KEOUGH MOODY

NAPERVILLE
114 East Van Buren Avenue
Naperville, IL 60540
phone 630 369 2700
facsimile 630 369 9279

CHICAGO
161 North Clark Street, Suite 1600
Chicago, IL 60601
phone 312 899 9989
www.kmlegal.com

How Should the Association Handle Emotional Support Animals in Individual Units, Despite its "No Pet" Policy?

The law that applies to accommodations for an emotional support animal is primarily the Fair Housing Act ("FHA"). Please note that the American with Disabilities Act pertains to the state and federal government being prohibited from discriminating against people with disabilities in public places. It does apply to some types of housing situations, but is not the applicable statute for the Association, with service animal requests. The FHA requires "accommodations that are necessary (or indispensable or essential) to achieving the objective of equal housing opportunities between those with disabilities and those without." *Cinnamon Hills Youth Crisis Center, Inc. v. Saint George City*, 685 F. 3d 917, 923 (10th Cir.2012).

Therefore, when considering whether the provisions above apply, the Association must consider two questions:

1. Does the person seeking to have a service animal have a disability?
2. Does the animal perform tasks that assist a person with a disability?

If the Association answers both those questions affirmatively, then it must make an exception to its no-pet policy, as same would be considered a "reasonable accommodation" under the FHA.

The FHA prohibits the Association from placing restrictions on emotional support animals, and must permit owners to keep such animals. However, the Association can conduct a "reasonable inquiry" into the disability giving rise to the need of such an animal, to ensure that the FHA provision applies, if the disability is not obvious. This means that it can make an inquiry, but cannot be overly intrusive in its questioning. It also does not need and should not make an inquiry if the disability is readily apparent. For example, the Association must be cautious not to delve further if it can ascertain that the person is blind, requires assistance in mobility, or even if it receives a medical note, as same must be taken at face value. Courts have found that inquiries asking about treatment, medications, the diagnosis, etc., are beyond the scope of a reasonable inquiry. The Association can also inquire as to the reasonable nexus between the emotional support animal and the person's disability. In other words, the Association can ask why the animal is necessary. Please note that a note from a physician is typically sufficient to show the nexus. It is not for the Association to make a medical diagnosis of the person or even to determine if the animal is really necessary. It is only for the Association to ensure compliance with the law.

Once these requirements are met, an accommodation must be made and the "no pet" rule should not be enforced against the Owner. The Owner is also subject to certain rules of the Association but not those related to fees assessed by the Association. However, the FHA does provide exceptions and allows an Association to restrict the animal if the presence would cause an undue financial and administrative burden. In addition, if the animal poses a direct threat to health and safety of others, the Association may prohibit the animal. Please note that this must be based on actual conduct of the animal, not mere speculation, i.e. just because the animal is a rottweiler does not mean that the request can be denied.

Generally, the best way for the Association to avoid litigation or a discrimination claim is to develop and follow a policy and procedure for the treatment of any accommodation requests. A policy should include what information the association requires to make a determination and how the determination is made to ensure a meaningful review of the request. The Association should develop a standardized request form and submission packet. Before implementing any standardized form, the Association should have the documents and procedure reviewed by its attorney, so that we can ensure that the Association is asking only questions permitted under statute. After all, even asking for certain information can give rise to a discrimination claim.

The following are certain statements or actions a Board should avoid when considering a request for an accommodation:

1. Telling the Owner this is a no pet building and all animals are prohibited.
2. Telling an Owner they are responsible for paying the Association's annual fee for pet's who reside in the Building.
3. Denying a request because the Board does not believe that this particular breed will provide the proper emotional support for the Owner.
4. Denying the request because the Board does not believe that the person is disabled enough.
5. Denying a request because the Board does not believe the doctor who provided the note is a legitimate doctor.

(You laugh, but these are true statements or actions by a Board!)

Finally, please note that a Board can decide to deny a request. Yet, it is important that before a request is denied, the Board consults with an attorney, as failure to properly consider a request or denial of a legitimate request may give rise to a discrimination lawsuit against the association and even individual board members.