



# PARK WATCH

™ LEGAL DEVELOPMENTS NEWSLETTER

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## HUD Explains the Federal View of Service Animals and Pets. Service Animals No Longer Subject to Breed, Size Limitations

*Clarification of Varying Statutory Schemes Amplifies the Duties of the Park Owner.*

By Terry R. Dowdall, Esq.

### ■ Upshot

When HUD changes a policy, it is only polite to explain to the regulated what the nature of the change is and how to comply. Sometimes HUD has not done so, and has been harshly criticized by the courts for failing to do so.

*In our view, the Pfaffs' facially neutral, numerical occupancy restriction was hardly an unreasonable means under existing law to prevent the dilapidation of their little house. . . . HUD's actions here fall well outside the limits of good -or acceptable -- government, and so we grant the petitioners the relief they seek. 6 We also express our hope that HUD will avoid such incidents in the future by providing the public with guidance adequate to enable honest people to comply with the 1988 Fair Housing Amendments Act.*

The ADA<sup>1</sup> is a civil rights law. The FHA<sup>2</sup> is a civil rights law. Because the ADA and FHAA have similar protections, the laws are generally consistently interpreted.

*"[W]hen Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes." Smith v. City of Jackson, 544 U.S. at 233 (plurality opinion, citing per curiam opinion in Northcross v. Board of Ed. of Memphis City Schools, 412 U.S. 427, 428 (1973)).*

As we shall see, the ADA is focused on public accommodations and does not apply to private residential housing. Park owners are not public accommodations. The Department of Justice regulations are different for a reason. The ADA governs the use of animals by persons with disabilities primarily in the public arena. The FHAA applies to private residential facilities. There are many areas where the ADA and the FHAA contain different requirements. HUD's regulations and policies pertaining to reasonable accommodation were constructed specifically to address housing and, furthermore, were enacted prior to the development and implementation of the ADA regulations.

The Fair Housing Act does apply to park owners in all respects. The FHA is the focus of our attention today.

### RIGHTS OF THE DISABLED TO ACCOMMODATIONS GENERALLY

The FHA is a fair housing statute that *forbids* discrimination on the grounds of, among other things, *disabilities*. Further, the housing provider is obligated to provide a *reasonable accommodation* for the *disabled* in order to assist in attaining the rights and privileges of housing in the same manner and extent as the able-bodied. While landlords cannot inquire as to the existence of a disability, a robust dialogue is expected to ensure when the tenant makes it known that an accommodation is necessary or appropriate to facilitate tenancy with the disability. The

<sup>1</sup> The Americans with Disabilities Act

<sup>2</sup> The Federal Fair Housing Act

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accommodation may be a change in *rules, policies, practices, or services, or allowance of a physical modification of the premises.*

*Examples abound.* Perhaps a parking space in front of the mobilehome where the driveway is not wide enough to accommodate a disability van; perhaps not a trampoline for the accommodation of an autistic youngster. A housing provider should do everything reasonably possible to assist, but is not required to make changes that would fundamentally alter the housing program or create an undue financial and administrative burden. Hence, reasonable accommodations may vary with the *relative wealth* of the park owner. Reasonable accommodations may be necessary at all stages of the housing process, including application, tenancy, or to prevent eviction.

The ADA, generally, does not apply to the park owner. According to HUD:

*In most cases, the ADA does not apply to residential housing. Rather, the ADA applies to places of public accommodation such as restaurants, retail stores, libraries, and hospitals as well as commercial facilities such as offices buildings, warehouses, and factories. However, Title III of the ADA covers public and common use areas at housing developments when these public areas are, by their nature, open to the general public. For example, it covers the rental office since the rental office is open to the general public.*

## SERVICE ANIMALS DEFINED

The new regulations pertain to *service animals*. We, of course, know that a service animal is *not* a pet; it is a tool to facilitate the disability. An assistance animal is an animal that works, provides assistance, or performs tasks for the benefit of a person with a disability, or provides emotional support that alleviates one or more identified symptoms or effects of a person's disability. Assistance animals are sometimes referred to as "service animals," "assistive animals," "support animals," or "therapy animals."

Under the FHA, *any animal may be a service animal*. Under the ADA, it must be a dog. Since the ADA only applies in very limited respects, it is the interpretation of the FHA on which we must focus.

## DUTIES OF THE PARK OWNER

For our purposes, as private housing providers, the FHA is more expansive than the ADA. Let's review HUD's latest on the subject. Much of the rules we know and reiterate past practice. But there are some nuanced shifts of which we should be aware. Keep in mind that the rules are not promulgation of regulations carrying the force and effect of law. The letter interpretations signal the policy of enforcement HUD intends to follow.

## WHAT OF PRE-EXISTING GUIDANCE AND INFORMATION PROVIDED BY HUD?

Questions will remain about what property owners should do in two respects: whether the now-enunciated intent implicitly repeals or limits past explanations of practice and interpretation of specific fact situations this new more broad policy enunciation does not address (or not), and whether the new interpretations square with the regulations and the underlying statutes. In general, the interpretation now handed down is consistent with the new emphasis and focus on enforcement of the rights of the disabled. But whether this supersedes all prior guidance is not known.

## NO INDIVIDUAL TRAINING OR CERTIFICATION IS REQUIRED FOR A SERVICE ANIMAL!

Assistance animals perform many disability-related functions, including but not limited to, guiding individuals who are blind or have low vision, alerting individuals who are deaf or hard of hearing to sounds, providing protection or rescue assistance, pulling a wheelchair, fetching items, alerting persons to impending seizures, or providing emotional support to persons with disabilities who have a disability-related need for such support.

But, for purposes of reasonable accommodation requests, the FHA does *not require an assistance animal to be individually trained or certified*. Referring to past guidance, HUD responded to past criticism to the effect that elimination of training component is inconsistent with regulations implementing the ADA. Under the ADA regulations [at 28 CFR 36.104] a service animal is defined as an animal "individually trained" to do work or perform tasks for the benefit of an individual with a disability. *However, the FHAA eliminates training requirements.*

The requirements for assistance/ service animals are independent of the ADA regulations (formulated to meet the needs of persons with disabilities in a public context, and were adopted subsequent to HUD's regulations).

There is a distinction claimed valid between the functions animals provide to persons with disabilities in the public arena, *i.e.*, performing tasks enabling individuals to use *public* services and public accommodations, as compared to how an assistance animal might be used in the *home*. For example, *emotional support animals* provide *very private functions* for persons with *mental and emotional disabilities*. Specifically, emotional support animals by their very nature, and without training, may *relieve depression and anxiety*, and help reduce stress-induced pain in persons with certain medical conditions affected by stress. Disabled tenants who use emotional support animals may not need to take them into public spaces covered by the ADA.

## WHAT ARE WE SUPPOSED TO DO NOW?

HUD states that we should first evaluate a request for accommodation under the ADA approach and then under the FHAA analysis to make sure we cover all the bases. Using both the ADA and FHAA analysis together also ensures there can be no complaint when all the statutory schemes can be satisfied.

The new guidance states that the evaluation of a request for accommodation should be approached like this:

Housing providers are to evaluate a request for a reasonable accommodation to possess an assistance animal in housing using the general principles applicable to all reasonable accommodation requests. After receiving such a request, the housing provider must consider the following:

(1) 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?

(2) 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?

The FHAA requires the housing provider to modify or provide an exception to a "no pets" rule or policy to permit a person with a disability to live with and use an assistance animal(s) in all areas of the premises where persons are normally allowed to go, unless doing so would impose an undue financial and administrative burden or would fundamentally alter the nature of the housing provider's services.

The request may also be denied if:

(1) the specific assistance animal in question poses a **direct threat to the health or safety of others** that cannot be reduced or eliminated by another reasonable accommodation, or

(2) the specific assistance animal in question would cause **substantial physical damage** to the property of others that cannot be reduced or eliminated by another reasonable accommodation.

## NO BREED DISCRIMINATION

Breed, size, and weight limitations may not be applied to an assistance animal. A determination that an assistance animal poses a direct threat of harm to others or would cause substantial physical damage to the property of others must be based on an individualized assessment that relies on objective evidence about the specific animal's actual conduct — not on mere speculation or fear about the types of harm or damage an animal may cause and not on evidence about harm or damage that other animals have caused. Conditions and restrictions that housing providers apply to pets may not be applied to assistance animals.

For example, while housing providers may require applicants or residents to pay a pet deposit, they may *not* require applicants and residents to pay a deposit for an assistance animal.

A housing provider may not deny a reasonable accommodation request because he or she is uncertain whether or not the person seeking the accommodation has a disability or a disability related need for an assistance animal.

Housing providers may ask individuals who have disabilities that are not readily apparent or known to the provider to submit reliable documentation of a disability and their disability-related need for an assistance animal. For example, the housing provider may ask persons who are seeking a 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 disability. Such documentation is sufficient if it establishes that an individual has a disability and that the animal in question will provide some type of disability-related assistance or emotional support.

*If the disability is readily apparent or known but the disability-related need for the assistance animal is not, the housing provider may ask the individual to provide documentation of the disability related need for an assistance animal.*

However, a housing provider may *not ask* to provide documentation showing the disability or disability-related need for an assistance animal if the disability or disability-related need is readily apparent or already known to the provider.

*For example*, persons who are blind or have low vision may not be asked to provide documentation of their disability or their disability-related need for a guide dog. A housing provider also may not ask an applicant or tenant to provide access to medical records or medical providers or provide detailed or extensive information or documentation of a person's physical or mental impairments. Like all reasonable accommodation requests, the determination of whether a person has a disability-related need for an assistance animal involves an individualized assessment. A request for a reasonable accommodation may not be unreasonably denied, or conditioned on payment of a fee or deposit or other terms and conditions applied to applicants or residents with pets, and a response may not be unreasonably delayed. Persons with disabilities who believe a request for a reasonable accommodation has been improperly denied may file a complaint with HUD.<sup>1</sup>

A covered entity shall not require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal. These are the only two inquiries that an ADA-covered facility may make even when an individual's disability and the work or tasks performed by the service animal are not readily apparent (e.g., individual with a seizure disability using a seizure alert service animal, individual with a psychiatric disability using psychiatric service animal, individual with an autism-related disability using an autism service animal).

A covered entity may not make the two permissible inquiries set out above when it is readily apparent that the animal is trained to do work or perform tasks for an individual with a disability (e.g., the dog is observed guiding an individual who is blind or has low vision, pulling a person's wheelchair, or providing assistance with stability or balance to an individual with an observable mobility disability).

## WHAT IF THE ANIMAL IS OUT OF CONTROL OR DANGEROUS?

The animal may be denied access where:

- (1) the animal is out of control and its handler does not take effective action to control it;
- (2) the animal is not housebroken (*i.e.*, trained so that the animal controls its waste elimination); or
- (3) the animal poses a direct threat to the health or safety of others that cannot be eliminated or reduced to an acceptable level by a reasonable modification to other policies, practices and procedures, or the specific assistance animal in question would cause substantial physical damage to the property of others that cannot be reduced or eliminated by another reasonable accommodation.

A determination that a service animal poses a direct threat must be based on an individualized assessment of the specific service animal's actual conduct - not on fears, stereotypes, or generalizations. The service animal must be permitted to accompany the individual with a disability to all areas of the facility where members of the public are normally allowed to go."

Under either the FHA, rules, policies, or practices must be modified to permit the use of an assistance animal as a reasonable accommodation in housing when its use may be necessary to afford a person with a disability an equal opportunity to use and enjoy a dwelling and/or the common areas of a dwelling, or may be necessary to allow a qualified individual with a disability to participate in, or benefit from, any housing program or activity receiving financial assistance from HUD.

Park owners are to evaluate a request for a reasonable accommodation to possess an assistance animal in a dwelling using the general principles applicable to all reasonable accommodation requests. After receiving such a request, the housing provider must consider the following:

(1) 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?*

(2) 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 question (1) or (2) is "no," then the FHA do not require a modification to a provider's "no pets" policy, and the reasonable accommodation request may be denied.

The request may also be denied if: (1) the specific assistance animal in question poses a direct threat to the health or safety of others that cannot be reduced or eliminated by another reasonable accommodation, or (2) the specific assistance animal in question would cause substantial physical damage to the property of others that cannot be reduced or eliminated by another reasonable accommodation.

● Where the answers to questions (1) and (2) are "yes," the FHA requires the housing provider to modify or provide an exception to a "no pets" rule or policy to permit a person with a disability to live with and use an assistance animal(s) in all areas of the premises where persons are normally allowed to go, unless doing so would impose an undue financial and administrative burden or would fundamentally alter the nature of the housing provider's services.

## BREED, SIZE, AND WEIGHT LIMITATIONS MAY NOT BE APPLIED TO AN ASSISTANCE ANIMAL.

A determination that an assistance animal poses a direct threat of harm to others or would cause substantial physical damage to the

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT  
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OFFICE OF FAIR HOUSING  
AND EQUAL OPPORTUNITY

MEMORANDUM FOR: FHEO Regional Directors

FROM: Bryan Greene, Deputy Assistant Secretary for Enforcement and Programs, ED

SUBJECT: Insurance Policy Restrictions as a Defense for Refusals to Make a Reasonable Accommodation

This memorandum responds to requests for guidance on how HUD investigators should examine Fair Housing Act "reasonable accommodation" cases where a housing provider cites an insurance policy restriction in denying a request from a person with a disability to reside in a dwelling with an assistance animal that is of a breed of dog that the landlord's insurance carrier considers dangerous. In the referenced cases, the housing providers stated that their insurance carriers will either refuse to cover their properties, substantially increase the cost of coverage, or adversely change the terms of their policies if these animals are allowed to occupy dwellings.

As with any request for a reasonable accommodation, the request should be evaluated on a case-by-case basis. HUD provides the following guidance to assist in that evaluation.

According to the *Joint Statement on Reasonable Accommodations*, an accommodation is unreasonable if it imposes an undue financial and administrative burden on a housing provider's operations. If a housing provider's insurance carrier would cancel, substantially increase the costs of the insurance policy, or adversely change the policy terms because of the presence of a certain breed of dog or a certain animal, HUD will find that this imposes an undue financial and administrative burden on the housing provider. However, the investigator must substantiate the housing provider's claim regarding the potential loss of or adverse change to the insurance coverage, by verifying such a claim with the insurance company directly and considering whether comparable insurance, without the restriction, is available in the market. If the investigator finds evidence that an insurance provider has a policy of refusing to insure any housing that has animals, without exception for assistance animals, it may refer that information to the Department of Justice for investigation to determine whether the insurance provider has violated federal civil rights laws prohibiting discrimination based upon disability.

property of others must be based on an individualized assessment that relies on objective evidence about the specific animal's actual conduct — not on mere speculation or fear about the types of harm or damage an animal may cause and not on evidence about harm or damage that other animals have caused.

Conditions and restrictions that housing providers apply to pets may not be applied to assistance animals. For example, while housing providers may require applicants or residents to pay a pet deposit, they may not require applicants and residents to pay a deposit for an assistance animal.

A housing provider may not deny a reasonable accommodation request because he or she is uncertain whether or not the person seeking the accommodation has a disability or a is ability related need for an assistance animal.

Housing providers may ask individuals who have disabilities that are not readily apparent or known to the provider to submit reliable documentation of a disability and their disability-related need for an assistance animal. If the disability is readily apparent or known but the disability-related need for the assistance animal is not, the housing provider may ask the individual to provide documentation of the disability related need for an assistance animal. For example, the housing provider may ask persons who are seeking a reasonable accommodation for an assistance animal that provides emotional support.

A housing provider may require a tenant to cover the costs of repairs for damage the animal causes to the tenant's dwelling unit or the common areas, reasonable wear and tear excepted, if it is the provider's practice to assess tenants for any damage they cause to the premises.

## WHAT IF YOUR INSURANCE COMPANY WILL NOT COVER PIT BILLS?

HUD has issued a directive that states, where an insurance company will not cover a particular breed, such will not be deemed a reasonable accommodation. This may not allow the park owner to institute breed discrimination, however, how this directive will be interpreted is not now known. It may well remain a guideline for the park owner and provide for a determination that it is the insurer who is acting, not the housing provider. If sued, it should be the insurer who is called on to show that the decision not to insure for such a breed is justified.

This only makes sense. As one HUD attorney told me, a liability award from a pit bull attack could bankrupt the housing opportunity and eliminate the housing altogether. That risk does not jibe with the definition of a "reasonable accommodation" which is not supposed to require a change in the nature of the housing.

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## Dowdall to Receive Freedom Fighter Award

■ **Upshot** The 25th Annual Mobilehome Parkowners Alliance Symposium is being held at Treasure Island Hotel.

■ **Bio** Dowdall has practiced mobilehome park law since 1978. His practice includes all phases of representation of park owners and management. Since 1996, he has served as legal advisor to the WMA legislative committee. As legal advisor, he has drafted many pro-owner changes in state law. Recently, he was appointed legal advisor to the MHET Board.

Terry has represented owners in fighting rent controls across the state for decades, most recently knocking out the: (1) *San Mateo* rent control ordinance and (2) before that, *Chula Vista's* law and (3) *Colton's* law which impaired leases.

His *amicus* brief in the 1984 *Oceanside* case was the very first attack on vacancy controls as a taking of park owners' property.

He and partner *Brent Swanson* took the City of Carson to the Cal. Supreme Court and represented owners in many other cities and counties. Terry also been involved in many other industry challenges. He set the precedent in defending the constitutionality of 'older persons' housing in the Ninth Circuit in *Taylor v. Rancho Santa Barbara*. He defeated a massive class action attack in the discrimination case in *United States v. Plaza*, involving a dozen parks sued by the U.S. Justice Department across 3 states.

Setting several precedents in regard to 'familial status' housing and limiting damages claims of thousands down to just one family, he is involved in fighting local park zoning fights, recently suing Yucaipa on behalf of park owners on a pro bono basis.

He has represented the WMA and CMPA as *amicus curiae* in numerous other appellate cases.

As to education, Terry attended the University of Southern California for his undergraduate degree. He received a fellowship for doctoral study at U.S.C. before entering the law school. He graduated in 1977 and immediately started working with Brent Swanson, suing cities to stop rent controls. Terry opened his own practice in 1993, now celebrating 20 years of hard work and dedication to the industry.

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Please Feel Free to Contact Us with Any Questions!



Terry



WMA Spring Seminar, lecture on the Big Island, 2013