HOW TO DEAL WITH RESTRICTED BREEDS

Restricted breed disputes arise frequently. Most communities have at least some breed or weight restrictions. Because restricted breed requests usually involve a request for an exception to the community's breed restriction policies based upon disability, most restricted breed issues involve fair housing laws. Accordingly, you can't effectively deal with restricted breed issues without being trained on how to handle reasonable accommodation requests. The restricted breed issue is further complicated by local ordinances banning certain breeds, and by the conflict between the American's with Disabilities Act ("ADA") and the Fair Housing Act ("FHA"). Many communities struggle needlessly with restricted breed issues involving non-disabled tenants simply because the issue is not adequately dealt with in leasing criteria and leases.

When a non-disabled tenant wants an animal on the restricted breed list, the issue does not involve fair housing laws. Only disabled individuals (as defined by FH law) are entitled to exceptions to restricted breed policies. When the tenant is not disabled, the dispute is over the animal's classification. Despite the appearance of the dog, the tenant swears on their mother's grave that it is not a pit bull.

This issue can easily be solved (and more importantly entirely avoided) with appropriate language in both your leasing criteria and lease. Both documents should make it clear that regardless of the tenant's representation as to the breed or classification of any animal, the landlord shall make the final determination as to the breed or classification of any animal in landlord's sole and absolute discretion. When the potential tenant is put on notice before applying that you are going to make the call on their animal and that prohibited animals are not allowed, a non-disabled prospective tenant is much less likely to try to sneak a restricted breed animal onto the property, and then plead ignorance or argue about the animal's breed.

Many managers and landlords go wrong on the restricted breed issues because of what they have read about service animals under the ADA. Clients tell us that under recent ADA regulations only dogs that are specifically trained to perform a task for a

disabled individual can be service animals, and the ADA does not allow comfort, companion, or emotional support animals. Is this true? Yes, this is a correct statement of ADA law. Unfortunately, ADA law does not control rental housing. Anyone that has ever attended a THS fair housing class knows that the ADA has little applicability to rental housing. The FHA controls almost exclusively restricted breed issues involving rental housing. Under the FHA, assistive animals do not need to be trained or certified, and include service animals, support animals, assistance animals, or therapy animals (companion or emotional support animals).

In April of this year, HUD published a memo entitled "Service Animals and Assistance Animals for People with Disabilities in Housing and HUD-Funded Programs" ("Service Animal Memo"). HUD's Service Animal Memo states, "breed, size, and weight limitations may not be applied to an assistance animal." For some this may be news. However, for those of you who have sought advice from us or attended our fair housing classes, this is not new or surprising. We have always advised our clients to handle restricted breed requests just like any other reasonable accommodation request. HUD's Service Animal Memo makes it clear that "housing providers are to evaluate a request for a reasonable accommodation to possess an assistance animal (including requests for restricted breed animals) using the general principles applicable to all reasonable accommodation requests."

As with any reasonable accommodation request, the issues are disability, need, and reasonableness. Does the person seeking to use and live with the restricted breed animal have a disability? Disability under fair housing law generally means a physical or mental impairment that substantially limits one or more major life activities. Does the person making the request have a disability-related need for an assistance animal? 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 tenant or potential tenant is obviously disabled and obviously has a disability related need for the assistance animal, you must grant the request for a restricted breed animal. For example, if a blind prospect requests a German Shepherd, which is on your

restricted breed list, over the weight limit, or both, you would have to grant the request. You could not require or request further documentation because both the tenant's disability and need for this particular assistance animal is obvious.

You may not deny requests for restricted breeds simply because you are uncertain whether the tenant requesting the animal is disabled or has disability related need. In "a not sure scenario", the law imposes a duty upon you to open and maintain a dialog with the tenant to ascertain the tenant's qualifications for the animal. You can and should ask the tenant to submit reliable documentation of a disability and their disability-related need for an assistance animal. If the tenant's disability is readily apparent, but their need for the assistance animal is not, you may only request documentation regarding the tenant's disability-related need for the animal.

You do not have to allow a restricted breed if the requested animal poses a direct threat to the health or safety of others. Remarkably, HUD regulations apply the same direct threat analysis to assistive animals that HUD applies to people. The determination of whether an assistance animal poses a direct threat must be based on an individualized assessment of the specific service animal's current conduct or recent history, and not on fears, stereotypes, or generalizations. The individual assessment must consider the nature, duration, and severity of the risk of injury; the probability that the potential injury will actually occur; and whether reasonable modifications of rules, policies, practices, procedures, or services will reduce the risk. This means you cannot automatically disqualify pit bulls or Rottweilers because they account for the majority of dog attacks. Rather the focus is on whether the specific pit bull or Rottweiler have a history of attacking others.

Even more remarkable and similar to direct threat analysis for people, under HUD regulations you can't reject a restricted breed that has a specific history of violent attacks until you have explored with the tenant whether there is any action that the tenant has taken or will take that would reduce the animal being a threat. Examples in the regulations include obtaining specific training, medication, or equipment for the animal. Since a tenant may not be entirely forthcoming about the history of a restricted breed, you may ask the tenant's previous landlord if there were problems with the

animal. In summary, you can eliminate or deny a restricted breed animal if the animal has a recently been a threat to the health or safety of others, and the animal's owner has not or will not take action to reduce or eliminate the risk.

You can also deny or eliminate a restricted breed animal if the specific assistance animal in question would cause substantial physical damage to the property of others that cannot be reduced or eliminated by a reasonable accommodation. Again, are there steps that can be taken to prevent the animal from damaging property, and is the tenant willing to take them? As a practical matter, this provision of the law has little if any real world applicability to prevent damage because the animal's propensity for damaging property is almost never known until after the animal is at the community. Thus, the provision appears only useful in removing a problem restricted breed animal once the damage is done.

You may also deny a restricted breed dog based upon reasonableness. Like most reasonable accommodation requests a request is legally unreasonable if it imposes an undue financial and administrative burden or would fundamentally alter the nature of your services. While possible, we have never seen a restricted breed request that "fundamentally altered the nature of" one of our client's housing services. Thus, the reasonableness issue almost always comes down to cost. Everyone in the industry should always remember two key points when evaluating the cost (reasonableness) of a tenant's accommodation request, including when the request involves a restricted breed animal. First, the federal government and you do not and will not agree on what constitutes an unreasonable cost. Second, and most importantly, the third prong of the reasonable accommodation test (reasonableness) is not for novices to determine. If the tenant is disabled and has a disability related need for a restricted breed animal, and the only issue is whether the request is reasonable, you should always consult with us before making any determinations.

Granting a disabled tenant's request for a restricted breed animal normally does not result in significant costs to the landlord. However, insurance related costs are one exception. A 2006 HUD memo entitled "Insurance Policy Restrictions as a Defense for Refusals to Make a Reasonable Accommodation" addresses insurance related issues.

The memo states that "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."

Because HUD or the Colorado Civil Rights Division ("CCRD") will scrutinize your insurance if a tenant files a fair housing complaint, you should never deny restricted breed reasonable accommodation request based on insurance grounds unless you have carefully evaluated your specific insurance situation. Since the CCRD will request your policy, you should verify that the policy doesn't cover attacks from restricted breeds. However, you shouldn't stop there. You should also obtain from your insurance carrier a statement that liability from restricted breeds isn't covered, and that if restricted breeds are allowed on the property the carrier would either cancel the policy, substantially increase the premium (a specific amount would be great), or otherwise adversely change the terms of the policy. Finally, because the CCRD may investigate whether the insurance is available from another carrier, you should be prepared to demonstrate that you shopped a number of carriers, and all carriers either didn't cover restricted breeds or adversely changed policy terms to get coverage.

Whether you can reject a restricted breed based on a local ordinance is a legal grey area. Aurora, Castle Rock, Commerce City, Denver, Fort Lupton, La Junta, Lone Tree, and Louisville all ban pit bulls. HUD has not issued specific guidance under the FHA on this issue. However, in responding to public comments on ADA rule changes, HUD stated that "the Department does not believe that it is either appropriate or consistent with the ADA to defer to local laws that prohibit certain breeds of dogs based on local concerns that these breeds may have a history of unprovoked aggression or attacks . . . Some jurisdictions have no breed restrictions. Others have restrictions that, while well-meaning, have the unintended effect of screening out the very breeds of dogs that have successfully served as service animals for decades without a history of the type of unprovoked aggression or attacks that would pose a direct threat, e.g., German Shepherds."

Regardless of HUD's comments on the ADA regulation, a pit bull is still illegal in Denver (it shall be unlawful for any person to own, possess, keep, exercise control over, maintain, harbor, transport, or sell within the city any pit bull). Almost every lease requires that a tenant not break the law. Further, you should not be required to aid and abet a tenant's illegal conduct. Similar to marijuana issues, the conflict between Federal and local law places landlords in a no-win situation. A landlord can either deny the tenant's request and risk a fair housing discrimination complaint, or allow the dog, and thus be complicit with the tenant's illegal conduct. On balance, a strong argument could be made that a tenant's request for a restricted breed in a jurisdiction that makes the breed illegal is unreasonable. Alternatively, landlords can grant the request, but inform the tenant that since the breed is illegal in the jurisdiction, the landlord will be reporting the animal to the appropriate authorities, and the tenant can sort the issue out with them.

The key to restricted breed disability related issues is to analyze the issue like any reasonable accommodation request. Remember, every request for a reasonable accommodation is a highly specific factual inquiry. Does the requestor meet the FHA definition of disability in general, and specifically does the disability substantially limit a major life activity. It's not OK, to ask a tenant's doctor for specific medical records regarding a tenant's depression. However, being "disabled" can mean a lot of things. The legal test requires a substantial limitation of a major life activity. Major life activities are those activities of central importance to daily life and are defined by Federal regulations as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. While these are the activities defined in the regulations, HUD has also said this isn't an exhaustive list. The term "substantially limits" suggests that the limitation is "significant" or "to a large degree."

Based on the law, if these issues aren't readily apparent (obvious), you can seek verification (documentation) that the tenant meets these requirements. Does the requestor have a physical or mental impairment? Does the requestor's physical or mental impairment substantially limit a major life activity?

If the tenant's need for a restricted breed animal is not obvious, you may also seek verification on this issue as well. To show that a requested accommodation may be necessary, there must be an identifiable relationship, or nexus, between the requested accommodation and the tenant's disability. Thus, in the case of assistance/service animals, an individual with a disability must demonstrate a nexus between his or her disability and the function the service animal provides. This means that you may require tenants who request a restricted breed animal as an emotional support animal to provide documentation from a physician, psychiatrist, social worker, or other mental health professional that the animal provides support that alleviates at least one of the identified symptoms or effects of the 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.

As part of the documentation process and maintaining a dialog in addressing the tenant's request (HUD regulations require you to maintain a dialog to address a tenant's reasonable accommodation request), you can ask further questions and seek documentation that are particularly applicable to restricted breed reasonable accommodation requests. With respect to restricted breed emotional support animals, how long the tenant has had the animal is an important factor. If the tenant just obtained the pit bull, you should ask why they must have this dog and why a non-restricted breed dog can't provide emotional support given the lack of any long-term bond with the dog. Who is the source of the documentation and is it reliable? While you can't ask specific medical questions, you can verify that the person giving the documentation is qualified and legitimate. Based on our experience, any legitimate health care provider welcomes further contact and discussion. Finally, if the health care provider's documentation does not specifically state the need for the restricted breed animal, you can ask the health provider if the tenant needs this particular restricted breed animal or will a non-restricted breed animal meet the tenant's needs.

Because restricted breed issues can be extremely complicated, please always remember the most important point. We are always here to assist you with restricted breed situations.