emotional support animals provide the disabled with the ability to live life as it should be lived, alerting them to the world's hazards, enabling them to embrace every day's joys. However, pet restrictions have found their way into various residential developments, including condominiums and other projects governed by homeowners' associations. Some of these developments preclude pets entirely, while others arbitrarily impose limitations based on breed or weight.

Both Congress and New Jersey have recognized the benefit to disabled persons, with some emphasis upon those suffering from mental disorders, of having domestic pets in public and private residential settings.

## Rehabilitation Act of 1973 (RA)

Section 504 of the RA was the first federal enactment to add disability as a protected class. 29 U.S.C. §794. However, the RA is limited to federally assisted programs such as public or subsidized housing. It allows for a private cause of action and, under the remedial provisions of 42 U.S.C. §1988 (b) and §2000(d), the prevailing party is entitled to recover reasonable attorneys' fees. The RA defines "handicap" as a person with a physical or mental impairment that substantially limits one or more major life activities or who is treated as if he or she suffers from a substantially limiting impairment even though they might not currently suffer from such an incapacity. Promulgated regulations exhaustively define "major life activities." 29 C.F.R. §1615.103.

Absent an undue financial or administrative burden, the RA requires federally-assisted housing providers to make reasonable accommodations for known physical or mental limitations of a qualified handicapped person. It is unnecessary in a federally-assisted rental development for an elderly or handicapped tenant to seek relief under the RA because, under the Housing and Urban Rural Recovery Act of 1983, Congress enacted a rule entitled "Pet Ownership in Assisted Rental Housing for the Elderly or Handicapped" (POEH), 12 U.S.C. §1701r-1 (2000), which forbids the prohibition of common household pets.

## Fair Housing Act Amendments of 1988 (FHAA)

The FHAA was passed to protect handicapped persons from discrimination in all forms of housing, federally assisted and otherwise. This includes condominiums,

whether for sale or rent, except for buildings with four or fewer units where the landlord lives in one of them, and for private owners who do not own more than three single-family dwellings and do not employ brokers, agents or discriminatory advertisements. Private persons may enforce the FHAA and recover both compensatory and punitive damages, injunctive relief and counsel fees. 42 U.S.C. §§3601-3619. The FHAA, like the RA, requires housing providers to make reasonable accommodations and modifications for disabled persons.

The FHAA and the RA identically define "handicap," which must be of a nature and degree to impair a major life activity. In the context of a psychiatric disorder, this has been construed by courts as including depression, anxiety disorders, post-traumatic stress disorder and bipolar disorder. In addition, sleeping, eating, concentrating and even interacting with others have all been declared as major life activities.

Housing discrimination includes the refusal to make reasonable accommodations in rules, policies, practices or services when such accommodations are necessary to afford persons an equal opportunity to use and enjoy a dwelling. 42 U.S.C. §3604 (f)(3) (B). Examples in case law and in federal regulations make it clear that a reasonable accommodation includes the need to waive a no-pets rule to allow for a service or emotional support animal, the difference being that an emotional support animal has no specific disability training but nonetheless provides the necessary ingredients to treat a psychiatric disorder. *Bronk v. Ineichen*, 54 F.3d 425, 429 (7th Cir. 1995); 24 C.F.R. §100.204(b).

For example, a disabled person with cats may require a reasonable accommodation if the cats relieve anxiety and provide significant emotional support. *HUD v. Dutra*, 1996 WL 567690 (H.U.D.A.L.J.). Emotional support animals have also been permitted where deemed necessary for exercise motivation and diabetic control. *Frechtman v. Olive Executive Townhomes Homeowner's Ass'n*, 2007 U.S. Dist. Lexis 81125, at 6 (C.D. Cal. Sept. 24, 2007). A history of severe, recurrent depression has also been held sufficient to thwart the defense that it allows "people running out and getting a doctor's note saying I need a dog." *HUD v. Riverbay Corp.*, 1994 WL 497536 (A.U.D.A.L.J.).

## Americans with Disabilities Act (ADA)

The 1990 ADA (42 U.S.C. §§12101 to 12213), which applies to any state or local governmental body and, likewise regardless of federal housing assistance, prohibits disability discrimination in housing as well as in public accommodations such as restaurants, theaters, hotels, retail stores and recreational facilities. 42 U.S.C. 12181-12182. The ADA also defines the term "disability" similarly to the RA and the FHAA.

The essential standards a disabled person must meet for the waiver of a no-pets clause under the RA, the FHAA and the ADA are the existence of a known disability, the facilitation of the disabled individual's ability to equally enjoy the abode as a result of the pet, and the survival of a "cost-benefit balancing test." *United States v. Cal. Mobile Home Park Mgmt. Co.*, 107 F.3d 1374, 1380 (9th Cir. 1997). Unlike the FHAA, which is silent on the issue, the ADA arguably defines "service



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## N.J. has recognized the benefit to disabled persons of having pets in residential settings.

animals" as excluding untrained emotional support animals. See 28 C.F.R. §36.104.

## Pet Ownership in Public Housing Act (POPH)

Effective Aug. 9, 2000, Congress enacted POPH, 42 U.S.C. 1437z-3, which, while otherwise similar to POEH, only applies to federally-assisted rental housing other than for the elderly or handicapped. POPH permits public housing residents to own one or more common household pets subject to reasonable housing agency requirements.

## N.J. Law Against Discrimination (NJLAD)

The NJLAD, N.J.S.A. 10:5-1 et seq., prohibits "any unlawful discrimination against any person because such person is or has been at any time disabled. ..." N.J.S.A. 10:5-4.1. The NJLAD is more liberal than any federal legislation because proof of a disability need not entail a showing that a condition results in a substantial limitation upon a major life activity. *Failla v. City of Passaic*, 146 F.3d 149, 154 (3rd Cir. 1998). One provision of the NJLAD provides that any disabled tenant who has a service or guide dog is entitled to "full and equal access to all housing accommodations and shall not be required to pay extra compensation." N.J.S.A. 10:5-29.2.

*Oras v. Housing Auth. of Bayonne*, 373 N.J. Super. 302 (App. Div. 2004), is a key case which held a housing authority's policy prohibiting a disabled tenant in an apartment complex from having a dog weighing over 20 pounds was inconsistent with the NJLAD. *Oras* announced several guiding principles:

- There should be "[a] broad view of animals as a 'reasonable accommodation.'"
- "A reasonable accommodation 'means changing some rule that is generally applicable to everyone so as to make its burden less onerous on the handicapped individual.'" (*Citing Oxford House, Inc. v. Twp. of Cherry Hill*, 799 F. Supp. 450, 462, n.25 (D.N.J. 1992)).

- "[E]ven w[h]ere it [is] established that [a] plaintiff [is] aware of the pet policy at the time he enter[s] into [a] lease [or purchase] a condominium, that does not mean that he would be precluded from keeping a pet in his unit if he need[s] the pet to accommodate his disability."

## N.J. Civil Rights Act (NJCRA)

The NJCRA, N.J.S.A. 10:6-1 et seq., provides the right to a jury trial "if a person, whether or not acting under color of [state] law" and whether or not acting intentionally, "subjects or causes to be subjected any other person to the deprivation" of privileges secured by federal or New Jersey law. N.J.S.A. 10:6-2(a). The NJCRA is not limited to constitutional deprivations. The Act allows for compensatory damages, injunctive relief and an award of counsel fees and costs to the prevailing party. N.J.S.A. 10:6-2(f). Thus, a violation of the RA, FHAA, ADA or NJLAD will constitute a violation of the NJCRA as well.

To sum it up, both federal and state law provide that the disabled — which, so importantly, includes those suffering from psychological and psychiatric maladies — have an equal right to enjoy housing. That, in turn, in the context of a pet restriction, must include consideration of each occupant's circumstances and accommodation requests, even if that includes an emotional support or companion animal. Representation should not be frowned upon because the client's mental disability consists of something other than clinical depression or bipolar disorder, as under the NJLAD a person is entitled to a companion pet even if his condition does not substantially impair a major life activity. ■

Next Week...

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