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HUD UPDATES RULES ON EMOTIONAL SUPPORT ANIMALS

On January 28, 2020, the U.S. Department of Housing and Urban Development (“HUD”) issued updates on emotional support animals under the Fair Housing Act (“Act”). The Act requires community associations to make certain exceptions to community pet rules and other regulations to accommodate valid emotional support animals. In response to years of flagrant fraud in the identification of pets as emotional support animals, HUD issued updated guidance on how community associations and other housing-related service providers can handle requests for emotional support animal accommodations.

HUD’s recent statement provides a roadmap for evaluating an individual’s request for an emotional support animal when the disability is not obvious. Of great value to community associations, HUD also has clarified what information an association can request to better determine the validity of emotional support animal claims and requests.

An emotional support animal (“ESA”) is an animal that, among other things, provides emotional support that alleviates one or more identified symptoms or effects of a person’s disability. There is no requirement that an ESA be individually trained or certified. The Act requires associations to grant reasonable accommodations from association rules and policies to allow a person with an impairment or disability equal opportunity to use and enjoy the person’s dwelling and association common areas, which may include allowing emotional support animals that might otherwise violate association rules or policies.

Reviewing a Request for Accommodation of an ESA

Under the new HUD guidance, if an owner or resident requests waiver of some association regulation to accommodate an emotional support animal, such as a pet weight limit or other pet restriction, the association must consider the following:

Is the person’s impairment or disability readily observable or otherwise already known to the association?

If yes, then we move to the next question below. But if not, then HUD’s new policy allows the association to request certain information to support that the person has a non-observable disability.

A non-observable disability could include post traumatic stress disorder, depression, hearing or vision impairment, disability-related stress or pain, and other impairments. HUD’s new policy clarifies that the Association can request reasonable information to confirm the non-observable disability, such as: (i) a determination of disability from a federal, state, or local government agency; (ii) receipt of disability benefits or services (i.e., SSDI, Medicare or

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SSI for a person under 65, veteran's disability benefits, etc.); (iii) eligibility for housing assistance or a housing voucher received because of a disability; and/or (iv) information confirming disability from a health care professional (e.g., physician, optometrist, psychiatrist, psychologist, physician's assistant, nurse practitioner, or nurse). This list, however, is not exhaustive. These are just examples provided by HUD of health care professionals.

Has the person requested a specific reasonable accommodation or waiver of association rule or policy related to physical or mental impairment or disability?

A reasonable accommodation is a request for change, exception or adjustment to a rule, policy, practice or service that may be necessary for the person with the disability to have equal opportunity to use and enjoy the dwelling or association common areas. This may be, for example, a request for approval to keep an emotional support animal weighing more than the community pet weight limit, or being a breed banned under community regulations.

The request does not need to be in writing, and the person does not need to specifically use the words "reasonable accommodation" or "emotional support animals" for an accommodation request to be valid. Instead, the person must simply request approval for some association rule or policy waiver related to the requested animal. But, the person must identify what accommodation is being requested.

Once the person identifies the accommodation requested by having an ESA, has the person provided the association information to reasonably support that the animal does work, performs tasks, provides assistance, and/or provides therapeutic emotional support with respect to the individual's impairment or disability?

This may be complicated. The person requesting the accommodation must provide information to establish the relationship or connection between the impairment or disability and the need for the ESA. This is particularly the case where the disability is non-observable.

For example, a person may have a legitimate sleep disorder alleviated by an emotional support animal. But, that support would not be relevant and may not justify a request to



keep the animal at the community pool. HUD suggests that associations may require that a person requesting an accommodation demonstrate, through information from a health care professional, the nexus between the person's condition and the support being provided by the emotional support animal, so that associations approve only accommodations actually required to accommodate the needed rule or policy waiver.

Is the requested emotional support animal an animal commonly kept in households?

Even if a person requesting a rule or policy demonstrates the nexus between the condition and requested accommodation discussed above, the type of animal still is relevant for determination of whether the request is reasonable. HUD states that the following animals are considered commonly-kept household animals: dogs, cats, birds, rabbits, hamsters, gerbils, other rodents, fish, turtles, or other small, domesticated animals that are traditionally kept in the home for pleasure rather than for commercial purposes. HUD declares the following animals to not be considered common household animals: reptiles (other than turtles), barnyard animals, monkeys, kangaroos, and other non-domesticated animals.

If a person is requesting to keep a unique type of animal that is not commonly kept in households as described above, then the person has the "substantial burden" of demonstrating a disability-related therapeutic need for the specific animal or the specific type of animal. One example is the use of a capuchin monkey that retrieves food and water for a paralyzed individual. The monkey can use its hands to perform these tasks that a service dog cannot perform.

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Does the requested emotional support animal pose a direct threat to the health or safety of other individuals?

HUD notes that, even if the person satisfies the items discussed above, an emotional support animal could still be banned if the animal poses a direct threat to the health or safety of other individuals and cannot be eliminated or reduced to an acceptable level through actions the individual takes to maintain or control the animal. This determination must be made on objective evidence about the animal's conduct, and it cannot be based on speculation or fear of particular breeds. But, this provision provides some safety measure to communities.

Why HUD Issued New Guidance

One reason HUD published this new guidance is to address the use of online certificates, registrations and licenses for emotional support animals. HUD has taken a harsher stance in this regard stating that "documentation from the internet is not, by itself, sufficient to reliably establish that an individual has a non-observable disability or disability-related need for an assistance animal." This was a big step by HUD in recognizing the reality of fraud in some of the online emotional support animal services.

However, HUD also states that many online licensed health care professionals operate legitimate practices through the internet. To reconcile this, HUD seems to suggest that a critical factor is whether the health care professional has "personal knowledge" of the individual in question. HUD states that one reliable form of documentation is a note from a person's health care professional that confirms a person's impairment or disability and/or need for an emotional support animal when the provider has "personal knowledge" of the individual. These situations will have to be evaluated on a case-by-case basis, but HUD's statements acknowledge that some emotional support animal claims may be fraudulent.

In addition, while previous statements issued by HUD say that a person's condition can be established by documentation from a peer support group, a non-medical service agency, or a reliable third party who is in a position to know about an individual's impairment or disability, HUD now seems to emphasize documentation or information being provided by licensed health care professionals to verify an impairment or disability.

For example, HUD specifically discusses that support to demonstrate a condition often consists of information from a licensed health care professional (e.g., physician, optometrist, psychiatrist, psychologist, physician's assistant, nurse practitioner, or nurse). HUD states that this note from the health care professional may be general as to the person's condition, but specific as to the person and the emotional support provided by the animal. HUD then may, as an example, be rejecting general statements such as that an emotional support animal is required for anxiety, and instead expecting the health care provider's statement to specifically discuss the relationship or connection between the disability and the need for the emotional support animal.

HUD certainly appears to be recognizing the need for greater information and validation to establish emotional support animal requests, but each situation still will need individual review and consideration by community association boards of directors. It's important to be both reasonable and cautious in reviewing these requests.