NO PETS ALLOWED: HOUSING ISSUES AND COMPANION ANIMALS

By
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Companionship, emotional support, assistance for disabled family members, and general health benefits are just a few examples of why people choose to keep pets in their homes. This article explores the major legal issues that arise when people desire to keep companion animals in various types of housing. The Author examines the effects of federal, state, and local laws, as well as common contract clauses.

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I. INTRODUCTION

Sixty-two percent of households in the United States include a pet.[1] Owners of pets say that the most significant benefits of having an animal in their lives include companionship, love, company, and affection.[2] Many pet owners consider their animals to be family members.[3]

Pet owners report that they believe pets relieve stress and are good for their health and the health of other human family members.[4] This belief is supported by an increasing number of studies that have considered the impact of companion animals on human health.[5] For example, research shows that physical contact with companion animals has a calming effect on people.[6] Several studies have shown that interacting with companion animals decreases people's blood pres-

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[1] Am. Pet Prods. Mfrs. Assn., Inc. (APPMA), *2003–2004 APPMA National Pet Owners Survey* xvi (2003) (reporting data from 2002). The pets that the APPMA includes in this statistic include dogs, cats, birds, fish, and other small animals. *Id.* Pet ownership increased in fifty-four percent of all households in 1988 and has stayed stable from the last survey reporting data from 2000. *Id.*

[2] *Id.* at xxxiv (reporting what owners of dogs, cats, birds, and small animals list as benefits of pet ownership). An increasing number of persons with companion animals in their lives consider themselves their animals' "guardian" rather than "owner." Rebecca J. Huss, *Separation, Custody, and Estate Planing Issues Relating to Companion Animals*, 74 U. Colo. L. Rev. 181, 197–200 (2003) [hereinafter Huss, *Separation*] (discussing the increasing use of the term guardian and the adoption of statutory language in state and city codes that reflect this change). Notwithstanding the increasing use of this new terminology, this article will utilize the term "owner" to reflect the legal status of these animals as personal property. Rebecca J. Huss, *Valuing Man's and Woman's Best Friend: The Moral and Legal Status of Companion Animals*, 86 Marq. L. Rev. 47, 68–87 (2002) [hereinafter Huss, *Valuation*] (discussing the legal status of animals as personal property).

[3] Am. Veterinary Med. Assn. (AVMA), *U.S. Pet Ownership & Demographics Sourcebook* 12, 16 (2002) (reporting that 51% of dog owners and 46.1% of cat owners consider their pets family members). The percentage of owners that consider their pets family members decreases with the age of the respondent. *Id.*; *see also* Am. Pet Prods. Mfrs. Assn., Inc., *supra* n. 1, at xxxiv (reporting that seventy percent of dog owners and sixty-two percent of cat owners consider their animals to be like a child or family member).

[4] Am. Pet Prods. Mfrs. Assn., Inc. (APPMA), *supra* n. 1, at xxxiv (reporting that sixty-three percent of dog owners and sixty-five percent of cat owners say that a benefit of ownership is relaxation and stress relief, and that fifty-eight percent of dog owners and thirty-nine percent of cat owners report that they believe the animals are "good for my health or my family's health").

[5] *See generally Companion Animals in Human Health* (Cindy C. Wilson & Dennis C. Turner eds., Sage Publications 1998) (discussing a variety of studies done on the impact of companion animals on human health); Delta Society, *Health Benefits of Animals Bibliography*, http://www.deltasociety.org/dsc040.htm (accessed Mar. 12, 2005) (listing articles that report on studies finding companion animals affect human health in a positive way); Delta Society, *Healthy Reasons to Have a Pet*, http://www.deltasociety.org/dsc020.htm (accessed Mar. 12, 2005) (listing the results of studies that found various ways that companion animals improved the health of humans).

[6] Aaron H. Katcher, *How Companion Animals Make Us Feel*, in *Perceptions of Animals in American Culture* 113, 120 (R.J. Hoage ed., Smithsonian Press 1989) (discussing how visual and physical contact with animals induces calm).

sure.[7] Another study found that people with companion animals had lower cholesterol and triglycerides.[8] Companion animals are now being used to treat some types of mental illness.[9]

A growing number of people claim that their companion animals act as "emotional support" animals.[10] Unlike traditional service animals that are used to perform a physical task, the interaction with and presence of emotional support animals alone is thought to have psychological benefits. One recent study supporting this theory focused on the impact of pet ownership on depression in individuals at risk for AIDS.[11] The conclusion of the study was that "pets have a salutary effect on the mental health of men with AIDS."[12] Even in persons without a specific psychiatric problem, studies have shown that there are important mental and emotional benefits from pet ownership for adults.[13]

In addition, a significant number of pet owners believe that pets are good for children or teach children responsibility.[14] Studies focusing on the impact of having companion animals in the lives of children[15] show that pet ownership "provides long-term mental and emotional benefits for children and adolescents."[16]

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[7] *Id.* at 123 (reporting human physiological changes during interactions with pets).

[8] Alan M. Beck & Aaron H. Katcher, *Between Pets and People: The Importance of Animal Companionship* 7 (Purdue U. Press 1996).

[9] Elizabeth Blandon, *Reasonable Accommodation or Nuisance? Service Animals for the Disabled*, 75-Mar Fla. B.J. 12 (2001). Although the use of service dogs to assist persons with physical disabilities is well known, recently the use of animals to assist persons with mental disorders such as depression, panic disorder, and bi-polar disorder has generated attention. *Id.* at 14; *see also* Gail F. Melson, *Why the Wild Things Are: Animals in the Lives of Children* 99–131 (Harvard U. Press 2001) (discussing the use of animals in therapy with children); Tufts University School of Veterinary Medicine, *Animal Facilitated Therapy*, http://www.tufts.edu/vet/cfa/aft_bib.html (updated August 21, 1999) (listing journal and magazine articles discussing animal assisted therapy).

[10] *See infra* nn. 104–07 and accompanying text (discussing the role of emotional support animals).

[11] J.M. Siegel et al., *AIDS Diagnosis and Depression in the Multicenter AIDS Cohort Study: The Ameliorating Impact of Pet Ownership*, 11 AIDS Care 157, 159 (1999). This research utilized the participants of an existing study that was established to study the natural history of AIDS and was limited to homosexual and bisexual men. *Id.* This study found that the most "significant impact of pet ownership was among men with high levels of attachment to their pets and low levels of confidant support." *Id.* at 166–67.

[12] *Id.* at 167. The analysis of this study did not support a direct effect of pet ownership on depression. *Id.* at 166.

[13] Lynette A. Hart & Aline H. Kidd, *Potential Pet Ownership in U.S. Rental Housing*, 19 Canine Practice 24, 25 (1994).

[14] Am. Pet Prods. Mfrs. Assn., Inc. (APPMA), *supra* n. 1, at xxxiv (stating that thirty-eight percent of dog owners and twenty-eight percent of cat owners report that a benefit of pet ownership is that they are good for children or teach them responsibility).

[15] *See generally* Melson, *supra* n. 9 (discussing the relationship between animals and children and the impact of contact with animals on children). *Cf.* Am. Pet Prods. Mfrs. Assn., Inc. (APPMA), *supra* n. 1, at xxxvi (stating that "[p]et owners are more likely to have children living at home than the U.S. population at large").

[16] Hart & Kidd, *supra* n. 13, at 25.

Given the benefits of interacting with companion animals to such a significant portion of the U.S. population, it is important for the legal system to facilitate responsible pet ownership. This article will address the major legal issues that arise when people desire to keep companion animals in their homes. The article first examines the federal laws that may provide for a right to have a companion animal in the home.[17] Next, the article considers the impact of common clauses that restrict or prohibit pets in rental housing and condominiums. Finally, the article analyzes issues that all residents must consider when harboring a companion animal on their property.

II. FEDERAL LAWS

Animals are treated as personal property under U.S. law.[18] It is a long-standing tradition in the common law that people have a legal right to own and control property.[19] Generally, the common law supports the idea of "absolute" possession of property, although there may be some restrictions on the use of personal property.[20] If an animal is considered a companion animal, a person may have more rights in the animal but will also likely be subject to more statutory responsibilities.[21]

Absent an applicable statute, landlords may restrict or prohibit the harboring of an animal in a rental unit.[22] In addition, local laws may restrict the number or type of animal to be held on the property or impose other requirements relating to the ownership of the animal even if a person owns the real property where the animal is located.[23] Federal law may preempt these restrictions.[24] The federal laws directly impacting one's ability to keep a companion animal in housing all relate to specific classes of people or housing. The first law analyzed

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[17] This article discusses the federal laws applicable to companion animals in housing. Some states have laws that contain similar provisions, and examples of these laws will be referenced in the footnotes when applicable.

[18] *See generally* Gary L. Francione, *Animals, Property, and the Law* (Temple U. Press 1995) (discussing the treatment of animals as property in the law); Orland A. Soave, *Animals, the Law and Veterinary Medicine* 159 (4th ed. Rowman & Littlefield 2000) (noting the first U.S. judicial decision, in 1871, recognizing a property right in dogs); *see also* Huss, *Valuation*, *supra* n. 2, at 69–89 (discussing the current legal status of animals).

[19] Francione, *supra* n. 18, at 38.

[20] *Id.* at 41.

[21] James F. Wilson, *Law and Ethics of the Veterinary Profession* 74 (Priority Press, Ltd. 1988) (describing the statutory responsibilities that may arise out of local, state, or federal law). These responsibilities will be discussed in more detail in part IV *infra*.

[22] *See infra* nn. 241–48 and accompanying text (discussing restrictions in lease agreements).

[23] *See infra* pt. IV (discussing local laws).

[24] Prior to 1988 other laws were used to support having a service animal in housing. *See e.g. Ocean Gate Assocs. Starrett Sys., Inc. v. Dopico*, 441 N.Y.S.2d 34, 35 (Civ. Ct., N.Y.C., Kings County 1981) (citing to various laws in New York that precluded a summary judgment in a case where a landlord wanted to terminate a lease due to the disabled tenants' violation of a no-pet clause where the dog served in a security function).

in this article is the Fair Housing Act (FHA).[25] The FHA can require that service animals for the disabled be allowed to stay in housing despite no-pets clauses.[26]

A. Fair Housing Act (FHA)

1. Applicability to Disabled Persons and Service Animals

The FHA was originally passed as part of the Civil Rights Act of 1968.[27] It provided protection from discrimination in housing on the basis of race, color, national origin, or gender.[28] In 1988 the Fair Housing Act Amendments were passed, expanding the FHA to included handicapped persons in those classes protected from housing discrimination.[29] Handicap is defined, with respect to a person, as "(1) a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment."[30]

The Department of Housing and Urban Development (HUD) is responsible for the administration of the FHA.[31] The Attorney General or private persons may enforce the FHA.[32] Relief for private plaintiffs may include actual and punitive damages, injunctions, and attorney fees at the discretion of the court.[33]

Although many of the cases discussing the applicability of the FHA deal with multi-family dwellings, single-family homes also fall under the purview of the statute.[34] The sale or rental of a single-family home by an owner is exempt from the FHA; however, this exemption will not apply if the private individual owner owns more than three such single-family homes.[35] Similarly, use of a real estate agent or bro-

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25 42 U.S.C. §§ 3601 et seq. (2000). In this article, references to the FHA include the FHA as amended by the Fair Housing Amendments Act of 1988.

26 *See infra* n. 40 and accompanying text (explaining that waiver of a no-pet rule to allow for a service animal may be required as a reasonable accommodation under the FHA); nn. 52–70 and accompanying text (discussing cases where waiver of no-pets rules required).

27 42 U.S.C. §§ 3601 et seq.; *see also* H.R. Rpt. 100-711 at 14 (June 17, 1988) (reprinted in 1988 U.S.C.C.A.N. 2173, 2176) (available at 1988 WL 169871 at *15) (discussing the background and need for the Fair Housing Act).

28 42 U.S.C. §§ 3601 et seq.

29 *Id. See also* H.R. Rpt. 100-711 at 17 (June 17, 1988) (reprinted in 1988 U.S.C.C.A.N. 2173, 2179 (available at 1988 WL 169871 at *18)) (discussing the need for an amendment to the Fair Housing Act to protect handicapped individuals).

30 42 U.S.C. § 3602(h). The term handicap does not include "the current, illegal use of or addiction to a controlled substance." *Id.* This article will use the terms "handicap" and "disability" interchangeably as many of the court decisions do in this area. *See e.g. Helen L. v. Didario*, 46 F.3d 325 (3d Cir. 1995) (using both terms throughout).

31 42 U.S.C. § 3608. Note that this is the same department that administers the two other federal statutes discussed herein.

32 *Id.* at §§ 3613–14.

33 *Id.* at §§ 3612–13.

34 *Id.* at § 3603(b)(1).

35 *Id.*

ker to rent out the home also destroys the exemption for the private individual owner.[36]

A plaintiff may prove discrimination under the FHA by showing the failure to provide a reasonable accommodation.[37] Specifically, the FHA definition of housing discrimination includes refusing to make "reasonable accommodation in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling."[38] Note that, although the FHA requires that the public and common use portions of multi-family dwellings constructed after January 1, 1991 be handicapped accessible, any reasonable modifications within the unit are at the expense of the disabled person.[39]

Examples in federal regulations[40] and case law[41] have made it clear that a reasonable accommodation may include a waiver of a no-pets rule to allow for a service animal. It is not uncommon for a lawsuit alleging violation of the FHA to also include claims based on the federal Rehabilitation Act[42] and the Americans with Disabilities Act (ADA).[43]

2. *Nexus between the Animal and the Disability*

To establish a valid claim under federal law, it is necessary to establish a nexus between the animal and the disability.[44] In *Nason v. Stone Hill Realty Association*, a disabled tenant took in her mother's cat after her mother died. The manager of the apartment told her to remove the cat.[45] Nason, who had multiple sclerosis, submitted a letter from physician that "suggested that there would be serious negative consequences for her health if she was compelled to remove the cat."[46] The court found that Nason did not show "a substantial likelihood that maintaining possession of the cat [was] necessary due to her handicap."[47] Specifically, although the affidavit provided by Nason's

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36 *Id.*

37 *See Bronk v. Ineichen*, 54 F.3d 425, 426-27 (7th Cir. 1995) (deaf tenants claimed discrimination when landlord refused to permit them to keep a dog as a reasonable accommodation).

38 42 U.S.C. § 3604(f)(3)(B).

39 *Id.* at § 3604(f)(3)(A). This is in contrast to the Americans with Disabilities Act provision that requires the person with the public accommodation to pay for any reasonable accommodations. 42 U.S.C. §§ 12111(9)–(10)(B) (2000).

40 24 C.F.R. § 100.204(b) (2003).

41 *See infra* pts. II (A)(3)–(A)(5) (cases discussing waivers of no-pets rules).

42 29 U.S.C. §§ 791–94 (2000). The Rehabilitation Act of 1973 provides that agencies and organizations that receive federal funds or contracts (in excess of certain dollar amounts) may not discriminate against qualified individuals with disabilities. *Id.* § 794(a)–(c).

43 42 U.S.C. §§ 12101–213 (2000).

44 *Nason v. Stone Hill Realty Assn.*, 1996 WL 1186942 at *1 (Mass. Super. May 6, 1996).

45 *Id.*

46 *Id.*

47 *Id.* at *3.

doctor indicated that removal of the cat would result in "increased symptoms of depression, weakness, spasticity and fatigue," it "[did] not demonstrate that such symptoms [were] treatable solely by maintaining the cat or whether another more reasonable accommodation [was] available to address Nason's symptoms."[48] The court continued by stating that the affidavit failed to "illustrate how the presence of the cat, as opposed to some other therapeutic method such as chemical therapy, [was] essential or necessary to treating her symptoms."[49] Thus, the motion for a preliminary injunction was denied because the court found that the record "[failed] to clearly demonstrate the nexus between keeping the cat and her handicap . . . ."[50]

3. *Status of Animal is Key to the Analysis*

Another issue that has been the subject of case law is determining when an animal should be considered a service animal, as opposed to a companion animal whose owner may be prohibited from keeping the animal on the property. The only requirements in the federal regulations for classification as a service animal are that the animal (1) be individually trained, and (2) work for the benefit of a disabled individual.[51] There is no specific requirement as to the amount or type of training a service animal must undergo. There are also no requirements as to the amount or type of work a service animal must provide for a disabled person.

An often cited case discussing these issues is the Seventh Circuit case of *Bronk v. Ineichen.*[52] In *Bronk*, deaf tenants alleged that a landlord had discriminated against them in violation of the FHA by refusing to allow them to keep a dog in a rented townhouse.[53] The *Bronk* court found that "a deaf individual's need for the accommodation afforded by a hearing dog is . . . *per se* reasonable within the meaning of the statute."[54] The court found that in this case, the skill level of the dog (i.e. whether the dog was really a hearing dog) was in dispute.[55]

The *Bronk* court set out two standards that a disabled person must meet in arguing that an accommodation must be made.[56] First, "the accommodation"—in this case, waiver of a no-pets clause—"must facilitate a disabled individual's ability to function."[57] To determine whether the standard is met, it is possible to look in part at whether the animal has met any professional credentials; essentially, the level

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48 *Id.*
49 *Id.*
50 *Nason*, 1996 WL 1186942 at *1.
51 28 C.F.R. § 36.104 (2003).
52 54 F.3d 425.
53 *Id.* at 426–27.
54 *Id.* at 429 (italics in original).
55 *Id.*
56 *Id.* at 431.
57 *Id.*

of schooling of the animal.[58] However, the court specifically stated that the federal statute does not require professional training.[59]

The second standard set forth in *Bronk* was that "[the accommodation] must survive a cost-benefit balancing test that takes both parties' needs into account."[60] The court reiterated the findings of cases discussing reasonable accommodation under the ADA and stated that "reasonable accommodation does not entail an obligation to do everything humanly possible to accommodate a disabled person; cost (to the defendant) and benefit (to the plaintiff) merit consideration as well."[61] In addition, a "nexus" requirement was included in the court's analysis: "the concept of necessity requires at a minimum the showing that the desired accommodation will affirmatively enhance a disabled plaintiff's quality of life by ameliorating the effects of the disability."[62] After setting forth the standards for determining whether an accommodation is reasonable, the *Bronk* court found that a new trial was necessary due to jury instructions that may have confused jury members.[63]

A subsequent hearing-aide dog case that cited *Bronk* was *Green v. Housing Authority of Clackamas County*.[64] The *Green* court reviewed federal law and, citing to *Bronk*, found that there was no federal certification process and that there were no requirements for service animals.[65] It determined that the Housing Authority's "requirement that an assistance animal be trained by a certified trainer of assistance animals, or at least by a highly skilled individual, has no basis in law or fact."[66] As to the cost-benefit balancing analysis, Congressional intent supported a finding that, as a recipient of federal funds, the "only way a defendant can avoid modifying its 'no-pets' policy is if the animal fundamentally alters the nature of the program or if the defendant suffers undue financial and administrative burdens."[67] The defendant in this case admitted that waiving the no-pets policy did not "cause either a fundamental alteration to its programs or cause any financial or administrative burdens."[68] In addition, the housing authority could not impose any policy that limits the participation of a handicapped tenant, such as requiring "certification or third-party verification of the

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58 *Bronk*, 54 F.3d at 431.

59 *Id.*

60 *Id.*

61 *Id.* at 429 (citing *U.S. v. Village of Palatine*, 37 F.3d 1230, 1234 (7th Cir. 1994) and *Vande Zande v. State of Wis. Dept. of Administration*, 44 F.3d 538 (7th Cir. 1995)).

62 *Id.*

63 *Id.* at 431.

64 994 F. Supp. 1253, 1256 (D. Or. 1998).

65 *Id.* at 1255–56.

66 *Id.* at 1256.

67 *Id.*

68 *Id.*

assistance animal's abilities."[69] The plaintiff tenant's summary judgment motion was granted as the court found that the housing authority did not accommodate plaintiffs by modifying its no-pets policy.[70]

In contrast, a West Virginia court found that some type of certification process requirement for a service animal may be allowed under federal law.[71] In *In re Kenna Homes Cooperative Corp.*, the owners of cooperative units were allowed to have pets in their units for many years.[72] In 1996 the stockholders voted to request that the board of directors enact a rule phasing out animals on the property.[73] The Jessups' small dog had died after the rule was enacted, and they obtained two new dogs.[74] The Jessups had various medical problems, including arthritis, depression, and problems with blood pressure.[75] They presented evidence of these problems when they applied for permission to keep the newly acquired dogs in their apartment, arguing that a waiver of the no-pets policy would be a reasonable accommodation for their disabilities.[76] The board of directors rejected the request and filed a Petition for Declaratory Judgment in the Circuit Court of Kanawha County to determine whether the pet rule was in compliance with the applicable law.[77] The cooperative corporation's rule had an exception for trained dogs as follows:

> There is excepted, however, seeing-eye and hearing-aide dogs or any other trained dog, provided the animal is properly trained and certified for the particular disability, licensed and provided further that the stockholder or resident has a certificate or authorization request from a licensed physician specializing in the field of subject disability.[78]

The Circuit Court of Kanawha County found that the rule was "in compliance with both federal and state law" and reasoned that there was no correlation between the dogs and the claimed disabilities.[79]

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[69] *Green*, 994 F. Supp. at 1256. *But see infra* nn. 71–90 and accompanying text (discussing *In re Kenna Homes Coop. Corp.*, which allows for some type of certification requirement).

[70] *Green*, 994 F. Supp. at 1257. In addition, the *Green* court found that an Oregon state law requiring that a hearing ear dog be kept on an orange leash was preempted by federal law. *Id.*

[71] *In re Kenna Homes Coop. Corp.*, 557 S.E.2d 787 (W. Va. 2001).

[72] *Id.* at 791. *See infra* n. 268 (defining "cooperative corporation").

[73] *Id.* at 791–92.

[74] *Id.* at 792.

[75] *Id.*

[76] *Id.* at 792. One of the physicians' statements indicated "it is a medical necessity for [the Jessups] with their present health ailments to be able to keep their pets to suppress both the physical and mental need for companionship as well as the confinement due to the various illnesses." *In re Kenna*, 557 S.E.2d at 792.

[77] *Id.*

[78] *Id.*

[79] *Id.* Further, the circuit court found that that the "necessity" for these dogs was not related to any specific disability, and that there was no offering that the two dogs were a necessary reasonable accommodation. *Id.*

The appellate court in *Kenna* found that the rule was valid, in part.[80] Specifically, it stated that "a requirement that a service dog be 'properly trained' does not conflict with federal or state law."[81] As to the certification requirement, unless such requirement was applied in a flexible manner, it would violate the FHA.[82] Guidelines were set forth to govern the issue of certification.[83] Specifically, a landlord could require a tenant seeking to keep an animal under the FHA to:

> demonstrate that he or she made a bona fide effort to locate a certifying authority and, if such authority is located, to subject the service animal to the specialized training necessary for such certification . . . . If neither the tenant nor the landlord . . . can locate a certifying authority after reasonable attempts to do so, it is reasonable for the landlord . . . to require that a recognized training facility or person certify that the service animal has that degree of training and temperament which would enable the service animal to ameliorate the effects of its [owner's] disability and to live in its owner's household without disturbing the peace of mind of a person of ordinary sensibilities regarding animals.[84]

The *Kenna* court emphasized that certification was just a formal assertion, in writing, of some fact, but clearly stated that "the burden is on the person claiming the need for a service animal as a reasonable accommodation to show that his or her animal is properly trained."[85] Emphasis was also placed on the fact that the service animal must be a reasonable accommodation.[86] Thus, an animal can be excluded if it is a nuisance, and the tenant can be held to sanitary conditions and may be responsible for any damage caused by the service animal.[87] The court also found that it was reasonable for a landlord, in situations "where a tenant suffers from a disability which is not apparent to a person untrained in medical matters . . . to require a second concurring opinion from a qualified physician selected by the landlord . . . to substantiate the tenant's need for a service animal."[88] Holding that the rule, as it applied to the Jessups, did not violate the FHA or the West Virginia Fair Housing Act,[89] the court found that "[palliative] care and the ordinary comfort of a pet are not sufficient to justify a request for a service animal . . . ."[90]

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80 *Id.* at 797.

81 *In re Kenna*, 557 S.E.2d at 797. The court focused on federal regulations and other case law that found that a requirement of a service animal is that it be "individually trained." *Id.*

82 *Id.* The court did consider the fact that there are no uniform standards or credentialing criteria for service animals. *Id.*

83 *Id.* at 798.

84 *Id.*

85 *In re Kenna*, 557 S.E.2d at 798.

86 *Id.* at 799.

87 *Id.*

88 *Id.*

89 *Id.* at 800.

90 *Id.* (footnote omitted). The court did recognize that some chronic and severe psychoses may support the need for an animal as an accommodation. *Id.* at 800 n. 15.

Kenna is an example of the outer limits of case law relating to requirements that may be placed upon a disabled person in requesting a reasonable accommodation in connection with allowing a service animal in housing. Although *Kenna* provides an apparently rational interpretation of the FHA, it is important to note that this was a state court interpreting a federal law.[91]

The requirement that an animal be individually trained was supported by a subsequent federal district court case.[92] In *Prindable v. Association of Apartment Owners of 2987 Kalakaua*, the court emphasized that, where the primary handicap was mental and emotional in nature, an "animal . . . must be peculiarly suited to ameliorate the unique problems of the mentally disabled."[93] The *Prindable* court rejected the suggestion of plaintiff's counsel that "canines (as a species) possess the ability to give unconditional love, which simply makes people feel better,"[94] and stated that allowing this "reasoning permits no identifiable stopping point," and would change the test "from 'individually trained to do work or perform tasks' to 'of some comfort.'"[95] Nothing was found in the record to lead a reasonable jury to conclude that the dog at issue was an individually trained service animal.[96] The *Prindable* court agreed with the *Kenna* court that landlords may inquire into and verify an asserted handicap or the necessity of a requested accommodation.[97]

Notwithstanding the holdings in *Kenna* and *Prindable*, earlier cases make it clear that no distinction should be made between physical and mental disabilities.[98] In *Crossroads Apartment Associates v.*

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91 557 S.E.2d 787 at 790.

92 *Prindable v. Assn. of Apt. Owners of 2987 Kalakaua*, 304 F. Supp. 2d 1245, 1256 (D. Haw. 2003).

93 *Id.* at 1256 (citation omitted).

94 *Id.* at 1257 n. 25.

95 *Id.*

96 *Id.* at 1256. The court granted the defendants a judgment as a matter of law as to plaintiff's claims under the FHA for failure to make a reasonable accommodation. *Id.* at 1262.

97 *Prindable*, 304 F. Supp. 2d. at 1260. *See also Timberlane Mobile Home Park v. Wash. St. Human Rights Commn.*, 95 P.3d 1288, 1291 (Wash. App. Div. 2 2004) (holding that a dog was not a service animal when it had not received training for the purpose of assisting or accommodating a disabled person).

98 *E.g. Majors v. Hous. Auth. of the County of DeKalb Ga.*, 652 F.2d 454, 456 (5th Cir. 1981) (Although this case is based on the Rehabilitation Act of 1973, it is often cited when courts discuss waiver of a no-pet rule as a reasonable accomodation due to a mental disability. *E.g. Woodside Village v. Hertzmark*, 1993 WL 268293 at *5; *Auburn Woods I Homeowners Assn. v. Fair Empl. & Housing Commn.*, 18 Cal. Rptr. 3d 669, 680.); *Hous. Auth. of the City of New London v. Tarrant*, 1997 WL 30320 at *1 (Conn. Super. Jan. 14, 1997) (wherein the court noted that "given an appropriate factual predicate, mental handicap may warrant reasonable accommodations, including the keeping of an animal in a public housing complex," but found that the factual predicate was missing in this case. *Id.* at *2); *Whittier Terrace Assocs. v. Hampshire*, 532 N.E.2d 712 (Mass. App. 1989) (summary process action, also based on the Rehabilitation Act of 1973, wherein the tenant's psychiatric disability, and claimed emotional and psychiatric

LeBoo,[99] summary judgment was precluded on the issue of whether keeping a cat was necessary to assist a tenant in coping with a mental illness, specifically panic disorder with agoraphobia, mixed personality disorder, as well as chronic anxiety with a history of episodic alcohol abuse. The court stated, utilizing both the Rehabilitation Act and the FHA, that the plaintiff "must demonstrate that he has an emotional and psychological dependence on the cat which requires him to keep the cat in the apartment."[100]

In *Janush v. Charities Housing Development Corp.*, another case finding that summary judgment was inappropriate, the focus was on the effect of pets on a mental disability.[101] A genuine issue of material fact existed as to whether it was a reasonable accommodation to allow a mentally disabled tenant to keep two cats and two birds in violation of a no-pets policy.[102] Testimony in this case established that the pets lessened the effects of the tenant's disability by providing her companionship, and that the pets were necessary to her mental health.[103]

Although these cases dealt with persons with serious mental disabilities, a growing number of disputes are arising over so-called "emotional support animals."[104] One attorney's experience with these cases is that once a state human rights commission or HUD has established probable cause supporting a tenant, the landlord frequently drops the assertion of a no-pets clause.[105] Another attorney's experience is that a letter explaining in detail the law and the rights of the tenant to have an emotional support animal, along with substantive documentation from a medical professional, is usually sufficient to persuade a landlord to allow an emotional support animal to remain in a unit notwithstanding a standard no-pets clause.[106] One argument that is made by

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dependency on the cat, called for a "narrow exception to the rigid application of the no-pet rule." *Id.* at 713.).

99 578 N.Y.S.2d 1004 (City Ct. of N.Y., Rochester 1991).

100 *Id.* at 1005, 1007. In addition, a determination of whether a reasonable accommodation could be made was an issue in this case. Due to conflicting testimony, summary judgment was denied. *Id.* at 1007.

101 169 F. Supp. 2d 1133, 1134 (N.D. Cal. 2000).

102 *Id.* at 1134–36.

103 *Id.* at 1134.

104 Telephone Interview with Maddy Tarnofsky, Attorney (Jan. 28, 2004) (Ms. Tarnofsky practices in New York and has seen a growing number of cases involving emotional support animals); telephone Interview with Sharon Cregeen, Member of O'Donnell, McDonald & Cregeen, L.L.C. (Jan. 29, 2004) (Ms. Cregeen practices in Connecticut and has represented tenants with cancer, AIDS, and depression that have requested waivers of no-pets policies to allow for emotional support animals. She also reports having seen an increasing number of cases involving emotional support animals over the last few years); *see also* Motoko Rich, *Pet Therapy Sets Landlords Howling*, N. Y. Times F1 (June 26, 2003) (discussing cases of emotional support animals).

105 Telephone Interview with Maddy Tarnofsky, *supra* n. 104.

106 Telephone Interview with Sharon Cregeen, *supra* n. 104 (Ms. Cregeen finds that the biggest issue is educating landlords and tenants about the rights of tenants to keep an animal under the FHA); *but see Landmark Props. v. Olivo*, 2004 WL 1587447, at *2 (N.Y. App. Term July 6, 2004) (holding that a tenant failed to introduce sufficient evidence to establish his handicap, and to establish the necessity of keeping a dog to use

tenants' attorneys is that the "only requirements for an emotional support animal are that it be well-socialized and able to accompany [the tenant] to public places."[107]

If the standards set by *Kenna*, and adopted by *Prindable*, are supported by subsequent decisions interpreting the FHA, persons asserting their rights under the FHA will need to establish a clear record of their disabilities, as well as the status of the animal, to have a service animal in housing where a no-pets policy applies. Based on findings in *Prindable*, establishing the status of an animal as a service animal will be especially difficult in situations involving emotionally or mentally disabled individuals.[108] The courts in these cases ignore the studies that show a direct benefit to individuals, specifically those with these types of disorders that are ameliorated due to the companionship of an animal.[109] In addition, these recent cases appear to ignore earlier cases involving mentally and emotionally disabled tenants that set forth standards (that precluded summary judgment) focusing on whether there was emotional or physical dependence on an animal,[110] or whether an animal lessens the effects of a disability by providing companionship.[111] Furthermore, these cases fail to make a distinction, which is apparently being made in practice, supported by HUD consent orders, between service animals that provide physical tasks and those that provide emotional support.[112]

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and enjoy the apartment, when he provided only the "ambiguous statement of his physician that depressed people may benefit from having pets and notes from his medical records that he was anxious about possibly losing his dog").

107 *Zatopa v. Lowe*, No. C 02–02543, slip op. at 14 (N.D. Cal. Aug. 7, 2002) (Order Granting Preliminary Injunction and Requiring Bond); *see infra* nn. 117–28 and accompanying text (discussing *Lowe*). One of the letters by the physician in *Lowe* stated "[a]n emotional support animal is a pet — an animal whose function is to provide affection and companionship, and does not need any special training." Slip op. at 2.

108 *Prindable*, 304 F. Supp. 2d at 1256. There are organizations that register or provide testing for animals that are to be used for therapeutic purposes at nursing homes, hospitals, and schools. *See* Delta Socy., *Pet Partners Program*, http://www.deltasociety.org/dsa000.htm (accessed Mar. 12, 2005) (discussing Delta Society's Pet Partners® Program which trains and screens volunteers and their pets for visiting animal programs); Therapy Dogs Inc., *Therapy Dogs Inc.*, http://www.therapydogs.com/downloads/member%20guidelines%202004.pdf (accessed Nov. 7, 2004) (discussing Therapy Dogs, Inc., a non-profit volunteer program which offers a way to become a registered volunteer dog/handler team). These organizations' testing programs focus on basic obedience skills, and, in the case of the Pet Partners program, focuses on a dog's aptitude or temperament for participating in animal assisted activities. Delta Socy., *Pet Partners Program*, http://www.deltasociety.org/dsa000.htm (accessed Mar. 12, 2005). The Delta Society website specifically distinguishes between service animals and therapy animals. Delta Socy., *Basic Information About Service Dogs*, "The Difference Between Service Animals, Therapy Animals, Companion Animals and 'Social/Therapy' Animals," http://www.deltasociety.org/nsdc/sdbasic.htm (accessed Mar. 12, 2005).

109 *See supra* nn. 5–16 and accompanying text (describing studies on the benefits of companion animals on human health).

110 *See supra* nn. 99–100 and accompanying text (discussing *LeBoo*).

111 *See supra* nn. 101–03 and accompanying text (discussing *Janush*).

112 *See HUD v. Bayberry Condo. Assn.*, 2002 WL 475240 at **1–2 (H.U.D.A.L.J. No. 02-00-0504-8 Mar. 21, 2002) (providing, in an initial decision and consent order, that a

Based on the cases reported to date, it is clear that the emotional distress expected to occur if a person is forced to give up an animal will not support a claim that a reasonable accommodation must be made.[113] To increase the likelihood of successfully asserting that a reasonable accommodation should be made, it is imperative that a link between an existing disability and the services provided by the animal occurs prior to any indication that the person may be asked to give up an animal.

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resident of a condominium suffering from depression, generalized anxiety, and panic disorder be granted a waiver of a no-pet policy as a reasonable accommodation of her handicap, with such animal being referred to as an "emotional support pet"); *HUD v. Meridian Group, Inc.*, 2001 WL 865717 at *1 (H.U.D.A.L.J. No. 05-98-1418-8 July 18, 2001) (providing, in a consent order, that a tenant who stated she was handicapped because of manic depression would be given permission to have a cat in her unit); *HUD v. River York Stratford, L.L.C.*, 2000 WL 394074 at *2 (H.U.D.A.L.J. No. 02-99-0442-8 Apr. 14. 2000) (providing, in an initial decision and consent order, that a tenant suffering from anxiety would be able to retain her dog or a replacement dog of a similar size upon proof of the alleged handicap in the form of a reasonably descriptive letter from tenant's physician, psychologist, or social worker); *HUD v. Lerner*, 2000 WL 46116 at *3 (H.U.D.A.L.J. No. 02-98-0179-8 Jan. 14, 2000) (providing, in an initial decision and consent order, that a prospective tenant suffering from anxiety, depression, renal cancer, pulmonary disease, and angina pectoris who obtained a pet dog on the advice of his physician to abate symptoms of anxiety and depression will be offered an apartment in a building with a no-pet rule upon receipt of a reasonably descriptive letter from the prospective tenant's physician); *HUD v. Bay Ridge Condo.*, 1999 WL 137371 at *1 (HUDALJ No. 02-97-9769 Mar. 12, 1999) (providing, in a consent order, that a tenant who, on the advice of her therapist, obtained a pet dog to lessen her symptoms of dysthymia and/or depression would be able to retain the dog (or a replacement of similar size) if she provided a reasonably descriptive letter from her therapist or physician); *HUD v. Unique Restorations Co.*, 1998 WL 353869 at *2 (H.U.D.A.L.J. No. 2-97-0956-8 July 1, 1998) (ordering as part of a consent order that, if a tenant provides proof that she suffered from chronic depression and that harboring of "Pumpkin" (a dog) is necessary to the treatment and/or has therapeutic effects on her mental disability, a landlord shall allow the tenant to keep the dog as an emotional support animal); *HUD v. Riverbay Corp.*, 1995 WL 108212 (H.U.D.A.L.J. No. 02-93-0320-1 Sept. 8, 1994, *modified*, H.U.D.A.L.J. No. 02-93-0320-1 March 1, 1995) (finding for a tenant with mental disabilities in a case where there was no discussion of any certification or individual training); *see also Auburn Woods I Homeowners Assoc. v. Fair Empl. & Hous. Commn.*, 121 Cal. App. 4th 1578 (Cal. App. 3d Dist. 2004) (There, the California Court of Appeals, Third District, found that a dog did not need special skills to help ameliorate the effects of the parties' mental disabilities in a case interpreting the California Fair Employment and Housing Act. *Id.* at 1596. "[I]t was the innate qualities of a dog, in particular a dog's friendliness and ability to interact with humans, that made it therapeutic here." *Id.* The California Court of Appeals found that the original administrative law judge's finding that the condominium association violated the FEHA by failing to permit the residents to keep the dog as a reasonable accommodation to their disabilities should not have been overturned by the trial court. *Id.* at 1599); *but see HUD v. Blue Meadows LP*, 2000 WL 898733 at **9, 11 (H.U.D.A.L.J. Nos. 10-99-0200-8, 10-99-0391-8 July 5, 2000) (finding for a landlord who had requested verification that a dog was trained or certified in a case where the dog was used by a prospective tenant to pull his wheelchair). The landlord in *Blue Meadows* unsuccessfully requested payment of attorneys fees. *Id.* at *5.

113 *See supra* nn. 44–50 and accompanying text (describing the *Nason* case, where a doctor stated that the disability would be exacerbated by having to give up the animal).

4. Only a Reasonable Accommodation is Required

It is clearly established that disabled persons are not restricted to using only dogs and cats as service animals.[114] Other species that are used to assist persons with disabilities include monkeys, horses, and birds.[115] As discussed above, federal statutes do not attempt to define the animals that can be used as service animals.[116] Notwithstanding the general rule that no particular type or breed of service animal is valid, one district court ruled (regarding a motion for a preliminary injunction) that a landlord is not required to allow a particular breed to remain as a reasonable accommodation in the case of an emotional support animal.[117]

In *Zatopa v. Lowe*, a tenant suffering from AIDS and long-term clinical depression acquired a dog to help alleviate his symptoms in violation of a no-pets provision in his lease.[118] The dog that Lowe adopted was a pit-bull terrier or pit-bull mix.[119] There was disputed testimony over what notice Lowe provided to his landlords regarding his plan to acquire an emotional support animal.[120]

For purposes of the motion, the landlords conceded that Lowe was disabled and the "laws in question required an emotional support animal as a reasonable accommodation."[121] In correspondence between legal counsel leading up to the hearing on the motion, the type of animal that Lowe chose became the central issue in the dispute.[122] The landlords' position was that having a pit bull in the building constituted a nuisance and created "a substantial interference with the

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[114] Susan D. Semmel, *When Pigs Fly, They Go First Class: Service Animals in the Twenty-First Century*, 3 Barry L. Rev. 39, 40 (2002) (discussing the evolution of service animals in the United States, the variety of species being used, and the variety of tasks for which they may be utilized). The Semmel article describes a case of a 300 pound potbellied pig that was used as a service animal under the Air Carrier Access Act of 1986. *Id.* at 39. *See also LaFore v. Hous. Auth. of Portland*, 1999 WL 1058992 (D. Or. Nov. 19, 1999) (wherein plaintiff alleged housing and disability discrimination, claiming that her disabilities required her to have an opossum as an assistance animal in addition to a dog as a service animal). In *LaFore*, the Housing Authority denied plaintiff's claim for modification of the pet policy to permit her to keep the opossum, allegedly on the ground that "opossums are not domesticated animals and can present some issues because they are not normally inoculated, spayed/neutered and licensed." *Id.* at *1. The court dismissed the federal claims due to the running of the two year statute of limitations, but remanded the state claims to state court for further proceedings. *Id.* at **3–4.

[115] Semmel, *supra* n. 114, at 58; *see also infra* nn. 434–54 and accompanying text (discussing the use of miniature horses as service animals in the cases involving municipal ordinances and zoning).

[116] *See supra* n. 51 and accompanying text. Some states have specified animals in their assistance animal statutes. Semmel, *supra* n. 114, at 58.

[117] *Zatopa v. Lowe*, No. C 02–02543, slip op. at 10 (N.D. Cal. Aug. 7, 2002) (Order Granting Preliminary Injunction and Requiring Bond).

[118] *Id.* at 2.

[119] *Id.* at 3.

[120] *Id.* at 2–3.

[121] *Id.* at 5 n. 1.

[122] *Id.* at 3–6.

comfort, safety or enjoyment of the landlord and tenants in the building."[123] The landlords agreed to allow Lowe to keep a dog that was a breed they considered to be "safe and gentle."[124]

The District Court focused on whether the landlords were required to allow Lowe to keep this particular dog as a reasonable accommodation.[125] Analogous U.S. Supreme Court and Ninth Circuit decisions indicated that "an accommodation need not satisfy the particular preferences of the disabled person in order to be held reasonable."[126] Considering the issues of both reasonable accommodation and the equities, the court considered testimony of experts that discussed the pit bull breed generally and Lowe's dog individually.[127] It found that the "landlords' offer of a dog belonging to a safe and gentle breed constitutes a reasonable accommodation under both federal and state law."[128]

An example of the outer limits of reasonable accommodation, where the breed of dog was not an issue, is the case of *Woodside Village v. Hertzmark*, where a tenant with a mental disorder was unable to adhere to pet rules.[129] After making efforts to accommodate the tenant, including arranging for a dog trainer and offering to provide additional support for the tenant, the apartment complex filed a request for execution on a stipulated judgment.[130]

The stipulated judgment in *Woodside Village* granted the plaintiff (apartment complex) possession of the apartment with a stay of execution subject to the defendant's (tenant) compliance with rules relating to walking his dog in designated areas and cleaning up the animal's

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123 *Lowe*, slip op. at 4.

124 *Id.* The landlords provided a non-exhaustive list of breeds they deemed acceptable. *Id.* at 5.

125 *Id.* at 11–12. The court utilized cases discussing the ADA and the Rehabilitation Act to analyze the issue of reasonable accommodation. *Id.*

126 *Id.* at 12. The *Lowe* court recognized that there may be a violation of the law if a landlord "stubbornly refuses to allow a preferable and clearly more effective accommodation on arbitrary and capricious grounds." *Id.* at 13.

127 *Lowe*, slip op. at 13, 15–17. The landlords' expert provided generalizations about the pit bull breed, including a statement that the pit bull breed is second only to the Rottweiler breed in causing death or injury to persons in the United States. *Id.* at 15–16. Lowe's experts focused on temperament tests provided by a veterinarian and the co-founder of an organization focusing on responsible pit bull ownership. *Id.* at 16. Lowe's experts found the dog to be of good temperament. *Id.* The court found the expert testimony offered by Lowe problematic due to the fact no evidence was presented on the predictive value of the tests administered to the dog. *Id.* at 17.

128 *Id.* at 15. The court also considered the equities of the case, measuring the hardship to the landlords and to the tenant, Lowe. *Lowe*, slip op. at 17–19. The court cited to the public interest to support its finding that the balance of hardships tips toward the landlords. *Id.* at 18–19. When the court considered the hardship to Lowe, it considered Lowe's acquisition of the pit bull as a self-inflicted injury and found that such injury "cannot serve as the basis for a claim of hardship" in this context. *Id.* at 19.

129 1993 WL 268293 at *1 (Conn. Super. June 22, 1993), *appeal dismissed*, 36 Conn. App. 73 (Conn. App. 1994).

130 *Id.* at *1.

waste.[131] The court focused on whether the accommodation made by the plaintiff was reasonable.[132] It reviewed cases that had considered accommodations and found that there was no standard or precise measurement to determine whether a proposed accommodation would be reasonable.[133] Similar cases evaluating the issue of animals in housing were considered,[134] but the circumstances in this case were found to be different, because the health, safety, and comfort of other residents in the complex were at risk.[135] Plaintiff made reasonable accommodations for the tenant's disability, and the tenant's inability to follow the rules did not make the plaintiff's accommodations unreasonable.[136]

5. Financial Requirements

One issue that has not been directly addressed in appellate case law to date is whether a disabled individual would be required to pay a pet fee or pet deposit in order to keep a service animal in a unit.[137] In the consent order for *HUD v. Purkett*,[138] an administrative law judge enjoined the owners of an apartment complex from

> charging a handicapped individual a deposit for maintaining an auxiliary aid in the dwelling unit, when, because of the individual's handicaps, it may be necessary for the individual to use the auxiliary aid in order to afford the individual an equal opportunity to use and enjoy the dwelling unit, including public and common use areas. An auxiliary aid shall include, but not be limited to, any working animal which constitutes a guide dog, a signal dog, or a service dog.[139]

This consent order also required the return of a one hundred dollar pet deposit, but allowed the respondents to make all ordinary

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131 *Id.* The trial court had approved a modified stipulated judgment in October 1992 on substantially the same terms. *Id.*

132 *Id.* at *4.

133 *Id.*

134 *See supra* n. 98 and accompanying text (discussing cases that the court considered, *Whittier* and *Majors*, which are discussed herein).

135 *Woodside Village*, 1993 WL 268293 at *5. The *Woodside Village* court utilized the regulations implementing 12 U.S.C. § 1701r–1 for guidance in determining whether the apartment complex's pet rules were reasonable. *Id*; *see infra* Section B (discussing 12 U.S.C. § 1701r–1).

136 *Woodside Village*, 1993 WL 268293 at **5–6.

137 Pet deposits are specifically allowed under the other federal laws discussed herein. *See infra* nn. 174, 206 and accompanying text (discussing the federal rules allowing companion animals in public housing and housing for the elderly and handicapped receiving federal funding).

138 1990 WL 547183 (H.U.D.A.L.J. No. 09-89-1495-1 July 31,1990). The particular circumstances leading to this consent order were not disclosed; however it was clear that the tenant was physically disabled and used a specially trained service animal. *Id.* at *2. HUD charged that the tenant was discriminated against, in part by the respondents charging a pet deposit, but there were additional allegations of verbal harassment. *Id.*

139 *Id.*

charges against the tenant for any damages to her unit, other than reasonable wear and tear.[140]

Discrimination against someone due to that person's financial status is not prohibited by the FHA.[141] Some cases have held that economic limitations caused by a person's disability do not have to be accommodated under the FHA.[142] It is clear under the FHA that any modification of the premises to be occupied by the disabled person is at that disabled person's expense.[143] Thus, for example, if carpet had to be removed to facilitate a service dog assisting someone in a wheelchair, that change would be at the expense of the tenant. A pet deposit that is applicable to all persons with pets in a building, disabled or non-disabled, is a more difficult question.

The Ninth Circuit, in *U.S. v. California Mobile Home Park Management Co.*,[144] found that the FHA's affirmative duty to reasonably accommodate the needs of handicapped persons may require landlords to assume reasonable financial burdens in accommodating handicapped residents. The court considered whether assessing a guest fee and guest parking fee was acting in a discriminatory manner towards a disabled person, as it was necessary for the disabled person to have a home health care aide visit the home on a regular basis. The FHA was interpreted as having clearly established that "landlords would have to shoulder certain costs involved, so long as they are not unduly burdensome."[145]

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140 *Id.* at *3. Additional damages in the amount of $60,000 were awarded to the tenant in consideration of the tenant vacating the apartment and executing a release. *Id.* A similar charge in another case indicates that HUD's position on the imposition of pet deposits is that they are inappropriate if the animal is a reasonable accommodation. *HUD v. Guenther*, 2003 WL 1311333 at *1 (H.U.D.A.L.J. No. 08-00-0390-8 Mar. 9, 2003). In *Guenther*, the charge alleged that the landlord requested that a tenant pay a pet deposit for his companion animal, and imposed a pet policy on the tenant after the tenant had requested a reasonable accommodation for his handicap. *Id.*

141 42 U.S.C. § 3604.

142 *Salute v. Stratford Greens Garden Apts.*, 136 F.3d 293, 302 (2d Cir. 1998) (finding that apartment owner did not have to lease to disabled persons who were utilizing Section 8 vouchers and concluding that the request was not required under the FHA, because it related to their economic situation, not their disabilities); *Schanz v. Village Apts.*, 998 F. Supp. 784, 790–91 (E.D. Mich. 1998) (holding that a landlord was not required to accept a guarantor agreement for a disabled person, because it related to the person's economic situation, not the prospective tenant's disability); *see generally* Polly W. Blakemore, *Short of Money or Shortchanged? Reasonable Accommodations in Rental Rules and Policies for Disabled Individuals Receiving Financial Assistance*, 39 Brandeis L.J. 449 (2000) (discussing *Salute* and *Schanz* and analyzing the issue of assistance based claims for reasonable accommodations). Note that the Ninth Circuit in the *Giebeler* case, discussed *infra* nn. 152–55, specifically discussed the *Salute* case and rejected its reasoning.

143 42 U.S.C. § 3604(f)(3). It is discriminatory to refuse to permit reasonable modifications; however, in the case of a rental, the landlord can require the premises be restored to its original condition at the end of the tenancy. *Id.*

144 29 F.3d 1413 (9th Cir. 1994).

145 *Id.* at 1415–17. The court did not determine whether the fees in this case were improperly assessed, but reversed and remanded the case to the district court to make

The Ninth Circuit specifically rejected the claim by the landlord that "any fee which is generally applicable to all residents of a housing community cannot be discriminatory,"[146] citing to evidence that facially neutral rules that adversely impact disabled persons were also intended to be covered by the FHA.[147] An example provided by the court was a landlord allowing a blind tenant to have a dog while imposing a high fee for exercising that right.[148] "[F]ees that merit closer scrutiny are those with unequal impact, imposed in return for permission to engage in conduct that . . . a landlord is required to permit."[149]

Factors were set forth, which a reviewing court should examine to determine whether the waiver of the fee would be acceptable, including:

> the amount of fees imposed, the relationship between the amount of fees and the overall housing cost, the proportion of other tenants paying such fees, the importance of the fees to the landlord's overall revenues, and the importance of the fee waiver to the handicapped tenant.[150]

In a later proceeding in *California Mobile Home Park Management Co.*, the Ninth Circuit emphasized the need to show that "the waiver of the fees 'may be necessary' to afford [the resident] an equal opportunity to use and enjoy her dwelling," and found that the resident in this case "failed to show that the assessment of the fees caused the denial of her use and enjoyment of her dwelling."[151]

The Ninth Circuit again considered the issue of financial accommodations for the disabled under the FHA in 2003 in *Giebeler v. M & B Associates, LP.*[152] The court utilized a recent U.S. Supreme Court case interpreting the ADA to guide their analysis of the FHA and found: (1) "an accommodation may indeed result in a preference for disabled individuals over otherwise similarly situated nondisabled individuals;"[153] and (2) "accommodations may adjust for the practical impact of a disability, not only for the immediate manifestations of the physical or mental impairment giving rise to the disability."[154] It was speculated

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such a determination. *Id.* at 1418. The matter came before the Ninth Circuit again on issues regarding the treatment of the tenant as a substituted party and the right to a jury trial. *U.S. v. Cal. Mobile Home Park Mgt. Co.*, 107 F.3d 1374 (9th Cir. 1997). The Ninth Circuit found that the lower court error was harmless as "upon the evidence presented . . . no reasonable jury could have found for Cohen-Strong." *Id.* at 1380 (citation omitted).

146 *Cal. Mobile Home Park Mgt. Co.*, 29 F.3d. at 1417.

147 *Id.*

148 *Id.*

149 *Id.*

150 *Id.* at 1418.

151 *Cal. Mobile Home Park Mgt. Co.*, 107 F.3d at 1380.

152 343 F.3d 1143, 1144 (9th Cir. 2003). In *Giebeler*, a landlord rejected a disabled individual's request for a reasonable accommodation in allowing a family member to co-sign on a lease that he could not qualify for based on his current income. *Id.* at 1145.

153 *Id.* at 1150.

154 *Id.*

that mandating lower rents for disabled individuals would fail the reasonableness inquiry set forth by the Supreme Court.[155]

One argument to be made in the case of service animals is that handicapped tenants are more likely to incur pet fees due to their need to keep service animals in their units. The analysis in the case of a pet fee or pet deposit is of course complicated by the distinction the FHA makes between reasonable accommodations for common areas and those relating to the units themselves.[156] In the absence of case law or a regulation specifically addressing this issue, and given HUD's position charging discrimination when such fees are imposed,[157] landlords should be extremely cautious in requiring these types of fees.[158]

That said, based on the limited case law analyzing reasonable accommodation of service animals, as well as the existence of the specific provision relating to modifications to a unit, it appears clear that a disabled tenant remains responsible for any damage done to the unit by the animal.[159]

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155 *Id.* at 1154.

156 42 U.S.C. § 3604(f)(3)(C)(i).

157 *See supra* nn. 137–40 and accompanying text (discussing cases where pet deposit was raised as an issue).

158 In another case relating to pet fees, utilizing California law that parallels the FHA, the Fair Employment and Housing Commission (the "Commission") found that the Department of Fair Employment and Housing (the "Department") had not established that a waiver of a pet security deposit was necessary for a tenant to have equal use and enjoyment of his housing. *Dept. of Fair Empl. and Hous. v. Giosso*, 2002 WL 471667 at *7 (Cal. F.E.H.C. No. 02–06 Jan. 10, 2002). In *Giosso*, a tenant, McDonald, diagnosed with major recurrent depression moved into a no-pets building with a cat. *Id.* at *2. Three years later, the manager reminded all the tenants about the no-pets policy. *Id.* The complex found out that McDonald and two other tenants had cats. *Id.* at *3. The tenants with the cats were informed they could keep the cats in their units if they paid a pet security deposit of $250. *Id.* The other two tenants paid the deposit, but McDonald communicated to the complex manager "that his cat was not a pet but rather a 'service animal,' and that he was not required to pay a pet security deposit for a 'service animal.'" *Id.* at *4. Eventually, McDonald paid the pet deposit, which was returned to him in full when he moved out of the complex. *Giosso*, 2002 WL 471667 at *5. The Commission found that the Department did not show that the pet security deposit denied McDonald an equal opportunity to use and enjoy his unit. *Id.* at *6. The Commission further found that the $250 pet security deposit was a reasonable sum to secure against any damage that the cat might cause. *Id.* at *7. The Commission found that the Department's citations to federal regulations, clarifying that the pet rules for Pet Ownership in Assisted Rental Housing for the Elderly or Handicapped (POEH) were applicable to service animals and that "a provision in the 'ADA Technical Assistance Manual' . . . regarding deposits for 'service animals' in non-housing public accommodations . . . [was] inapposite to the private housing accommodation in this case." *Id.* at *8 n. 1 (citations omitted). A later Commission decision found that allowing a dog in a condominium with a no-dog policy would be a reasonable accommodation. *Dept. of Fair Empl. and Hous. v. Auburn Woods I Homeowners Assn., Nonprofit Mutual Corp.*, 2002 WL 1313063 at *12 (Cal. F.D.H.C. No. 02-11 May 7, 2002).

159 *See supra* n. 38 and accompanying text (discussing 42 U.S.C. § 3604(f)(3)).

6. Damages Available under the FHA

As stated above, relief for violation of the FHA may include actual and punitive damages, injunctions, and attorney fees at the discretion of the court.[160] An example is the administrative adjudication of *HUD v. Dutra*, relating to a case of a disabled tenant, Evans, who was threatened with eviction if he did not get rid of his cat.[161] Evans had listed on his rental application that he was disabled, and that he owned a cat.[162] There was some evidence that the property manager was unaware that the tenant's cat was more than a pet at the beginning of the lease period, but, eventually, Evans made statements that the cat was necessary for therapeutic purposes.[163] Evans provided a variety of statements from medical professionals supporting his claim that his cat served a therapeutic purpose.[164] After Evans filed a complaint alleging discrimination in housing because of a physical and mental handicap, the landlord dismissed an unlawful detainer action and executed an amendment to Evans's lease permitting him to keep a cat in his unit.[165]

The administrative law judge found that individuals involved in the management of the property and the owner of the apartments had violated the FHA.[166] She awarded economic damages, including attorneys fees, as well as the costs of prescription medication and a hospital visit that were related to the acute anxiety triggered by the threatened eviction.[167] Five thousand dollars was awarded to Evans for damages attributed to emotional distress and physical suffering.[168] The loss of civil rights was also claimed in this case.[169] Since Evans was not deprived of possession of his cat, the administrative law judge awarded only a modest amount for both physical injury and emotional dis-

160 42 U.S.C. §§ 3612–3613 (2000).

161 1996 WL 657690 at **1–3 (H.U.D.A.L.J. 09–93–1753–8 Nov. 12, 1996), *initial consent and order on application for fees*, 1997 WL 259158 (H.U.D.A.L.J. 09–93–1753–8 May 13, 1997). The tenant in this case had fibromyalgia and was dependent on Supplemental Social Security Income Payments. *Id.* at *1. HUD was the Charging Party in this case with Mr. Evans as an Intervenor. *Id.*

162 *Dutra*, 1996 WL 657690 at *2.

163 *Id.* at **2–5.

164 *Id.* at **6–7.

165 *Id.* at *7.

166 *Id.* at **10, 11.

167 *Id.* at *12. The initial consent and order on application for fees allowed for the tenant's (Intervenor) attorneys fees and costs in the amount of $16,392.79 to be added to the order. *Dutra*, 1997 WL 259158 at *7 (H.U.D.A.L.J. 09–93–2753–8 May 13, 1997).

168 *Id.* at *14. The administrative law judge referenced the fact that Evans was never separated from his pet and never forced to move in, finding that the requested emotional damages of $75,000 by Evans was excessive. *Id.* HUD also unsuccessfully requested emotional distress damages in the amount of $25,000. *Id.*

169 *Id.* at *15. This is a separate injury under the FHA. 42 U.S.C. § 3612(g).

tress.[170] Finally, a civil penalty of $5,000 was assessed against the respondents.[171]

Although the damages awarded in *Dutra* were modest, the case illustrates the various remedies available to a prevailing party.[172] *Dutra* acts as a warning for housing providers who adopt a standard no-pets clause without clarifying that such clause provides an exemption for service animals. Furthermore, it emphasizes the need to train personnel like the resident managers in *Dutra*, who continued to attempt to enforce the no-pets clause even after they were notified that Evans's cat might serve a therapeutic purpose, on the requirements of the FHA and the rights that disabled tenants may have to keep a service animal in their unit.[173]

B. Elderly and Handicapped Housing

As part of the Housing and Urban-Rural Recovery Act of 1983, Congress passed a rule titled Pet Ownership in Assisted Rental Housing for the Elderly or Handicapped (POEH).[174] POEH provides that owners and managers of federally assisted rental housing for the elderly or handicapped cannot prohibit or prevent a tenant from owning common household pets.[175] The legislative history of POEH indicates that the provision was passed in response to the fact that, "[a]lthough . . . HUD . . . [had not] issued regulations governing the keeping of pets, an absolute 'no-pet' policy [had been] widely practiced in Federally-assisted rental projects."[176] The Senate Report by the

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[170] *Dutra*, 1996 WL 657690 at *15.

[171] *Id.* at **15–17. Injunctive relief was also granted to enjoin the respondents from discriminating or retaliating against Evans. *Id.* at *17.

[172] *Id.* at *17; *see also supra* nn. 138–40 and accompanying text (discussing another administrative hearing that awarded damages).

[173] *Dutra*, 1996 WL 657690 at **2, 4.

[174] 12 U.S.C. § 1701r–1 (2000). There has been a significant amount of research specifically focused on the benefits of allowing the elderly to have access to companion animals. *See e.g.* H. Marie Suthers-McCabe, *Take One Pet and Call Me in the Morning*, 25 Generations 93 (2001) (discussing studies that show a positive influence of pets on the health of the elderly).

[175] 12 U.S.C. § 1701r–1(a). The definition of common household pet is: "[a] domesticated animal, such as a dog, cat, bird, rodent (including a rabbit), fish or turtle, that is traditionally kept in the home for pleasure rather than for commercial purposes. Common household pet does not include reptiles (except turtles)." 24 C.F.R. Subtitle A § 5.306(1) (2004). If there is a conflict with state or local law defining the pets that may be owned or kept in dwelling accommodations, the state or local law would apply. *Id.* An example would be the ban on ferrets in a California and Hawaii. Steve Chawkins, *Pet Cause for Ferret Fans; Enthusiasts Hope the Governor Will Revoke a State Ban*, L.A. Times B1 (Dec. 27, 2003) (available at 2003 WL 68907335) (discussing the effort by advocates in California to legalize the ownership of ferrets in that state).

[176] Sen. Rpt. 98–142 at 41 (May 23, 1983) (reprinted in 1983 U.S.C.C.A.N. 1770, 1812). The Committee on Banking, Housing and Urban Affairs believed that such a blanket policy was inappropriate for projects designed for the elderly and handicapped. *Id.* at 40, 41.

Committee on Banking, Housing and Urban Affairs stated the following:

> Evidence from numerous studies show that pets provide substantial physical and mental benefits to older persons, particularly those who live independently. It is the Committee's view that these benefits warrant Congressional action to prevent arbitrary rule-making in Federally-assisted projects.[177]

POEH allows for the removal of pets if such pets constitute a nuisance, and provides that HUD should establish regulations to create guidelines for owners and managers to prescribe reasonable rules regarding pets.[178] HUD established an extensive set of regulations to implement POEH.[179] The regulations distinguish between "Housing programs"[180] and "Public Housing;"[181] the description herein will focus on the regulations for Housing programs.

The HUD regulations clarify that animals assisting persons with disabilities are excluded from the requirements set forth therein, and state that project owners and public housing agencies "may not apply or enforce any pet rules developed under this subpart against individuals with animals that are used to assist persons with disabilities."[182] The regulations provide that tenants are to be given notice of the rights they have under the law, and are to be given access to any pet rules developed in accordance with the regulations.[183] The pet rules themselves are divided into discretionary and mandatory rules.[184]

The mandatory rules include the following requirements. First, pet owners must have their pets inoculated in accordance with state and local laws.[185] Second, sanitary standards must be set governing the disposal of pet waste, including specific limitations on the number of times a week that a pet owner is required to change the litter in a litter box.[186] Third, pets are required to be "restrained and under the control of a responsible individual while on the common areas."[187] Fourth, the pet owners must register their pets and update their registration at least annually.[188] This registration must include contact in-

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177 *Id.* at 41.

178 12 U.S.C. § 1701r–1(b), (c).

179 24 C.F.R. §§ 5.300 et seq. (2003).

180 *Id.* at § 5.306. Housing program is defined as "housing programs administered by the Assistant Secretary for Housing-Federal Housing Commissioner" and other programs "that assist rental projects that meet the definition of project for the elderly or persons [further defined] in subpart C." *Id.*

181 *Id.* Public Housing includes "[a]ny project assisted under title I of the United States Housing Act," excluding certain other projects. *Id.*

182 24 C.F.R. at § 5.303.

183 *Id.* at § 5.312.

184 *Id.* at §§ 5.318, 5.350.

185 *Id.* at § 5.350(a). Discretionary standards allow pet rules to require pet owners to license their pets in accordance with State and local law. *Id.* at § 5.318(f).

186 *Id.* at § 5.350(b).

187 24 C.F.R. at § 5.350(c).

188 *Id.* at § 5.350(d).

formation for "one or more responsible parties who will care for the pet if the pet owner dies, is incapacitated, or is otherwise unable to care for the pet."[189]

The discretionary pet rules provide for some flexibility to reflect the needs of each housing project. These rules allow reasonable limitations on the number of pets in each unit and specifically state that "project owners may limit the number of four-legged, warm-blooded pets to one pet in each dwelling unit."[190] Reasonable restrictions on the size, weight, and type of animals in each project may be mandated under the discretionary pet rules.[191] Pet deposits are allowed; however, they are limited to the equivalent of one month's rent or to an amount set by HUD periodically, depending on the type of housing.[192]

The discretionary pet rules also set out standards of pet care.[193] The pet rules cannot require that a pet's vocal cords be removed, but may require that dogs and cats are spayed or neutered.[194] It is also possible to bar pets from specified common areas, unless such exclusions deny a pet "reasonable ingress and egress to the project or building."[195] Pet owners may be required to control noise and odor caused by a pet.[196] Finally, pet rules may "limit the length of time a pet may be left unattended in a dwelling."[197]

If a tenant violates a pet rule, a procedure set out in the regulations establishes minimum notice and meeting requirements before steps can be taken to remove a pet or terminate a pet owner's tenancy.[198]

The regulations also provide for the removal of the pets covered by this law under specified circumstances.[199] Essentially, the project owner can contact the responsible party (named in the registration) if the health or safety of a pet is threatened by the death or incapacity of the pet owner.[200] If the named responsible party is unwilling or unable to care for the pet or cannot be contacted, the project owner can contact the appropriate state or local authority to request removal of the pet.[201] If the lease agreement contains language providing for such re-

189 *Id.* at § 5.350(d)(iii).

190 *Id.* at § 5.318(b)(1)(ii).

191 *Id.* at § 5.318(c). At least one housing authority outside of the state of California has banned ferrets. Michael Booth, *No Ferret: Denver Widow Cries Foul at Public Housing Rule Banning Pet*, Denver Post B01 (July 19, 2002) (available at 2002 WL 6571822) (discussing a dispute between a tenant with a ferret and the Denver Housing Authority). It was unclear in this newspaper story whether the housing at issue was housing for the elderly or handicapped, or public housing generally. *Id.*

192 24 C.F.R. § 5.318(d).

193 *Id.* at § 5.318(e).

194 *Id.*

195 *Id.* at § 5.318(e)(1).

196 *Id.* at § 5.318(e)(2).

197 *Id.* at § 5.318(e)(3).

198 24 C.F.R. at § 5.356.

199 *Id.* at § 5.363.

200 *Id.* at § 5.363(a).

201 *Id.* at § 5.363(b).

moval, the project owner can enter the unit, remove the pet, and place it in a facility that will provide for care and shelter for a period of time not exceeding thirty days, with the pet owner bearing the cost of the facility.[202]

As with state laws prohibiting discrimination against the handicapped, some states have passed laws providing similar provisions relating to pets in state-supported public housing for the elderly.[203] Although there were concerns about allowing pets in housing, the problems that HUD expected apparently have not arisen, and individual housing providers have reported that the senior tenants take excellent care of their pets.[204] The trend to allow pets in housing supported by the federal government is illustrated further by the enactment of the Pet Ownership in Public Housing Act discussed below.[205]

C. *Public Housing*

The most recently passed federal law affecting companion animals in housing is the Pet Ownership in Public Housing (POPH) law.[206] POPH became effective and applicable on October 1, 1999, and the rules implementing POPH were effective on August 9, 2000.[207] The terms of POPH are similar to those of POEH; however, the statute specifically states that the term "public housing" does not include federally assisted rental housing for the elderly or handicapped (the housing subject to POEH).[208] Under POPH, residents of public housing may own one or more common household pets subject to the "reasonable requirements of the public housing agency."[209] The legislative history discussing POPH references POEH and states, "[it] has been

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202 *Id.* at § 5.363(c), (d).

203 Cal. Health & Safety Code Ann. § 19901 (West 2002) (provision relating to pets in public housing for elderly or persons requiring supportive services, stating "no public agency which owns and operates rental housing accommodations, shall prohibit the keeping of not more than two pets by an elderly person or person requiring supportive services in the rental housing accommodations."); N. J. Stat. Ann. § 2A:42–103 to 111 (2000) (providing that persons in senior citizen housing projects in New Jersey are permitted to own a domestic animal while residing in those projects).

204 John Freeman, *CHA Pet Policy*, Chi. Trib. 20 (Mar. 26, 1998) (available at 1998 WL 2839016) (Author, President of the American Veterinary Medical Association, states that "the Department of Housing and Urban Development recently admitted that problems they foresaw never materialized."); Diane C. Lade, *Sticking Together; Under a Little-Known HUD Rule, Tenants' Pets Are Welcome in Federal Housing*, S. Fla. Sun-Sentinel (Ft. Lauderdale, Fla) 1B (Feb. 6, 2002) (available at 2002 WL 2945367) (reporting on the application of POEH in selected Florida housing complexes).

205 *Infra* pt. II(C).

206 42 U.S.C. § 1437z–3 (2000).

207 *Id.* The effective date for the final rules implementing POPH was August 9, 2000. *Pet Ownership in Public Housing*, 65 Fed. Reg. 42518 (July 10, 2000).

208 42 U.S.C. § 1437z–3(c); *see supra* pt. II(B) (discussing the terms of POEH).

209 42 U.S.C. § 1437z–3(a) (stating that the resident must maintain "each pet responsibly and in accordance with applicable State and local public health, animal control, and animal anti-cruelty laws and regulations and with the policies established in the public housing agency plan for the agency").

demonstrated, particularly with respect to the elderly, that pet ownership can add to the quality of life of individuals, families, and communities."[210]

The adoption of POPH and the regulations implementing it were controversial.[211] There were reports that urban public housing managers across the country were concerned about the responsibilities of pet ownership and feared that there would be problems with noise, waste, and injuries due to biting.[212] Some residents of public housing were also wary of the idea.[213] In addition, some local humane societies raised concerns over the ability of persons with limited financial means to care for animals and the possibility that the number of abandoned animals could increase.[214]

The rules implementing POPH received more comments than any other Public Housing Reform Act regulation.[215] While HUD altered a few of the provisions based on the comments (for example, by providing for any state and local laws relating to pet deposits to apply), it re-

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210 *The Public Housing Reform and Responsibility Act of 1997*, Sen. Rpt. 105–21 at *32 (May 23, 1997) (available at 1997 WL 282462).

211 Gina Holland, *Pets OK'd for Public Housing*, Houston Chron. 22 (July 1, 2001) (available at 2001 WL 23611576) (discussing new rules and problems in the implementation in the policy); Lisa J. Huriash & Enma Leyva, *Broward's Public Housing Opens Its Doors to Cats, Dogs*, S. Fla. Sun-Sentinel (Ft. Lauderdale, Fla.) 1 (July 29, 2001) (available at 2001 WL 22747162) (discussing new rules for the Broward County Housing Authority and concerns of the housing officials in the area); Cindy Skrzycki, *The Regulators: HUD's Pro-pet Rule Ruffles Some Feathers*, Wash. Post E01 (July 25, 2000) (available at 2000 WL 19620898) (discussing policy and comments to rulemaking); Tasha Thomas, *Dogs (and Cats) to Have Their Day in Public Housing Starting Aug. 1*, Columbus Dispatch (Ohio) 04E (July 18, 2001) (available at 2001 WL 23571727) (discussing the change in policy for the Columbus Metropolitan Housing Authority and concerns of the housing authority and local humane society representatives); *see infra* Section IV pt. E (discussing the problem of dog bites).

212 *Don't Send CHA to the Dogs*, Chi. Trib. 24 (Mar. 12, 1998) (available at 1998 WL 2834097) (warning in an editorial about the potential problems if public housing residents are allowed to keep dogs and cats); *Morningline*, Chi. Sun-Times 32 (Feb. 26, 1998) (available at 1998 WL 5568644) (a telephone poll reported that eighty-one percent of the people who called in answered "no" to the question of "[s]hould public housing residents be allowed to have pets in their apartments?").

213 Leon Pitt, *CHA Tenants Wary of Pet OK: Congress Considers Lifting Ban*, Chi. Sun-Times 9 (Feb. 25, 1998) (available at 1998 WL 5568532) (quoting concerned residents and tenant leaders in Chicago Public Housing).

214 Holland, *supra* n. 211, at 2 (quoting a worker at a Birmingham, Alabama, shelter); Tasha Thomas, *Dogs (and Cats) to Have Their Day in Public Housing Starting Aug. 1*, Columbus Dispatch (Ohio) 04E (July 18, 2001) (available at 2001 WL 23571727) (quoting Jim Cunningham, executive director of the Capital Area Humane Society as saying "[we] don't believe most would be bad pet owners as far as taking care of their emotional needs, but there is a financial responsibility").

215 Cindy Skrzycki, *The Regulators: HUD's Pro-Pet Rule Ruffles Some Feathers*, Wash. Post E01 (July 25, 2000) (available at 2000 WL 19620898) (discussing policy and comments to rulemaking). HUD reported that it received 3,777 comments prior to the end of the comment period for the rules with approximately three thousand additional comments being received after the end of the comment period. *Pet Ownership in Public Housing*, 65 Fed. Reg. 42518, 42519 (July 10, 2000).

sisted setting forth specific rules on many issues, preferring to allow Public Housing Authorities (PHAs) to set their own rules.[216]

Similar to the discretionary rules implementing POEH, the reasonable requirements set by the PHAs may include:

> (1) requiring payment of a nominal fee, a pet deposit or both . . . (2) limitations on the number of animals in a unit, based on unit size; (3) prohibitions on (A) types of animals that are classified as dangerous; and (B) individual animals, based on certain factors, including the size and weight of the animal; and (4) restrictions or prohibitions based on size and type of building or project . . . .[217]

The regulations supporting POPH are much less extensive than the regulations for POEH.[218] In addition to the requirements stated in the statute described above, the public housing authority can require that the pet be registered, or that they be spayed or neutered, but may not require pet owners to have any pet's vocal chords removed.[219]

Some public housing authorities have interpreted POPH in a manner that allows them to prohibit dogs and cats in high-rise or multifamily buildings.[220] In addition, the implementation of the new pet rules by housing authorities in some areas has been slow and not widely publicized, which effectively limits the ability of a tenant to keep a pet in that housing.[221] Finally, there were reports that public housing residents did not rush to obtain animals; these were attributed in part to the cost, including the nonrefundable pet fees and deposits that are allowed by POPH.[222] Notwithstanding the concern over

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216 *Pet Ownership in Public Housing*, 65 Fed. Reg. 42518, 42521 (July 10, 2000) (to be codified at 24 C.F.R. Pt. 960).

217 42 U.S.C. § 1437z-3(b); *see e.g.* N.Y. City Hous. Auth., *Notice: New York City Housing Authority Pet Policy*, (N.Y. City Hous. Auth. Nov. 17, 2003) (available at http://nyc.gov/html/nycha/pdf/pet_policy_engl.pdf) (providing for a limit of one dog or cat and limiting the weight of the dog to forty pounds, with a grandfather provision allowing exceptions for pets owned before May 1, 2002); E-Mail from James M. Owenby, Commun., Seattle Hous. Auth., to Rebecca J. Huss, Prof. of L., Val. U. Sch. of L., *Hous. Auth. of the City of Seattle Pet Policy Lease Rider* (Feb. 9, 2004, 10:35 a.m. EDT) (copy on file with Author) (prohibiting pitbulls or pitbull mixes and limiting dogs or cats to fifteen inches in height at the shoulder or thirty-five pounds in weight).

218 24 C.F.R. §§ 960.701 et. seq. (2004).

219 *Id.* at § 960.707(b)–(c).

220 Chicago Housing Authority, *Chicago Housing Authority: Pet Policy* §§ 1.02(1), 1.02(1)(b), http://www.thecha.org/transformplan/files/pet_policy_and_procedures_0504.pdf (Oct. 21, 2003) (prohibiting dogs and cats in high rise and mid rise buildings); Catherine Gilfether, *Tight Leash on Pets in Public Housing: Multifamily Unites in Lorain Would Ban Dogs, Cats, But Not Fish*, Plain Dealer (Cleveland, Ohio) 3B (Mar. 29, 2001) (available at 2001 WL 20543712) (discussing policy of the Lorain Metropolitan Housing Authority which allows small dogs and cats at "scattered site" units but not at multifamily sites). There have been no published cases to date interpreting POPH.

221 Lori Weisberg, *Oh, by the Way, HUD Tenants Can Have Pets*, San Diego Union-Trib. I1 (Mar. 17, 2002) (available at 2002 WL 4591009) (discussing the San Diego Housing Commission's rewriting of its pet policy almost two years after the HUD rules were announced).

222 24 C.F.R. § 960.707(b)(1); Michelle Crouch, *Price of Having Pets Drops in Public Housing: Refundable Deposit Falls to $600 but It Still Tops Charges in the Private Sec-*

problems attributable to allowing pets and implementing a pet policy, if the experience of administrators with housing for the elderly and handicapped is any indication, when a pet policy is being followed, significant problems should not arise due to the presence of the animals pursuant to the new rule.[223]

That said, there are important issues that will need to be dealt with as more animals are allowed in public housing, especially in urban areas. Specifically, ongoing concerns with maintenance and bites will continue to be issues that housing authorities and residents will need to deal with in order for pets in public housing to be workable in the long run.[224]

An important alternative to traditional public housing projects is the use of Section 8 vouchers and other programs relying upon private housing.[225] Section 8 allows persons eligible for public housing to rent from private owners, with the private housing provider given a subsidy directly from the government for each Section 8 tenant.[226] Because private housing that is being subsidized by Section 8 is not considered

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tor, Charlotte Observer 6B (Mar. 26, 2003) (available at 2003 WL 15317221) (reporting on the cut of the refundable pet deposit in public housing units from $1,500 to $600, which is still considerably higher than pet deposits charged by most private housing providers); Lisa J. Huriash & Enma Leyva, *Broward's Public Housing Opens Its Doors to Cats, Dogs*, Sun-Sentinel 1 (July 29, 2001) (available at 2001 WL 22747162) (citing to housing authorities in Broward County who reported that they did not have problems because no residents have gotten cats or dogs). Some housing authorities do not track the number of residents that have pets so it is difficult to determine the impact of POPH. E-Mail from James M. Owenby, *supra* n. 217 (stating that the Seattle Housing Authority does not have a good way to track the number of residents that have pets).

223 Gilfether, *supra* n. 220, at 3B (citing to one housing authority where no problems had been reported for the first four months of the policy and to a problem with a pit bull in another housing authority, where such breed would be banned under the terms of the proposed pet policy).

224 Telephone Interview with Howard Marder, Pub. Info. Officer, N.Y.C. Hous. Auth. [hereinafter NYCHA] (Feb. 4, 2004) (Mr. Marder stated that there are ongoing concerns about maintenance issues and problems with animals biting in housing provided by his organization. NYCHA is the largest housing authority in North America with 2,702 buildings and approximately 416,000 residents. Prior to POPH, the official policy of NYCHA was that no pets were allowed, with the exception of service animals and animals in housing for the elderly and handicapped. Under the current NYCHA pet policy, pets are required to be registered with NYCHA. As of the end of 2003 there were only 1,384 dogs registered. However, Mr. Marder stated that he believed there were "quite a bit" more animals in the units. NYCHA had a designated "dog hotline" for complaints about dogs (the dog hotline has since been combined with New York City's general information line). In approximately five years there have been 6,009 complaints to the dog hotline.).

225 42 U.S.C. § 1437(f) (2000).

226 *Id.*; *see generally* Paula Beck, *Fighting Section 8 Discrimination: The Fair Housing Act's New Frontier*, 31 Harv. Civ. Rights-Civ. Libs. L. Rev 155, 156–58 (1996) (describing the Section 8 program generally); Dan Nnamdi Mbulu, *Affordable Housing: How Effective Are Existing Federal Laws in Addressing the Housing Needs of Lower Income Families*, 8 Am. U. J. Gender Soc. Policy & L. 387, 397–99 (2000) (discussing Section 8 and the growth of the program and noting that there are other variations of this program, including one in which HUD provides Section 8 subsidies to landlords to rehabilitate multi-family units.).

"public housing," a tenant in public housing may be able to keep a companion animal, whereas a tenant in private housing using a Section 8 voucher will not be able to keep a companion animal, if the private owner bans pets from its buildings.[227] In fact, one report states "[private] owners of low-income housing dislike the idea [of pets] so much that they got themselves exempted from the legislation."[228] There are certainly good reasons why these housing complexes were excluded from the application of POPH. As there is no requirement to accept Section 8 vouchers, a rule requiring these private landlords to accept pets would serve as a deterrent to the participation of landlords in the program, therefore reducing the options available to low income tenants. Thus, persons who rely on public housing, and who want to have or keep a pet, will be required to make a difficult choice: stay in the housing that is required to allow pets, or move to perhaps a better geographic area and building and lose the right to have pets.[229]

D. Application of Federal Laws

Given the relatively recent effective dates of the federal laws discussed above, it is not surprising that there are few cases analyzing this statutory language.[230] It does appear clear, from passage of these laws, that legislators have begun to accept the evidence of the importance of companion animals to a significant number of people. In interpreting these laws, judges need to be sensitive to the growing body of literature that supports the health benefits of living with companion animals. It is clear that the interests of housing providers and tenants without companion animals in their lives, whose health, safety and comfort are affected by the companion animals of other tenants, must be considered as well.[231] Case law has established that a cost-benefit analysis is appropriate when considering whether an accommodation is reasonable under the FHA.[232] Congress has made this type of cost-

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227 Note, however, that the private owners are subject to the terms of the FHA; thus, disabled persons who need service animals would be entitled to a reasonable accommodation that may mean an exception to a no-pets policy. *See supra* nn. 52–128, 161-73 and accompanying text (cases discussing waivers of no-pets rules).

228 Skrzycki, *supra* n. 215, at E01 (discussing policy and comments to rulemaking).

229 Of course, some private landlords also allow pets, but given the number of cases generated for breach of no-pet clauses (see *infra* n. 248 and accompanying text), it is clear that there is not a surplus of rental housing where pets are allowed.

230 Search of Westlaw, ALLFEDS database (Nov. 5, 2004) (searching for the terms "42 U.S.C. 1437" (POPH) and "12 U.S.C. 1701" (POEH) with a date after 2000 and finding 3 results (*Rivera v. Phipps Houses Services, Inc.*, 2001 WL 740779 (S.D.N.Y. 2001); *Langlois v. Abington Hous. Auth.*, 234 F. Supp. 2d 33 (D. Mass., 2002); *University, Ltd., v. U.S. Dept. of Hous. and Urban Dev.*, 2003 WL 1145438 (E.D. Wis. 2003)).

231 *See supra* nn. 118–36 and accompanying text (cases considering the effects of service animals on landlords and other tenants).

232 *Bronk*, 54 F.3d at 429 (citing *U.S. v. Village of Palatine*, 37 F.3d 1230, 1234 (7th Cir. 1994) and *Vande Zande v. State of Wis. Dept. of Administration*, 44 F.3d 538 (7th Cir. 1995)).

benefit analysis for tenants and landlords of public housing.[233] The regulations that HUD has established to administer POEH and POPH provide adequate assurances that tenants without companion animals, as well as property owners, are not unduly inconvenienced by pets in the buildings. As the Secretary of HUD in 2001 stated, "[The] benefits that can come to children and the elderly are far larger than the management problems."[234]

In analyzing the FHA, the issue of what type of training an animal must have in order to be considered a service animal will continue to be problematic, especially when the disabled person at issue is suffering from emotional or psychological disabilities. Although the physically disabled continue to be faced with ignorance about the use of service animals, there is clearly a wider acceptance of the use of service animals that are familiar.[235] As more studies show a therapeutic link between psychological disabilities and the presence of companion animals, the use of animals for this purpose should become more acceptable.[236] Unfortunately, as seen by the relatively long period of time for the acceptance of service animals for the physically disabled and the continuing evidence of problems in this area, it appears likely that those with psychological disabilities will be forced to establish the standard of their treatment on a case-by-case basis.

III. ISSUES IN RENTAL HOUSING AND CONDOMINIUMS

A. Rental Housing

Absent a specific statutory restriction, a landlord may have a no-pets policy in leased premises. An increasing number of organizations provide information to tenants on non-legal avenues to bypass these types of restrictions.[237] In addition, information is available to landlords that encourages renting to persons who have pets.[238]

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[233] *See supra* nn. 209–19 and accompanying text (discussing the costs and benefits accounted for in POPH).

[234] Holland, *supra* n. 211, at 22 (quoting to the Secretary of HUD Mel Martinez discussing the implementation of POPH).

[235] Delta Socy., *Basic Information about Service Dogs*, http://www.deltasociety.org/nsdc/sdbasic.htm#difference (accessed Mar. 12, 2005).

[236] *See supra* nn. 4–9 and accompanying text (discussing impact of companion animals on human health).

[237] *See e.g.* Animal Leg. Def. Fund, *Resources*, "Legal Information," http://www.aldf.org/packets.asp?sect=resources (accessed Mar. 12, 2005) (providing some common-sense rules for dealing with issues of companion animals and rental housing, in addition to links to many other animal law issues); Delta Socy., *Companion Animals in the Community*, "Pets in Housing," http://www.deltasociety.org/dsz000.htm (accessed Mar. 12, 2005) (providing information on many aspects of companion animal ownership and the human-animal bond).

[238] *See e.g.* Doresa Banning, *Northtown Summit: Among Many Amenities Are Corporate Apartments, Acceptance of Large Dogs*, Reno Gazette 42 (Oct. 4, 2003) (available at 2003 WL 64979982) (discussing upscale apartment community that allows large dogs and has two dog parks); Peter Demarco, *Landlords: Despite Case, It's Easier to Rent with Pet*, 5/18/03 Boston Globe 14 (May 18, 2003) (available at 2003 WL 3397244) (re-

Restrictions on keeping pets in rental housing have a significant impact on tenants, who are forced to choose between their home and their pet, leading some to relinquish their animals to shelters.[239] One study found that thirty-five percent of people without a pet would keep a pet if their rental housing allowed animals.[240] Landlords may place significant restrictions on pets including allowing only cats, birds or fish or limiting the size and breed of the animals.[241]

The average pet deposit is around $225, but flat fees range from $20 to $700.[242] Some landlords also require a monthly surcharge for pets.[243] Landlords also often impose regulations relating to animals

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porting on an increase in pet friendly apartment listings attributed to a sluggish rental market); Andrew Guy, Jr., *Pet Peeves: It's Hard but Not Impossible to Find Apartments That Will Accept Your Dog or Cat*, Houston Chron. 1 (Oct. 6, 2003) (available at 2003 WL 57447799) (discussing restrictive pet policies, specifically the difficulty in finding housing that allows dogs); Elaine Lee, *Dog People Only Need Apply*, Bark 24 (Fall 2001) (discussing pet screening formula and reasons to rent to pet owners as well as references for landlords); C. Kalimah Redd, *Tossing Dog Owners a Treat in Competitive Market, More Housing Complexes Welcoming Pets Landlords Toss Pet Owners a Treat*, Boston Globe 1 (Jan. 1, 2004) (available at 2004 WL 59765032) (discussing a rental complex that caters to pet owners); Mim Swartz, *Pets Allowed: Dumb Friends League Helps Owners Find Accommodating Landlords*, Rocky Mt. News (Denver, Colo.) 4F (Aug. 25, 2001) (available at 2001 WL 7380943) (reporting on the difficulty of finding rental housing that allows animals and a program that educates landlords); Michelle Cobey, *Pets in Housing Resources*, http://www.deltasociety.org/dsz100.htm (accessed Oct. 15, 2004) (reporting on the San Francisco SPCA Open Door Program that has increased the number of rental units in the area that allow animals).

239 Phillip H. Kass et al., *Understanding Animal Companion Surplus in the United States: Relinquishment of Nonadoptables to Animal Shelters for Euthanasia*, 4 J. Applied Animal Welfare Sci. 237, 238 (2001) (stating that "[some] view the problem of euthanasia performed at animal shelters not as a problem of an overabundance of unwanted animals but, instead, as an underavailability of homes (i.e. when residential regulations or leases prohibit pet ownership)"); John C. New, Jr. et al., *Moving: Characteristics of Dogs and Cats and Those Relinquishing Them to 12 U.S. Animal Shelters*, 2 J. Applied Animal Welfare Sci. 83, 84 (1999) (citing a study that reported that "moving was the most often cited of seventy-one reasons for relinquishing dogs and the third most common reason for relinquishing cats"); Rental Housing On Line, *No Pets Allowed in Most Rental Housing*, http://rhol.org/rental/pets.htm (accessed Mar. 12, 2005) (estimating that twenty-five percent of the animals surrendered to shelters are relinquished because their owners cannot find affordable rental housing that allows their pets); Robyn Watts, *The Legal Ins and Outs of Pet Ownership and Housing*, http://www.deltasociety.org/dsz101.htm (accessed Mar. 12, 2005) (citing to study that indicated that nine percent of animals are relinquished to shelters due to problems with a landlord, and that the fact that most animals relinquished to shelters are euthanized adds to the stress that a tenant feels when making a decision about their housing options).

240 Hart & Kidd, *supra* n. 13, at 24; *see also* Cobey, *supra* n. 238 at "Humane Society of the U.S." (discussing a study by the National Council on Pet Population and Policy).

241 Hart & Kidd, *supra* note 13, at 27.

242 Rental Housing On Line, *supra* n. 239 (reporting that the most often quoted fee is $100, although the average fee is $225).

243 *Id.* (stating that monthly surcharges range from six to twenty-five dollars with the monthly surcharge of fifteen dollars most often quoted).

allowed in units, and the violation of those rules can lead to eviction.[244]

Although it is difficult to determine the percentage of rental units that allow pets, estimates range from five to fifty percent of units allowing animals of some sort.[245] It is also difficult to estimate the number of renters that are keeping pets in their units.[246] One marketing survey indicated that approximately fifty percent of units have some type of companion animal (including so-called "pocket pets" and fish).[247]

If a lease contains a no-pets provision, harboring a companion animal in the building will be a violation of the lease, and the tenant, subject to proper processes, may be evicted. The violation of no-pets policies is "one of the most frequently violated provisions of residential leases by tenants."[248]

One legal defense to a no-pets clause is that a landlord has "waived" the no-pets policy by allowing the open and notorious housing of animals in the property over a period of time. Some jurisdictions have codified this equitable waiver argument.[249] New York City's (NYC) "Pet Law" is a well-known example of the statutory protections available to renters in some municipalities.[250]

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244 *See e.g. W. Ridge Green Co. v. Ortiz*, 1994 WL 432162 at *5 (Ohio App. 9th Dist. 1994) (providing that a manufactured home tenant's lease properly terminated for breach of manufactured home park's pet regulations). In *Ortiz*, the tenant had a Shih-Tzu dog that she allowed to run unattended and that she tied outside her mobile home in violation of the park's rules. *Id.* at *1. Ohio law requires that rules promulgated to govern manufactured home lots cannot be "unreasonable, arbitrary or capricious." *Id.* at *3 (citing Ohio Rev. Code Ann. § 3733.11(c) (West 2004)). The *Ortiz* court found that was credible evidence that the rules were not unreasonable, arbitrary, or capricious and that the defendant had materially breached those rules willfully and in bad faith. *Id.* at **4–5.

245 Hart & Kidd, *supra* n. 13, at 25–26 (estimating a number of fifty percent); Rental Housing On Line, *supra* n. 239 at ¶ 2 (estimating that only five percent of rental housing allows pets, and citing to a Humane Society of the United States report that 49.4% of U.S. renters have pets).

246 David Carrigg, *Rental Properties Going to Dogs*, available at http://www.vancourier.com/issues01/07401/news/074101nn6.html (accessed Mar. 12, 2005) (discussing tenants who hide pets to avoid confrontations with landlords).

247 Hart & Kidd, *supra* n. 13, at 25 (citing to survey that 49.8% of all rental units have companion animals); *see also* AVMA, *supra* n. 3, at 48 (reporting that the percentage of pet-owning households that rent decreased from 49.8% in 1991 to 46.7% in 2001). In comparison, the percentage of pet-owning households that own their home (which may be a condominium or other common interest development) was 60.7% in 1991 and 58.7% in 2001. *Id.* at 48. Only 34.7% of apartment dwellers owned pets. *Id.*

248 George M. Heymann, *Animals in the Apartment: A Landlord's Pet Peeve*, N.Y. Law J. at 1 (Sept. 29, 1999).

249 *See e.g.* N.Y.C. Admin. Code § 27-2009.1(b) (2003) (New York City's provision providing for waiver of no-pets clause for tenants harboring pets "openly and notoriously for . . . three months or more . . . ."); *see also* Watts, *supra* n. 239 (noting that "if the lease does include a no-pets clause, there may be local laws that can supercede . . . .")

250 N.Y.C. Admin. Code § 27-2009.1 (West 2003). The application of the NYC Pet Law to condominiums is dependent on where the condominium is located. Heymann, *supra* n. 248, at 1. There is a split of opinion in Appellate Department decisions on this mat-

The NYC Pet Law's legislative declaration states that the enforcement of no-pet provisions led to widespread abuses by building owners and agents who seek to evict tenants for reasons unrelated to the pet.[251] The declaration recognizes that household pets are "kept for reasons of safety and companionship."[252] The NYC Pet Law provides that if a tenant harbors a pet (1) open and notoriously, (2) the owner or his or her agent has knowledge of that fact, and (3) the owner or agent does not commence proceeding to enforce the lease provision within three months, then (4) the lease provision shall be deemed waived.[253] Although statutory provisions like the NYC Pet Law are useful, disputes over the application of the law still arise.[254]

Another issue raised in connection with no-pets provisions is the inclusion of such a clause in renewal leases. The ability to alter lease provisions will be governed by state law and may be restricted to only reasonable changes. A case frequently cited in this area is the New Jersey case of *Young v. Savinon*.[255] In *Young*, a purchaser of an apartment building attempted to impose a no-pets provision in renewal leases.[256] The New Jersey Anti-Eviction Act limits the permissible causes for eviction and requires that lease provisions and any changes be reasonable.[257] The *Young* court considered whether a prohibition on

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ter. *Id.* Tenants in cooperatively owned apartments are protected by the Pet Law. *Id.* *See infra* n. 267 (distinguishing between condominiums and cooperatives).

251 N.Y.C. Admin. Code § 27-2009.1(a) (West 2003). The Westchester County Code provision sets out some of those reasons, such as facilitating a condominium conversion, garnering a larger monthly rental with a new tenant, and discouraging tenants from enforcing their rights. Westchester County Code § 695.01 (2000); Delta Socy., *The Legal Ins and Outs of Pet Ownership and Housing*, http://www.deltasociety.org/dsz101.htm (accessed Nov. 4, 2004).

252 N.Y.C. Admin. Code § 27-2009.1(a).

253 *Id.* at § 27-2009.1(b). The waiver provision of the statute specifically does not apply if the harboring of the "pet causes damage to the subject premises, creates a nuisance or interferes substantially with the health, safety or welfare of other tenants or occupants of the same or adjacent building or structure." *Id.* at § 27-2009.1(d).

254 Heymann, *supra* n. 248, at 1 (analyzing cases relating to the Pet Law including what type of knowledge the owner or agent must have in order for the waiver provision to apply). Another example of the type of dispute that may arise is the application of the law to a replacement pet. *Park Holding Co. v. Emicke*, 646 N.Y.S.2d 434, 435 (N.Y. App. Term 1st Dept. 1996) (holding that a prior waiver will not prevent a landlord from objecting to the presence of a replacement pet); *see also Defeo v. Carmody*, 689 N.Y.S.2d 862, 864 (N.Y.C. Ct., Mt. Vernon 1999) (interpreting the Westchester County Code provision, which is virtually identical to the NYC Pet Law, that a landlord did not waive his right to object to a new dog, although in this case the landlord failed to timely object to a new animal). There have been efforts to change the NYC Pet Law to provide more certainty in its application and to allow anyone sixty-two or older to have a pet regardless of a no-pet clause. Amy Sacks, *Pet Owners on Short Leash*, N.Y. Daily News 16 (Sept. 27, 2003) (available at 2003 WL 58603259) (discussing proposed changes to NYC Pet Law).

255 492 A.2d 385 (N.J. Super. App. Div. 1985).

256 *Id.* at 387. The previous owner had imposed no prohibition on pets. *Id.* The new landlord admitted "purchasing the premises with the intention of forcing the tenants either to get rid of their pets or move." *Id.*

257 *Id.* at 388 (citing to N.J. Stat Ann. § 2A:18–61.1 (West Supp. 2003)).

pets "shall operate retroactively to force the removal of pets already owned by tenants in a situation where there was no lease violation when the pets were acquired."[258] The *Young* court found that, to determine the reasonableness of the prohibition, the circumstances of both the landlord and tenant should be considered.[259]

The tenant defendants in *Young* presented testimony by a specialist on the influence of companion animals on the mental and physical health of their owners.[260] The expert testimony established

> that the loss of their pets . . . would cause significant health problems, especially if the loss is due to a defendant being forced to give up his or her pet as opposed to the pet's dying a natural death. Defendants could be expected to suffer grief and depression as great as that suffered at the loss of a family member and, in addition, suffer from a sense of guilt and loss of self-esteem.[261]

The expert also cited to studies showing the positive impact of pets on human health and testified to specific negative consequences that could be expected if the tenants were forced to give up their animals.[262] Given the unimpeached testimony concerning the bonding between the tenants and their dogs, and the adverse effect to the tenants if the provision were to be enforced, the court found that it would be unreasonable to enforce the no-pets provision with respect to the tenants and their current pets.[263]

Obviously, *Young* illustrates a progressive attitude about the role of companion animals in the lives of their owners, with the allowance of expert testimony and providing for a balancing of interests. Most renters will need to continue to search for the limited number of pet-friendly premises in order to ensure that they will be able to keep their companion animals in their lives.

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[258] *Id.* at 389.

[259] 492 A.2d at 389.

[260] *Id.* at 387. The expert was Dr. Aaron Katcher. See *supra* nn. 6, 8 for work by Dr. Katcher.

[261] *Young*, 492 A.2d at 387.

[262] *Id.* at 387–88. The *Young* court reported that the testimony established that "the presence of pets generally lowers the rate of mortality." *Id.* at 388.

[263] *Id.* at 389–90. The three dogs at issue were all at least twelve years old and none of the dogs had been subject to any but "the most minor complaint." *Id.* at 387. Testimony also established that there was some criminal activity in the area. *Id.* Tenants, including those without pets, "testified that the presence of the dogs [makes them] feel safer, since [the dogs] give warning when strangers approach." *Young*, 492 A.2d at 387. The *Young* court also set forth the general rule regarding no-pets provisions, stating that

> Such provisions have been found reasonable from a landlord's point of view and should be enforced unless the landlord has expressly or impliedly permitted particular pets to be maintained, is otherwise estopped from enforcing the provision, or if a tenant who had previously been allowed to maintain a pet upon the premises can show that it is unreasonable to enforce the provision under the particular circumstances of the case before the court.

Id. at 390.

One way to support the ability of tenants to keep pets in rental premises is to support and expand the educational efforts being made by humane societies and other organizations that understand the benefits of responsible pet ownership.[264] Laws that prevent the inequitable eviction of tenants with animals also enable responsible owners to retain their rental housing.[265]

B. Condominiums

Even if one is fortunate enough to have the financial means to own real property, restrictions on pet ownership do not disappear.[266] In fact, depending on the type of property one owns, the problems may be very similar. An example is the restriction of pets in condominium or cooperative housing developments.[267] There are many types of housing developments; however, the focus of this section of the article will be on condominiums.[268]

Condominium refers to a form of ownership in a multi-unit development "in which a person has both separate ownership of a unit and [an] . . . interest . . . in the common areas."[269] Every state has its own condominium statute.[270] Use restrictions, such as keeping an animal

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264 *See* Swartz, *supra* n. 238 (discussing one organization's educational efforts); Delta Socy., *The Legal Ins and Outs of Pet Ownership and Housing*, http://www.deltasociety.org/dsz101.htm (accessed Mar. 12, 2005) (offering some guidance to pet owners regarding housing issues).

265 *See supra* nn. 249–54 and accompanying text (discussing local laws that codify the circumstances under which a tenant may keep an animal in rental housing despite a no-pets clause in his or her lease).

266 *See generally* APPMA, *supra* n. 1, at xxxvi ("More pet owners own their own home than the total U.S. population (especially dog and cat owners).").

267 Cooperative developments are common in New York City and the East Coast, with the condominium structure more common elsewhere. Stewart E. Sterk, *Minority Protection in Residential Private Governments*, 77 B.U. L. Rev. 273, 276 (1997); *see Park Village West Assoc., Inc. v. Sugar*, 1999 WL 1441926 at *4 (Mass. Super. 1999) (discussing the distinction between condominiums and cooperative associations in a case involving the change of a house rule prohibiting any new dogs). *Sugar* illustrates the importance of recording documents (although the court makes it clear that house rules of a cooperative do not need to be recorded) and notice of rule changes. *Id.*

268 Wayne S. Hyatt, *Condominium and Homeowner Association Practice: Community Association Law*, 13–19 (3d ed. Am. L. Inst. 2000) (discussing types of developments). Another form of development that is sometimes confused with a condominium is a cooperative. In a cooperative (or co-op), a corporation owns all the real estate and issues shares and leases to its shareholders. *Id.* at 14. Under this system the shareholder-tenants are entitled to exclusive possession of their individual units. *Id.* This article will also discuss issues relating to subdivisions and municipal ordinances. *See infra* pt. IV(A). According to the Community Associations Institute, there were an estimated 249,000 community associations in the United States at the end of 2003, with planned communities accounting for 50–55% of these associations, condominiums for 40–45%, and cooperatives for 5–7%. Community Associations Institute, *Data on U.S. Community Associations*, http://www.caionline.org/about/facts.cfm (accessed Oct. 10, 2004).

269 *Black's Law Dictionary* 291 (Bryan A. Garner ed., 7th ed. West 1999). Use of the condominium form of development did not become widespread until after 1961 when mortgage and title insurance became available.

270 Hyatt, *supra* n. 268, at 11.

in a unit, can be included in several documents that govern the condominium.[271] Of these documents, the "Declaration" is drafted and recorded by the developer prior to the sale of any individual unit.[272] Other documents include bylaws that govern the condominium association, and a separate set of rules for the development owner.[273] In general, "[courts] are far more likely to enforce use restrictions that appear in the recorded Declaration than they are to enforce restrictions imposed by subsequent vote of the association's board."[274]

Pet provisions are the "most frequently litigated of lifestyle restrictions" in these type of developments.[275] Whether a restriction on keeping a pet will be valid is often dependent on when and how the prohibition was put in place. If the prohibition is contained in a Declaration or bylaws, there is "nearly universal agreement" that the prohibition is enforceable.[276] If a Declaration expressly contemplates that the unit owners may keep pets, the association should not be able to, by rule, prohibit pets.[277] In addition, courts are not as likely to sustain an association's action to prohibit pets if it seeks to apply such a prohibition retroactively.[278]

Perhaps the most well-known of the condominium pet rules cases is the 1994 case, *Nahrstedt v. Lakeside Village Condominium Assoc., Inc.*[279] In this Supreme Court of California case, Narhstedt moved into

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271 Sterk, *supra* n. 267, at 277.

272 *Id.* Sometimes the Declaration is called the Declaration of Covenants, Conditions and Restrictions, thus the abbreviation of CCRs (or CC&Rs) that is often used when discussing restrictions in the Declaration. This document may also be called a "Master Deed." *Id.*

273 *Id.* at 277–78; *see also Bd. of Dirs. of 175th E. Del. Place Homeowners Assoc. v. Hinojosa*, 679 N.E.2d 407, 409 (Ill. App. 1st Dist. 1997) (discussing the various documents utilized to govern condominiums).

274 Sterk, *supra* n. 267, at 278.

275 *Id.* at 340 (discussing pet restrictions along with other lifestyle restrictions).

276 *Id.* at 339. Another commentator agrees with this analysis as it relates to Declarations. Jordan I. Shifrin, *Welcome to CondoWorld! . . . Where Life is Almost Perfect* 195 (iUniverse 2002). *See e.g. The Pines of Boca Barwood Condo. Assoc., Inc. v. Cavouti*, 605 So. 2d 984, 985 (Fla. 4th Dist. App. 1992) (finding that a pet restriction in a condominium declaration was "clothed with a strong presumption of validity" and was valid); *Noble v. Murphy*, 612 N.E.2d 266, 270–271 (Mass. App. 1993) (finding that the substance of a valid pet restriction was part of the originating documents of the condominium and was incorporated into the bylaws to better accommodate future enforcement).

277 Sterk, *supra* n. 267, at 339 (stating that "courts have been unwilling to sustain pet prohibitions that are inconsistent with the Declaration").

278 *Id.* at 340 (discussing the retroactive application of a pet provision and the common use of "grandfather" clauses when rules are changed).

279 878 P.2d 1275 (Cal. 1994). *See e.g.* Carl B. Kress, *Beyond Nahrstedt: Reviewing Restrictions Governing Life in a Property Owner Association*, 42 UCLA L. Rev. 837 (1995) (discussing the *Nahrstedt* case and the law of other jurisdictions); Sheri L. Marvin, *A Condominium Association's Recorded and Uniformly Enforced Use Restrictions Prohibiting Pet Ownership are Presumptively Valid and Reasonable Equitable Servitudes Under Cal. Civ. Code Section 1354*: Nahrstedt v. Lakeside Village Condo. Assoc. Inc., 22 Pepp. L. Rev. 1692 (1995) (discussing the *Nahrstedt* case); Daniel R. Puterbaugh, *The Reasonable Pet: An Examination of the Enforcement of Restrictions in California Common Interest Developments After* Nahrstedt v. Lakeside Village Condo.

a condominium with her three cats in violation of the project's declaration, which prohibited specified animals, including cats, from being kept in the units.[280] Narhstedt argued that the pet restriction "was 'unreasonable' as applied to her because she kept her three cats indoors and because her cats were 'noiseless' and 'created no nuisance.'"[281]

The California Supreme Court provided background on condominiums generally, as well as the role of use restrictions.[282] The *Narhstedt* court cited to several cases that upheld pet restrictions.[283] California has specific legislative language that provides that use restrictions contained in a recorded declaration will be enforceable unless unreasonable.[284]

The court's analysis of this statutory language resulted in the following test to determine whether a restriction should be enforced: "such restrictions should be enforced unless they are wholly arbitrary, violate a fundamental public policy, or impose a burden on the use of affected land that far outweighs any benefit."[285] The *Nahrstedt* court elaborated by stating that "the reasonableness or unreasonableness of a condominium use restriction . . . is to be determined *not* by reference to facts that are specific to the objecting homeowner, but by reference to the common interest development as a whole."[286] The court concluded as a matter of law that the restriction at issue "is not arbitrary, but is rationally related to health, sanitation and noise concerns legitimately held by residents of . . . Lakeside Village."[287]

Assoc., Inc., 36 Santa Clara L. Rev. 793 (1996) (discussing the *Nahrstedt* case and condominium law in California); *see also* Armand Arabian, *Condos, Cats, and CC&Rs: Invasion of the Castle Domain*, 23 Pepp. L. Rev. 1 (1995) (Extrapolating from his dissent in *Nahrstedt*, Justice Arabian discusses some of the critical concerns from its holding and proposes model legislation designed to protect individual property owners.).

280 *Nahrstedt*, 878 P.2d at 1278. The pet restriction stated "[n]o animals (which shall mean dogs and cats), livestock, reptiles or poultry shall be kept in any unit." *Id.*

281 *Id.* Nahrstedt's cats were kept indoors. *Id.* The court of appeals "concluded that the homeowners association could enforce the restriction only upon proof the plaintiff's cats would be likely to interfere with the right of other homeowners 'to the peaceful and quiet enjoyment of their property.'" *Id.*

282 *Id.* at 1280–81. "Use restrictions are an inherent part of many common interest developments and are crucial to the stable, planned environment of any shared ownership arrangement." *Nahrstedt*, 878 P.2d at 1281.

283 *Id.*

284 Cal. Civ. Code Ann. § 1354(a) (West 2004). The *Nahrstedt* court continued by stating "[in] states lacking such legislative guidance, some courts have adopted a standard under which . . . recorded use restrictions will be enforced so long as they are 'reasonable.'" *Nahrstedt*, 878 P.2d at 1283. The court then continued its analysis by considering the various ways that "reasonable" had been interpreted by several courts outside of California. *Id.* at 1283–84.

285 *Id.* at 1287.

286 *Id.* at 1290 (emphasis in original).

287 *Id.* The California Supreme Court found "no fundamental public policy that would favor the keeping of pets in a condominium project." *Id.* at 1291. The court continued by stating that there was no California statute that conferred a general right to keep pets in a condominium and footnoted the California provision that allows disabled individu-

Although *Nahrstedt* is notable for its comprehensive review of condominium law and restrictive use provisions, it is also frequently cited because of the dissenting opinion and the aftermath of the decision. The dissenting opinion provided an eloquent discussion of the role pets play in the lives of their human caretakers.[288] Justice Arabian found the pet restriction patently arbitrary and unreasonable and stated that the provision "does not promote 'health, happiness [or] peace of mind' commensurate with its tariff on the quality of life for those who value the companionship of animals. Worse, it contributes to the fraying of our social fabric."[289] In his dissenting opinion, Justice Arabian cited to historical and cultural references along with sources that establish the benefits of animal companionship.[290] As to the aftermath of the decision, one commentator states that "[partially] in response to *Nahrstedt*,"[291] the California civil code was amended to provide that at least one pet per single interest may be kept in a common interest development (or mobile home park) where the development's governing documents were entered into or amended on or after January 1, 2001.[292]

In addition to the California approach of whether the restriction is "unreasonable," other courts have analyzed these types of restrictions under a "reasonableness" standard, or utilizing a "business judgment rule," as well as mixtures of the two.[293] Justice Arabian believes that all the standards of review substantially limit individual challenges.[294]

At least in some jurisdictions, it may be possible for a condominium board to promulgate a rule restricting pet ownership.[295] In *Board*

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als and the elderly to keep pets in publicly funded housing. *Nahrstedt*, 878 P.2d at 1291, n. 12.

288 *Id.* at 1292–97.

289 *Id.* at 1293.

290 *Id.* at 1294–95.

291 John Paul Hanna & David M. Van Atta, *California Common Interest Developments: Law and Practice* § 22.62 (West 2003).

292 Cal. Civ. Code Ann. §§1360.5, 798.33 (West 2002) (mandating pet ownership in common interest developments and mobile home parks respectively); *see also Villa de las Palmas Homeowners Assoc. v. Terifaj*, 121 Cal. Rptr. 2d 780 (Cal. App. 4th Dist. 2002), *petition for review granted*, 55 P.3d 36 (Cal. 2002) (court of appeals upheld a No-Pets rule citing to the *Nahrstedt* case) (*aff'd*, 14 Cal. Rptr. 3d 67 (Cal. 2004)).

293 Arabian, *supra* n. 279, at 11–18 (discussing the Florida reasonableness standard and the New York Business Judgment Rule as well as other standards of review); Kress, *supra* n. 279, at 842–69 (discussing California law and the law of other jurisdictions).

294 Arabian, *supra* n. 279, at 18.

295 *Hinojosa*, 679 N.E.2d at 409 (stating that the issue of whether the Board may promulgate a rule restricting dog ownership was an issue of first impression in the state of Illinois); *but see Brookside Condo. Trust v. Zuliani*, 1999 WL 1331233 at *3 (Mass. Super. Feb. 18, 1999) (finding that a condominium's "prohibition against keeping dogs in the condominium units if found only in the Rules and Regulations, which by statute may govern conduct only in common areas and facilities, not in individual units . . . as such, cannot be enforced to prohibit the keeping of a dog within an individual condominium unit").

of Directors of 175th East Delaware Place Homeowners Assn. v. Hinojosa, an Illinois appellate court considered whether a board could promulgate a rule that restricted dog ownership.[296] The court recognized that rules promulgated by boards are not "clothed with a strong presumption of validity,"[297] and would require affirmative proof that the rule is reasonable in its purpose and application.[298] The *Hinojosa* court considered the specific facts surrounding the case, in addition to a Maryland case that barred pets by house rules that included "potentially offensive odors, noise, possible health hazards, clean-up and maintenance problems."[299] The building at issue in *Hinojosa* was a high-rise with the residences on the fourty-fifth to ninety-second floors, located in a densely populated area where recreational areas for dogs were scarce.[300] The board had utilized less restrictive measures to regulate dogs previously, but those measures did not alleviate the potential and real problems it perceived.[301] The *Hinojosa* court concluded that the rule was reasonable under the specific facts of the case.[302]

In addition to litigation over the placement and adoption of pet restrictions, unit holders fighting the enforcement of a restriction may argue that there has been arbitrary application, selective enforcement, waiver,[303] changed conditions, estoppel,[304] or that the statute of limitations has run.[305]

An example of selective enforcement is a recent Florida case where a condominium association brought an action seeking an injunc-

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296 *Hinojosa*, 679 N.E.2d at 411.

297 *Id.*

298 *Id.*

299 *Id.* (citing to *Dulaney Towers Maint. Corp. v. O'Brey*, 418 A.2d 1233, 1235 (Md. Spec. App. 1980)).

300 *Id.*

301 *Id.* The *Hinojosa* court noted that the new rule only prohibited additional or replacement dogs; existing dogs were allowed. *Hinojosa*, 679 N.E.2d at 411.

302 *Id.* The court also noted that the rule was applied to all owners and had a rational purpose. *Id.*

303 *See e.g. Dice v. Inwood Hills Condo.*, 237 A.D.2d 403, 404 (N.Y. App. Div. 2d Dept. 1997) (finding it was a factual issue as to whether the No-Pets provision of regulations had been waived); *but see Northwoods Condo. Owners' Assn. v. Arnold*, 770 N.E.2d 627, 630 (Ohio App. 8th Dist. 2002) (holding that a unit holder's assent to purchase with actual knowledge of a pet provision waived any right to raise the defense that the provision was illegally adopted).

304 *See e.g. Jefferson Place Condo. Assn. v. Naples*, 708 N.E.2d 771, 776–77 (Ohio Ct. App. 7th Dist. 1998) (finding that a condominium association would be equitably estopped from enforcing an animal restriction against a unit owner who reasonably relied on representations that pets were allowed in the units), *appeal not allowed*, 692 N.E.2d 1027 (Ohio 1998).

305 *Pond Apple Place III Condo. Assn., Inc. v. Russo*, 841 So. 2d 526, 527 (Fla. 4th Dist. App. 2003) (discussing the applicable statute of limitations in a case where a condominium association brought suit to enforce a restrictive covenant prohibiting dogs in the units); *see generally* Hyatt, *supra* n. 268, at 163–68.

tion to bar a resident from keeping a dog on the premises.[306] In *Prisco v. Forest Villas Condominium Apartments, Inc.*, an appellate court found that a resident was entitled to raise the affirmative defense of selective enforcement of a covenant when a condominium association allowed cats but not dogs, despite a prohibition in the declaration against pets other than fish or birds.[307]

From the perspective of an association that wishes to keep pets out, one practitioner cites the following to ensure successful application of the restriction:[308]

1. If a change in policy is necessary, amendment of the declaration is preferred over a modification of rules or regulations;[309]
2. The rules should define the term "pet," and should set out remedies and procedures for any violation;[310]
3. Pet regulations should be enforced consistently, uniformly, and fairly;[311]
4. If applicable, local codes or ordinances can be utilized to buttress a case against a problem unit holder.[312]

One way to encourage the allowance of companion animals in common interest developments is to support the passage of legislation similar to the California provisions that limit the ability to prohibit pets in this type of housing. Over time, more judges may be convinced of the value animals can play in the lives of their human companions, and, instead of a dissenting opinion,[313] the majority of a court may interpret the law in a way that recognizes the importance of these animals. In the short term, it is important for persons purchasing units in condominiums to pay close attention not only to the current restrictions in the governing documents, but also the process for change to make cer-

306 *Prisco v. Forest Villas Condo. Apts., Inc.*, 847 So. 2d 1012, 1012 (Fla. 4th Dist. App. 2003).

307 *Id.* at 1015.

308 Shifrin, *supra* n. 276, at 195–98 (discussing the problem of careless pet owners). Shifrin states that "[t]he most effective way of dealing with irresponsible pet owners is to have tough rules and regulations and strict enforcement procedures." *Id.* at 198.

309 *Id.* at 195–96. Amendment of the declaration, while more difficult, may be less problematic in the long run due to increased odds of litigation if rules and regulations alone are modified. *Id.* at 195. In addition, Shifrin states that "most appellate court decisions addressing pet restrictions have imposed the requirement of using grandfather clauses for pet amendments, where the owner can keep the pet until it dies or the unit is sold." *Id.* at 196.

310 *Id.* at 197. Shifrin recommends the specification of any types of animals not allowed, as well as clear standards if there are any size or behavioral restrictions. Shifrin, *supra* n. 276, at 197.

311 *Id.* at 196. Shifrin discusses the role of owners in reporting violations and the need for detailed complaints. Shifrin also discourages the imposition of rules, such as pet deposits, being applied in a discriminatory fashion between tenants and unit holders. *Id.*

312 *Id.* at 198. Shifrin recommends the consideration of any other local ordinances before a hearing is conducted. *Id.*

313 *Nahrstedt*, 878 P.2d at 1292–97.

tain that their expectations regarding pet ownership continue to be met.[314]

IV. LOCAL LAWS

A. *Municipal Ordinances and Restrictive Covenants*

Municipalities have passed different types of ordinances to try to regulate companion animals. Statutes that relate to the regulation of companion animals have been contested frequently, but such lawsuits have generally been unsuccessful.[315] Historically, mandatory registration (licensing) programs have been more commonly applied to dogs than cats.[316] An estimated ninety percent of cities and counties have had a dog registration program.[317] The justifications for animal licensing laws vary by jurisdiction, but many times the proceeds support the funding of shelters, vaccination enforcement, and educational programs.[318] If an animal is licensed, enforcement agencies are able to identify and reunite lost companion animals with their owners.[319] Some ordinances require that animals wear tags or be implanted with microchips in addition to or instead of registration.[320] Studies on mandatory registration programs for cats show that licensing-plus-identification programs increase the number of cats that are returned to their owners.[321]

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314 *See* Patrick A. Randolph, *Changing the Rules: Should Courts Limit the Power of Common Interest Communities to Alter Unit Owners' Privileges in the Face of Vested Expectations?* 38 Santa Clara L. Rev. 1081, 1097–102 (1998) (analyzing whether persons in common interest communities have a legally enforceable expectation that certain aspects of the community will not change without their consent and citing to the few cases considering the pet issue).

315 Soave, *supra* n. 18, at 164; *see also Nicchia v. N.Y.*, 254 U.S. 228, 231 (1920) (finding that there is no infringement of the U.S. Constitution, specifically of the Fourteenth Amendment, if a state statute requires the licensing of a dog); David Favre & Peter L. Borchelt, *Animal Law and Dog Behavior* 197 (Laws. & JJ. Publg. Co., Inc. 1999) (noting that a law that is rationally related to an appropriate public health, safety, and welfare interest must violate a citizen's constitutional right to be set aside); *see e.g. Holt v. City of Sauk Rapids*, 559 N.W.2d 444, 447 (Minn. App. 1997) (upholding ordinance that limited the number of dogs that could be kept on residential premises); *Prof. Houndsmen of Mo., Inc. v. County of Boone*, 836 S.W.2d 17, 23 (Mo. App. W. Dist. 1992) (finding that an animal control ordinance with registration, vaccination, and control provisions was valid).

316 Humane Socy. of the U.S., *Guide to Cat Law: A Guide for Legislators and Humane Advocates*, 3 (Humane Society of the U.S. 2002) [hereinafter *Guide to Cat Law*].

317 *Id.* at 3.

318 Wilson, *supra* n. 21, at 79.

319 *Id.*; *see also* Huss, *Separation*, *supra* n. 2, at 211–20 (discussing the issue of lost animals).

320 *Guide to Cat Law*, *supra* n. 316, at 3–4; *see also* Huss, *Separation*, *supra* n. 2, at 204 n. 153 (discussing "microchipping" of companion animals).

321 *Guide to Cat Law*, *supra* n. 316, at 3 (citing to a return-to-owner rate increase from 0.9% (in 1995) to 4% (in 2002) after an ordinance requiring that cats wear identification or be "microchipped" was enacted in Oahu, Hawaii).

Vaccination requirements are also quite common, with most states requiring periodic rabies vaccinations for dogs,[322] and a number of states requiring rabies vaccinations for cats as well.[323] Confinement and control of animals is justified by the need to control diseases or to prevent animals from becoming nuisances or injuring people.[324]

Due to the threat to the public from dog bites, beginning in the late 1970s, a number of jurisdictions adopted statutes covering dangerous dogs.[325] Courts have consistently upheld the language of well-written dangerous dog statutes as a legitimate exercise of the jurisdiction's police power.[326] The "bite" issue, as it relates to housing, is discussed

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322 Wilson, *supra* n. 21, at 79. The justification for mandatory rabies vaccinations is the public health threat to humans as well as animals. *Id.* "The widespread vaccination of dogs in the United States has reduced the number of cases of rabies in dogs from 6,949 in 1947 to 114 in 2000." *Guide to Cat Law*, *supra* n. 316, at 6.

323 *Guide to Cat Law*, *supra* n. 316, at 6. "Today more cats than dogs succumb to [rabies] . . . . [A]s of 2001, twenty-five states mandated rabies vaccination of cats and an additional thirteen required local jurisdictions to vaccinate cats against rabies." *Id.*

324 Soave, *supra* n. 18, at 164. Provisions that set specific standards as to the care or treatment of animals are becoming more common in municipal ordinances. *See e.g.* Renee Koury, *Coming in from the Cold; Advocate Promoting Indoor Homes for Dogs*, San Jose Mercury News 1 (Dec. 1, 2003) (available at 2003 WL 69054153) (discussing the adoption of anti-tethering ordinances in eight U.S. cities).

325 Favre & Borchelt, *supra* n. 315, at 202–06; *see also* Christopher C. Eck & Robert E. Bovett, *Oregon Dog Control Laws and Due Process: A Case Study*, 4 Animal L. 95 (1998) (discussing Oregon dog control laws that require the impounding and euthanasia of any dog found to be chasing injuring or killing livestock); Favre & Borchelt, *supra* n. 315, at 208–10 (discussing statutory provisions covering dogs and other animals worrying or harassing livestock).

326 Favre & Borchelt, *supra* n. 315, at 202–06. Generally, the application of a dangerous dog statute requires that a dog first be identified as being a danger to the public—due to the dog biting or attacking a person or other animal. *Id.* at 203. Normally the action taken by the dog must be unprovoked. *Id.* Statutes have also been passed classifying certain breeds of dogs, usually pit bulls or pit bull mixes, as being naturally dangerous. Soave, *supra* n. 18, at 176–78. The identification of the dog as dangerous causes the possession by the owner to become conditional—sometimes subject to keeping the dog confined or on leash at all times, as well as providing proof of minimum insurance coverage if the dog causes injuries. Favre & Borchelt, *supra* n. 315, at 203; Soave, *supra* n. 18, at 176. If the owner does not follow the strict provisions of the law, or if the dog causes injury, there can be criminal sanctions against the owner as well as seizure of the animal. Favre & Borchelt, *supra* n. 315, at 202–06. Some statutes make it extremely difficult to regain custody of an animal once it has been confiscated. *Id.* These statutory provisions vary but may require the posting of a bond and paying the costs for the animal's care while the animal is held. *See* N.H. Rev. Stat. Ann. § 644:8(IV) (West Supp. 2003) (providing for the posting of a $2,000 bond and for costs to be assessed for the care of the animal); *see also* Mich. Comp. Laws Ann. § 750.50(3) (West 2003) (providing hearing prior to forfeiture of animals unless cash or security is submitted to cover the costs of care from initial impoundment to trial); N.Y. Agric. & Mkts. Law §§ 118, 373 (McKinney 2004) (creating process for notification to owner of identified dog, and posting of security in case of person charged with cruelty to cover the costs of the animals' care prior to the adjudication of the charges); *see also e.g. Porter v. DiBlasio*, 93 F.3d 301, 306–07 (7th Cir. 1996) (finding that the owner of horses had a due process right to notice and an opportunity for a hearing prior to the permanent termination of his interest in the horses). The ultimate penalty for the dog that has caused harm is the euthanasia of the dog. Favre & Borchelt, *supra* n. 315, at 203. The state has clear authority to

briefly below.[327]

A restriction that may be in the form of a municipal ordinance or a restrictive covenant in a subdivision is one that that limits the type and number of animals that can be kept by each resident.[328] Ordinances with these types of limits serve several purposes. One is to maintain a common scheme of development—as with any other type of restrictive covenant. Oftentimes this purpose is raised when the type of animal the property owner wishes to keep is unusual.[329]

One benefit of this type of ordinance is that it provides a tool for governments to resolve animal hoarding cases. "Animal hoarders are individuals who accumulate so many animals (in the dozens or even hundreds) that they are unable to provide even minimal standards of nutrition, sanitation and veterinary care."[330] With an ordinance that limits the number of animals, officials may be able to remove animals from the property without first having to prove animal cruelty.[331] Limitations on the type or number of animals can also be used to deal with possible nuisance problems.[332]

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kill a dangerous dog. *Id.* The constitutionality of some breed-specific statutes has been successfully challenged. Lynn Marmer, *The New Breed of Municipal Dog Control Laws: Are They Constitutional?* 53 U. Cin. L. Rev. 1067 (1984) (discussing the enactment and constitutionality of pit bull regulations).

327 *See infra* pt. IV(E) (discussing the problem of injuries caused to humans by companion animals).

328 There are many restrictions on keeping exotic or wild animals in state and local law. Challenges to these types of restrictions utilize a similar analysis as the statutes discussed herein. *See e.g. Kent v. Polk Co. Bd. of Supervisors*, 391 N.W.2d 220, 227 (Iowa 1986) (finding that a county ordinance regulating possession of dangerous and vicious animals was a valid exercise of police power and did not constitute a taking in a case where a property owner was keeping a lion as a pet); *Town of Grant v. Johnson*, 1993 WL 231683, *1 (Minn. App. June 29, 1993) (citing to the town's police power to uphold an ordinance prohibiting the keeping of wild animals without a permit); *Peoples Program for Endangered Species v. Sexton*, 476 S.E.2d 477, 481 (S.C. 1996) (finding that ordinance that classified wolves as wild animals did not violate property owners' equal protection rights); *Rhoades v. City of Battle Ground*, 114 Wash. App. 1062, 1062–63 (Wash. App. Div. 2 2002) (upholding order dismissing constitutional challenges to an ordinance that prohibits ownership of exotic animals within city limits utilizing the rational basis test). As this article deals with companion animals, these restrictions on exotic animals will not be discussed further. Note that potbellied pigs and horses are now considered companion animals by some people. *See infra* nn. 408–54 and accompanying text for cases dealing with these animals. Subdivisions also have covenants that restrict the number and type of animals. *See e.g. Turudic v. Stephens*, 31 P.3d 465, 472 (Or. App. 2001) (discussing whether a covenant prohibited the keeping of a cougar or the cougar's pen).

329 *See infra* nn. 408–54 (discussing cases wherein potbellied pigs and horses are at issue).

330 *Guide to Cat Law*, *supra* n. 316, at 11. Animal hoarders frequently do not recognize that the animals are suffering. *Id.*

331 *Id.*; *see also Combat Animal Hoarding*, Providence J. (R.I.) B06 (Aug. 11, 2003) (available at 2003 WL 57184868) (discussing the problem of animal hoarding).

332 *Guide to Cat Law*, *supra* n. 316, at 11; *see e.g. Commonwealth v. Creighton*, 639 A.2d 1296, 1299–1300 (Pa. Commw. 1994) (illustrating the interaction of an ordinance limiting the number of cats and dogs to five per residence and a nuisance claim). Note that the *Creighton* court found it necessary to remand the case to the trial court to

An example of the flexibility a municipality has in drafting its ordinances is *City of Marion v. Schoenwald*.[333] At issue in this Supreme Court of South Dakota case was a city ordinance that limited households to four dogs, only two of which could weigh over twenty-five pounds.[334] Schoenwald owned three dogs which were properly licensed and vaccinated in June, 1999.[335] At the time of licensing, one of the dogs weighed twenty pounds.[336] In February 2000, Schoenwald was notified that she was in violation of the ordinance by housing three dogs weighing over twenty-five pounds.[337] The *Schoenwald* court stated it was "not clear from the record how the City determined that Schoenwald's third dog had subsequently exceeded the weight limitation."[338] After a second notice, she was issued a citation.[339] At trial, Schoenwald argued that the ordinance exceeded the scope of municipal authority and was unconstitutional under the South Dakota Constitution.[340]

The South Dakota Supreme Court began its analysis by discussing the authority under which cities may regulate.[341] If there is not inherent authority, the right of cities to regulate is derived from the legislature, which delegates "a large measure of police power to municipal corporations, either expressly or inferentially."[342] The Court noted its own history "of not interfering with municipal governments unless their actions are palpably arbitrary, unreasonable, or beyond their authority."[343] The only specific enabling statute in the state code dealt with prohibiting, regulating, licensing, and dogs running at large.[344] Moreover, "[a] broader power to regulate in this area stems from mu-

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determine the goals of the ordinance and to determine whether the goals were legitimate and the means used to achieve them were reasonable. *Id.* at 1301.

333 631 N.W.2d 213 (S.D. 2001).

334 *Id.* at 215. The ordinance provides that each home was restricted to having no more than four dogs and four adult cats. *Id.*

335 *Id.* At the time of the licensing, the dogs weighed the following: shepherd-collie (seventy-five pounds), male golden retriever (thirty pounds), and female golden retriever (twenty pounds). *Id.* Diane Schoenwald was married with three children. *Id.* Diane was issued the citation; however, the record indicates that while the dogs may have been owned by Diane for purposes of licensing, they were considered the family's dogs. *Schoenwald*, 631 N.W.2d at 215.

336 *Id.*

337 *Id.*

338 *Id.* at 215 n. 2

339 *Id.* at 215.

340 *Id.* at 215–16. The magistrate granted Schoenwald's dismissal motion, and the City of Marion requested discretionary review. *Schoenwald*, 631 N.W.2d at 216.

341 *Id.*

342 *Id.*

343 *Id.* The *Schoenwald* court continued by stating "[w]e also presume that cities are familiar with their local conditions and know their own needs; therefore we will not substitute our judgment for their decisions, unless they abuse their power." *Id.* at 217.

344 *Id.* at 217. The *Schoenwald* court considered the enactments' legislative intent; finding that the legislative intent was to leave subjects like pet control to local governments. *Schoenwald*, 631 N.W.2d at 217.

nicipal authority to maintain the health, safety, and general welfare of the community and the right to abate nuisances."[345]

In almost all jurisdictions, "municipal power to regulate animals kept as pets is broadly construed. . . . and [restrictions] on the aggregate number of dogs in households are commonly upheld against constitutional attacks."[346] The City of Marion cited to no animal science authority that supported a weight threshold and to no other case in which a similar weight restriction was upheld.[347] Notwithstanding concerns regarding the weight restrictions (specifically, that compliance with the ordinance may fluctuate) the South Dakota Supreme Court upheld the ordinance, citing to a rule of statutory construction that the enactment should be read as a whole.[348] The *Schoenwald* court found that "larger dogs have a greater potential for harm" and that the "limit on the number of dogs assuredly advances public welfare."[349] The weight limit, read together with the ability to possess four dogs, was "sufficiently related to the purpose of protecting public health and safety; thus it did not unreasonably exceed the City's regulatory authority."[350]

Ordinances may limit the number of pets kept on property based on the type of housing. *Village of Carpentersville v. Fiala* illustrates this concept.[351] The ordinance in question provides "[n]o person shall permit more than two dogs to be or remain in or about any single-family residence, building[,] or lot, or more than one dog in any single-family unit in any multiple housing building . . . ."[352] The Illinois appellate court considered whether the classifications contained in the ordinance violated equal protection.[353] It found that the classifications in the ordinance were not "suspect classifications" and did not involve "fundamental interests," so the rational basis test would be applicable.[354] The analysis continued with a finding that, although individu-

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345 *Id.* "Regulation of specific breeds is also considered a proper exercise of police power." *Id.* (citations omitted).

346 *Id.* (citation omitted).

347 *Id.* at 218.

348 *Id.*

349 *Schoenwald*, 631 N.W.2d at 218. The South Dakota Supreme Court found that the "ordinance is an attempt to balance competing needs, public and private." *Id.*

350 *Id.* The *Schoenwald* court also found a "rational relationship between the ordinance and the problems caused by large dogs," so there was no violation of the South Dakota Constitution. *Id.*

351 425 N.E.2d 33 (Ill. App. 2d Dist. 1981).

352 *Id.* at 34 (citing to Section 14-23 of the Village Code). The Village of Carpentersville has the same restrictions in its current Village Code. Village of Carpentersville, Ill., *New Resident Information*, "Important Village Code Summaries: Limitation as to Number of Dogs to Be Kept," http://vil.carpentersville.il.us/resident.htm (accessed Nov. 4, 2004).

353 *Fiala*, 425 N.E.2d at 35. The *Fiala* court also considered and rejected the argument that there was not statutory authority for the enactment of the ordinance. *Id.*

354 *Id.* "Suspect classifications" include sex, race, alienage, or national origin. *Id.* "Fundamental interests" include the right to travel freely or practice a religion. *Id.* For a classification "to be constitutional in the sense of equal protection, [it] must be based

als have a privilege to use property freely, this "is subject always to a legitimate exercise of the police power under which new burdens and restrictions may be imposed when the public welfare demands."[355]

The *Fiala* court noted that, "[w]ith regard to the keeping of dogs, we believe there are real and substantial differences between single-family residences and single-family units within multiple housing buildings."[356] The differences cited include "considerations of indoor and outdoor space, density and proximity to others, noise levels and structural differences."[357] The court found that the difference articulated by the statute between single-family and multi-family housing buildings was rationally related to the object of the ordinance and not violative of equal protection.[358]

It is necessary for municipal ordinances to meet general statutory constructs. For example, in *Foster v. State*, the Supreme Court of Georgia found a county ordinance unconstitutionally vague.[359] The ordinance provided in part:

> It shall be unlawful for there to be more than four dogs and/or cats on any residential lot that is less than five acres in size, subject to the following exceptions: (1) Animal owners who have an approved permit issued by the animal control board shall be excepted from this section.[360]

The absence of ascertainable standards to grant or deny the permit gave the board uncontrolled discretion which was "incompatible with the requirements of due process."[361]

As illustrated by *Schoenwald*, amending and enforcing municipal ordinances relating to companion animals can be quite controversial and can lead to litigation.[362] Municipalities wishing to limit the type

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on some real and substantial difference in persons and bear a rational relation to the purposes of the statute." *Id.*

355 *Fiala*, 425 N.E.2d at 36.

356 *Id.* This appellate court noted that the Illinois Supreme Court had previously held that there are "real and substantial differences between owners of a fee and a tenant under a lease." *Id.* The Illinois Supreme Court case that the *Fiala* court referenced dealt with a tax issue. *Id.* The *Fiala* court made its own distinctions between single and multiple family residences as well. *Id.*

357 *Id.*

358 *Fiala*, 425 N.E.2d at 36. The *Fiala* court continued by finding that the defendant did not "establish that the ordinance constitutes arbitrary, capricious or unreasonable municipal action." *Id.*

359 544 S.E.2d 153, 155 (Ga. 2001).

360 *Id.* at 154.

361 *Id.* at 155. The Supreme Court of Georgia reversed the judgment of conviction against Foster. *Id.*

362 *See e.g.* Stephanie Doster, *Kenner's Pet Law Goes to the Dogs; Judge Strikes Down Measure that Set Limit of 4 Pets Per House*, Times-Picayune (New Orleans, La.) 1 (May 16, 2003) (available at 2003 WL 4009382) (discussing litigation over municipal ordinance in Kenner, Louisiana). The attorney representing the defendant in the Kenner, Louisiana case reported that the State Fifth Circuit Court of Appeals reversed the lower court, finding for the City of Kenner. *City of Kenner v. Kruebbe*, 882 So.2d 596 (La. 2004). He has taken a writ to the Louisiana Supreme Court and has not yet heard back on its decision. Voicemail from Anthony Ligi, Attorney, to Rebecca J. Huss, Assoc. Prof.

and number of animals should make certain that the legislative record articulates the link between a valid public policy, such as public health, and the proposed limitation. Although occasionally a waiver to a municipal ordinance is given, pet owners should be aware of the restrictions that may be placed on pet ownership prior to making a decision to reside in an area.[363]

B. Nuisance

The issue of nuisance is often raised when dealing with animals.[364] There are different ways that nuisance is considered. Private nuisance can be defined as "a civil wrong, based on a disturbance of rights in land. The remedy for it lies in the hands of the individual whose rights have been disturbed."[365] A tort action for damages arises for a private nuisance so long as "the interference is substantial and unreasonable, and such as would be offensive or inconvenient to the normal person."[366]

In contrast, a public nuisance (sometimes referred to as a common nuisance) is "a species of catch-all criminal offenses consisting of an interference with the rights of the community at large . . . . [T]he normal remedy is in the hands of the state."[367] A public nuisance may also be a private nuisance if it interferes with the enjoyment of land.[368] A common scenario where the issue of private or public nuisance occurs is when a property owner has dogs that bark.[369] Following are a few recent cases that illustrate the issues that are raised when dealing with barking dogs.

The first case, *Rae v. Flynn*, illustrates how problems with barking dogs can escalate into allegations of violence.[370] The dispute began when Flynn complained that Rae's dogs were barking and running at

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of Law, Valparaiso U. Sch. of L. (Jan. 19, 2004, 11:10 a.m. CST) (transcription on file with Author). *See also* Lizabeth Hall, *Panel Considers Raising Limit on Pets; Proposals Would Allow Residents to Keep More Than Three Per Home*, Hartford Courant (Conn.) B3 (Oct. 15, 2003) (available at 2003 WL 64211010) (discussing controversy over change in policy).

363 *See e.g.* Jodi S. Cohen, *Reprieve Granted in 2-Dog Limit Case*, Chi. Trib. Metro 3 (Oct. 2, 2003) (available at 2003 WL 64666300) (discussing the suspension of a case against a resident who brought home a third dog in violation of a municipal ordinance restricting the number of dogs per household to two).

364 This nuisance discussion focuses on cases that relate to individual property owners that are keeping companion animals. Nuisance issues relating to animals kept in commercial kennels or kept for food production are beyond the scope of this article.

365 W. Page Keeton et al., *Prosser and Keeton on Torts* 618 (5th ed., West 1984).

366 *Id.*

367 *Id.*

368 *Id.*

369 Odor can also be an issue in nuisance cases. *See Barnes v. Bd. of Adjustment of the City of Bartlesville*, 987 P.2d 430 (Okla. Civ. App. 1999) (potbellied pig case where odor was an issue in determining whether keeping a pig was a nuisance); *see also Boudinot v. State*, 340 P.2d 268, 271–72 (Okla. 1959) (affirming injunction that prohibited keeping a large number of cats on residential property due to noise and odor).

370 690 So. 2d 1341 (Fla. 3d Dist. App. 1997).

large.[371] Rae was found in violation of a municipal code ordinance for "permitting an animal to be a nuisance or run at large."[372] Rae then built a large dog kennel on the common property line.[373] Flynn alleged that the barking became worse and filed a complaint with local animal control authorities.[374] Both neighbors filed petitions for injunctions against repeat violence with allegations of harassment and trespass.[375] Flynn's petition was heard first, and at the conclusion of that hearing, the parties stipulated to the entry of a permanent injunction against violence.[376] After a full evidentiary hearing on Rae's petition, the trial court denied the injunction and modified the previous injunction in favor of Flynn to "prohibit Rae from housing any pets outside her property."[377] Rae appealed the decision of the trial court.[378]

The appellate court began with the premise that a "residential property owner has a duty not to unreasonably interfere with other persons' use and enjoyment of their property."[379] It went on to state that "mere noise may be so great at certain times and under certain circumstances as to amount to an actionable nuisance."[380] Several decisions by other courts have held that "excessive dog barking which interferes with a neighboring property owner's right to enjoy the use of his or her home constitutes an enjoinable nuisance."[381]

Unfortunately, as the *Flynn* court noted, there is no bright line test to follow:

> Although there is no exact rule or formula for ascertaining when barking dogs rise to the level of nuisance, relief will be granted where plaintiffs show they are substantially and unreasonably disturbed notwithstanding proof that others living in the vicinity are not annoyed.[382]

The restrictions imposed on Rae were found to be within the authority of the trial court, and the court admonished Rae for not having "simply respected her neighbor's legitimate complaint."[383]

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371 *Id.* at 1342. The number of dogs was not disclosed in the case.

372 *Id.*

373 *Id.* The kennel was ten feet by twenty feet. *Id.*

374 *Id.*

375 *Flynn*, 690 So. 2d at 1342.

376 *Id.*

377 *Id.*

378 *Id.*

379 *Id.* "Anything which annoys or disturbs one in the free use, possession, or enjoyment of his property or which renders its ordinary use or occupation physically uncomfortable may become a nuisance and may be restrained." *Id.* (quoting the Florida Supreme Court in *Knowles v. Central Allapattaw Properties, Inc.*, 145 Fla. 123, 130 (1940)).

380 *Id.* at 1342 n. 1 (quoting Florida Supreme Court in *Bartlett v. Moats*, 120 Fla. 61, 67 (1935) (quoting vice chancellor Pitney of New Jersey in *Gilbough v. W. Side Amuse. Co.*, 64 N.J. Eq. 27, 28 (1902)).

381 *Flynn*, 690 So. 2d at 1343.

382 *Id.*

383 *Id.* The court continued by stating "[n]eighbors should reasonably resolve their differences without having to abuse the court system." *Id.*

Another dog barking case illustrates the type of evidence used to support a complaint. In *Zang v. Engle*, the Zangs alleged the "Engles' dogs engaged in excessive and continuous barking which constituted a nuisance."[384] A magistrate found that a nuisance existed and ordered that the "Engles be permanently enjoined from allowing any of their dogs to bark in a manner that creates an unreasonable amount of noise such that it interferes with the peace, quiet and normal enjoyment of the Zangs' residence."[385]

Like *Flynn*, the *Zang* court set out general principles to determine whether a private nuisance exists.

> [I]t is not necessary that such owner be driven from his or her dwelling or that the defendant's acts create a positive unhealthy condition; it is enough that the owner's enjoyment of life and property is rendered uncomfortable . . . . [A] trial court must look at what persons of ordinary taste and sensibilities would regard as an inconvenience or interfere materially affecting their physical comfort.[386]

The *Zang* court considered Mr. Zang's testimony that he could hear barking from inside his house even with the windows closed; and that the barking had affected his ability to sleep and work out of his home office, and had interrupted meals and entertaining.[387] Ms. Zang testified that the barking affected her ability to concentrate, her mood, and interrupted her sleep.[388] To support their testimony, the Zangs kept a log of the dog barking, with entries made almost every day over a year and four months.[389] The Zangs also provided videotapes of the dogs barking.[390] Based on the record, the *Zang* court found that there

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384 2000 WL 1341326 at *1 (Ohio App. 10th Dist. Sept. 19, 2000). The Engles had four dogs. *Id.* at *4.

385 *Id.* The Engles filed objections to the magistrate's decision, but the trial court overruled their objections and adopted the magistrate's decision. *Id.* One of the magistrate's decisions that the trial court and this appellate court rejected was the request that the Zangs submit to a psychological evaluation. *Id.* at *2. The Engles contended that, because nuisance cases require a showing that the alleged nuisance annoys a person of normal sensibilities, a psychological evaluation should have been ordered. *Id.* at *3. The *Zang* court rejected this analysis and stated that "[s]imply because a nuisance action may involve a showing that the plaintiff is a person of normal sensibilities does not in and of itself serve as a basis for ordering a psychiatric or psychological evaluation." *Zang*, 2000 WL 1341326 at *3.

386 *Id.* at *4.

387 *Id.* at **4–5.

388 *Id.* at *5.

389 *Id.* "The logs as a whole show that the dogs were outside and barking at various times." *Id.*

390 *Zang*, 2000 WL 1341326 at *5. The videotapes were not on record on appeal. *Id.* at *6. The Engles alleged that the Zangs provoked the dogs into barking, but the appellate court found that the "trier of fact could reasonably conclude that the dogs were not provoked into barking." *Id.* at *7.

was "sufficient competent, credible evidence to support a finding of a private nuisance"[391] and upheld the trial court's injunction.[392]

Patterson v. City of Richmond illustrates a public nuisance involving barking dogs.[393] Patterson appealed a bench trial verdict finding she failed to "exercise proper care and control of her dogs to prevent them from becoming a public nuisance" in violation of a Richmond city code provision.[394] The code provision at issue was a noise ordinance that requires "that dog owners properly control their dogs to prevent them from barking 'in an excessive, continuous, or untimely fashion.'"[395] Patterson testified that she owned five dogs, two of which were service animals.[396] Two neighbors complained about the dogs and testified about the negative impact the barking had on their lives.[397] The neighbors both testified that if they had known about the barking they would not have bought their homes.[398] An animal control officer, who had previously issued notices to Patterson regarding the barking of her dogs, issued the summons for violating the Richmond code provision after a visit to Patterson's house to investigate complaints.[399]

Patterson argued that testimony from only two households was insufficient to support a public nuisance violation.[400] The appellate court rejected this argument, finding that none of the relevant code sections required a minimum number of people to be affected before finding a violation.[401] Citing to the Virginia Supreme Court, the court found that, "if the annoyance is one that is common to the public generally, then it is a public nuisance. The test is not the number of persons annoyed, but the possibility of annoyance to the public by the invasion of its rights."[402] Therefore, Patterson's conviction was affirmed.[403]

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391 *Id.*

392 *Id.* at *8. The trial court's injunction also required the Engles to obtain an anti-barking device for their dogs. *Id.*

393 576 S.E.2d 759 (Va. App. 2003).

394 *Id.* at 760.

395 *Id.* at 764.

396 *Id.* at 761. Patterson also testified that she occasionally provided housing for other dogs through her work with the Central Virginia Doberman Rescue League. *Id.* The court found that Patterson was legally blind and had "five to eight dogs at any one time." *Id.*

397 *Patterson*, 576 S.E.2d at 761. Similar to the testimony in *Zang*, Patterson's neighbors complained of loss of sleep, interference with entertainment and other normal activities. *Id.*

398 *Id.* Both neighbors owned dogs themselves. *Id.*

399 *Id.* at 762. The animal control officer testified that she heard the dogs barking in a manner that was "excessive, continuous," and "untimely" given it was late in the evening. *Id.*

400 *Patterson*, 576 S.E.2d at 762. Patterson argued that a minimum of four persons should testify to support a public nuisance. *Id.*

401 *Id.*

402 *Id.* at 763.

403 *Id.* at 765.

In addition to cases involving barking dogs,[404] there have been claims of nuisance based on the trespass of dogs onto land,[405] allowing an animal to damage property,[406] and threatening dogs.[407] Needless to say, there are a wide variety of claims of nuisance based on animals' behavior and irresponsible owners.

C. *The Popularity of Potbellied Pigs*

As discussed above, municipal code provisions, subdivision covenants, and zoning regulations often restrict the type of animals that may be kept on real property. One survey estimated that the number of "unusual" household pets is "nearly doubling every five years, [and surpassed] two million in 2001."[408] One type of animal that is increas-

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404 *See e.g. Hernandez v. Richard*, 772 So. 2d 994, 995 (La. App. 3d Cir. 2000) (finding violation of the municipal nuisance ordinance due to twelve to eighteen beagles where issue was whether there was a frequent or continuous noise); *City of Cuyahoga Falls v. Vogel*, 1998 WL 646766 at *3 (Ohio App. 9th Dist. Sept. 16, 1998) (upholding conviction of nuisance ordinance for allowing a dog to bark and finding statute constitutional).

405 *FOC Lawshe LP v. Intl. Paper Co.*, 574 S.E.2d 228, 230 (S.C. App. 2002) (discussing claim of nuisance based on disruption caused by trespassing dogs). A private nuisance claim has also been supported by the failure to contain dogs. *Wallace v. Grasso*, 119 S.W.3d 567, 580–81 (Mo. App. 2003).

406 *Savage v. State*, 587 S.E.2d 294, 297–98 (Ga. App. 2003) (upholding conviction for violation of public nuisance law when owner's dogs damaged the property of others).

407 *Williams v. King*, 860 So. 2d 847, 851–52 (Miss. App. 2003) (finding that evidence supported a claim of private nuisance when a dog was threatening to others).

408 Sean L. McCarthy, *Exotic Pets' Popularity Brings Trouble; Rare Diseases, Care Raise Concern*, Ariz. Republic (Phoenix) A1 (July 21, 2003) (available at 2003 WL 57919049) (citing to survey by the American Veterinary Medical Association). This article continues by discussing pets as fads and states that "fads have come and gone for the ostrich and the potbellied pig, and now people are hyping miniature horses." *Id. See infra* pt. IV(D) (discussing case involving a miniature horse). Maintaining a standard size horse on residential property may also violate local laws. *See e.g. Wing v. Zoning Bd. of Appeals of the Town of Cromwell*, 767 A.2d 131, 136–37 (Conn. App. 2001) (holding that the evidence did not establish a legal nonconforming use of a pony or horse on property); *Town of Atlantic Beach v. Young*, 298 S.E.2d 686, 691–92 (N.C. 1983) (holding that ordinance prohibiting keeping of livestock within town limits was not unconstitutional with respect to keeping of a pony and goats); *State v. Willett*, 1995 WL 815497 at *2 (Ohio App. 11th Dist. Dec. 29, 1995) (affirming judgment of the trial court that Willett created a public nuisance by failing to properly contain a horse within three acres of land). Keeping chickens in cities is also an issue that causes disputes. *See e.g. City of St. Paul v. Nelson*, 404 N.W.2d 890, 891 (Minn. App. 1987) (discussing case of a denial of a permit to keep a rooster in St. Paul, Minnesota); Nancy Woods, *Afowl of the Law*, Oregonian 01 (Jan. 8, 2004) (available at 2004 WL 58851887) (discussing a ban on chickens in one Oregon city and the Portland ordinance that allows residents to keep up to three chickens without getting a permit). People keeping chickens may not view them as companion animals, but as a source of food. *See e.g.* Katy Skinner, *The City Chicken*, http://www.thecitychicken.com (accessed Mar. 12, 2005) (discussing various aspects of raising chickens in cities). A 1986 Illinois appellate court case found that a monkey that was registered as an endangered species would fall within the definition of "domesticated household pet." *City of Rolling Meadows v. Kyle*, 494 N.E.2d 766, 770 (Ill. App. 1st Dist. 1986).

ingly becoming the subject of disputes is the potbellied pig.[409] Thousands of these animals were sold to U.S. households in the early and mid-1990s.[410] As the pigs grew larger than anticipated, many owners sought to "rehome" them, and most pig sanctuaries are now at capacity.[411] Another reaction to the increasing size of the animals is that they are being kept outside—in full view of the neighbors. It is common that claims of nuisance and other code violations are raised when potbellied pigs are kept as companion animals.[412] Two cases, *Barnes v. Board of Adjustment of the City of Bartlesville*[413] and *Gebauer v. Lake Forest Property Owners Assn., Inc.*,[414] will be described herein to illustrate some of the issues involving potbellied pigs.[415]

In *Barnes*, the owner of a 220 pound potbellied pig named Porsche applied for a special zoning permit after a new ordinance was passed that provided "[n]o outdoor quadrupeds or bipeds, except dogs and cats, shall be kept without prior approval of the Board of Adjustment."[416] The Board of Adjustment (Board) denied the adjustment and the district court upheld the denial.[417] The basis for the denial was that the Board, pursuant to zoning regulations, shall not grant a special zoning permit unless the use would not constitute a nuisance, among other requirements.[418] There had been testimony at the zoning

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409 *See generally* Andrea Hart Herbster, *More Than Pigs in a Parlor: An Exploration of the Relationship between the Law and Keeping Pigs as Pets*, 86 Iowa L. Rev. 339 (2000) (discussing legal issues that arise when pigs are kept as companion animals).

410 Jessica Wanke, *In More Ways than One, Pigs Got Too Big; Abundance, Size Ended Potbelly Fad*, Ariz. Republic (Phoenix) B2 (July 23, 2003) (available at 2003 WL 57919559) (citing to an estimate by Jane Treser of the National Committee on Potbellied Pigs).

411 *Id.*

412 *See e.g. Kusznir v. Zoning Bd. of Apps. of the City of Shelton*, 759 A.2d 1036, 1038 (Conn. App. 2000) (upholding a cease and desist order prohibiting a property owner from keeping two potbellied pigs on property in violation of a zoning regulation that prohibits keeping livestock on lots smaller than two acres); *City of Lilburn v. Sanchez*, 491 S.E.2d 353, 355–57 (Ga. 1997) (utilizing the rational basis test to find that a city ordinance that prohibited the keeping of potbellied pigs on lots under one acre in size was constitutional); *City of Peoria v. Ohl*, 636 N.E.2d 1029, 1030 (Ill. App. 3d Dist. 1994) (upholding ruling that zoning ordinance prohibiting farm animals did not preclude property owner from keeping potbellied pig within a residential zone); *Malmgren v. Inverness Forest Residents Civic Club, Inc.*, 981 S.W.2d 875, 880 (Tex. App. 1st Dist. 1998) (granting property owners motion for summary judgment on a statute of limitations defense in case about a potbellied pig).

413 987 P.2d 430 (Okla. Civ. App. 1999).

414 723 So. 2d 1288 (Ala. Civ. App. 1998).

415 *See generally* Herbster, *supra* n. 409 (discussing other cases involving potbellied pigs). Cases involving potbellied pigs continue to be generated. *See e.g. Association Says Pigs Must Go*, Orlando Sentinel (Fla.) B3 (Nov. 22, 2003) (discussing local homeowners association ruling against homeowner with two potbellied pigs in Winter Garden, Florida); *Dateline Texas*, Houston Chron. 37 (Sept. 14, 2003) (discussing dispute over a swine ordinance in Wink, Texas).

416 987 P.2d at 431.

417 *Id.*

418 *Id.* at 432.

hearing that since Porsche had been in residence there had been more flies and odor.[419] The only governmental official that visited the property was the Chief Building Inspector, a Code Enforcement Officer who testified that he saw Porsche and could detect an unpleasant odor.[420] Porsche's veterinarian testified that he did not believe there is any more odor attributable to a Vietnamese pot-bellied pig than to any other animal, and Porsche's owner, Barnes, testified that Porsche had no offensive odor.[421] The appellate court acknowledged that the evidence (of the odor) was disputed, but found there was sufficient evidence supporting the denial of Barnes' application.[422] A second argument, that the new ordinance violated state law because it lacked a grandfather clause, was also rejected since there was testimony that pigs were considered farm animals and, prior to the amendment, were not permitted to be kept within the city limits.[423]

A different result was reached in *Gebauer*.[424] The judge in this case utilized several swine related metaphors,[425] and found that the evidence did not support a finding that keeping a potbellied pig violated a neighborhood's restrictive covenant or that the potbellied pig created a nuisance.[426] The neighborhood restrictive covenant stated:

> No livestock of any description may be kept or permitted on the property with the exception of dogs, cats, and other animals which are qualified household pets, and which do not make objectionable noise or constitute a nuisance or inconvenience to owners of other lots nearby.[427]

Although this restrictive covenant was not as specific as the covenant in *Barnes*, the real distinction is how the judge viewed the particular animal.[428] In *Gebauer*, the court spent a significant amount of time discussing the distinction between potbellied pigs and pigs that are used for human consumption.[429] A "Day in the Life of Taylor" videotape was submitted as evidence that showed the activities of the potbellied pig.[430] The *Gebauer* court found that the evidence presented in the case did not support a finding that Taylor was livestock.[431] Regardless of the fact that potbellied pigs are genetically swine, the court found the evidence supported that the pig in this case was a household

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419 *Id.*

420 *Id.* at 433.

421 *Id.* at 432–33.

422 *Barnes*, 987 P.2d at 433.

423 *Id.*

424 723 So. 2d at 1290.

425 *Id.* at 1288–89 (e.g., "review committee charged ahead like a wild boar in rutting season," "with the exception of an oink, oink here and an oink, oink there, Taylor is quiet," and "the property owners association gleefully wallows in that statement").

426 *Gebauer*, 723 So. 2d at 1290.

427 *Id.*

428 *Barnes*, 987 P.2d at 432.

429 *Gebauer*, 723 So. 2d at 1289–90.

430 *Id.* at 1289. This pig apparently sleeps indoors at night. *Id.*

431 *Id.* at 1290.

pet.[432] As to the trial court's finding that Taylor was a nuisance, the *Gebauer* court found there was no evidence supporting that conclusion, stating "[t]here is no suggestion in the records that Taylor is loud, that she strays from her fenced-in yard, that she smells, or that she has any other unpleasantness about her."[433]

These potbellied pig cases illustrate the difficulty that municipalities and subdivisions have in enabling persons to keep companion animals on their property without allowing a nuisance to remain unabated. Given the popularity of these animals, a logical approach is to focus on the impact of the animal on surrounding property holders—whether there is unreasonable noise or odor rather than the type of animal that is being kept.

D. When is a Horse Not Just a Horse?

As discussed above, in addition to specific types of animals barred from municipalities, there are cases where animals are purportedly acting as service animals and thus should be exempt from municipal ordinances.[434] There are also cases that focus on the validity of municipal ordinances restricting particular animals that also raise quasi-service animal issues. The case of *Ridgewood Homeowners Assn. v. Mignacca* provides an example of the complexity of such cases.[435] *Mignacca* dealt with a family that wanted to keep a miniature horse in an "upscale and lavish" subdivision.[436] The Mignaccas' son, Christian, had weakened legs that required the use of braces frequently due to a bout of bacterial meningitis.[437] His weakened limbs precluded Chris-

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[432] *Id.* at 1289–90.

[433] *Id.* at 1290. The neighborhood association's case was not improved by evidence that another potbellied pig lived in the neighborhood and no action was taken against that property owner, or that there was no evidence that any of the three members of the architectural review committee had ever seen the pig. *Id.* at 1289.

[434] Recently a court found that a town did not discriminate against a young woman (Tiffany) in violation of the ADA when it refused to provide a modification to its municipal ordinance to allow a miniature horse to be kept within city limits. *Access Now, Inc. v. Town of Jasper*, 268 F. Supp. 2d 973, 973 (E.D. Tenn. 2003). In *Town of Jasper*, the court found that: "(1) Tiffany [was] not disabled within the meaning of the ADA; (2) the horse [was] not a service animal; (3) Tiffany [did] not need to use the horse as a service animal; and (4) the Town [had] not discriminate[d] against Tiffany by reason of disability." *Id.* at 974. Tiffany suffered from a form of spina bifida known as cervical myelomenigocele and hydrocephalus (water on the brain) and had a history of grand mal seizures. *Id.* Evidence supporting the Town of Jasper's position included Tiffany's doctor's statement that Tiffany does not need a service animal and other evidence proving that Tiffany was not substantially limited in her standing and walking. *Id.* at 975, 977. The court specifically stated that the issue of whether the horse was a service animal "does not turn on the type and amount of training" but on whether the horse was a service animal under the ADA. *Id.* at 980. Because the horse did "not assist and perform tasks for the benefit of Tiffany to help her overcome or deal with an ADA disability," it was not a service animal. *Id.*

[435] 2001 WL 873004 (R.I. Super. July 13, 2001), *rev'd*, 813 A.2d 965 (R.I. 2003).

[436] *Id.* at *4 (describing the Ridgewood subdivision and stating it was a "verdant and secluded enclave for some members of Rhode Island's economic aristocracy.").

[437] *Id.* at *2.

tian's participation in competitive sports such as basketball, soccer, and football; and he participated in shows and competitive events with the horse.[438] The Rhode Island Superior Court (the lower court) took judicial notice of "the emotional and physical well being animals kept as pets often bring to their human companions."[439] The superior court found Christian's physical and psychological challenges relevant, but stated that the relevant municipal ordinances and Rhode Island law regarding restrictive covenants and equity were of paramount concern.[440]

The restrictive covenant at the core of this case[441] provided in part, "no animals, livestock or poultry of any kind shall be raised, bred, or kept on any lot, except that two (2) dogs and/or two cats may be kept . . . ."[442] Definitions of "livestock" and "pet" in Rhode Island law both included a reference to equines.[443] The lower court conducted a view to determine the circumstances in which the horse was housed.[444] There were comparisons in the lower court's opinion of the miniature horse's size and level of noise (whinny) to those of a dog that found that the horse was smaller and likely to make less noise than a canine.[445]

The superior court's interpretation of the restrictive covenant, using general principles of statutory construction, was that the covenant was ambiguous as to scope and the intent was to prevent residents of the community from "keeping and raising animals in a 'farm-like' setting for commercial purposes."[446] In addition to the ambiguities in the covenant, the superior court found that the particular covenants at issue had been enforced arbitrarily, or not at all.[447] Ultimately, the superior court found that the restrictive covenant would not apply to the miniature horse in this case.[448]

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438 *Id.*

439 *Id.* at *4. The court footnoted this statement with the following: "A number of scientific studies have confirmed what any casual observer of pets interacting with humans should know." *Id.* at *4 n. 2.

440 *Mignacca*, 2001 WL 873004 at *5.

441 There was also a zoning issue in this case that related to a city code provision that allowed for horses to be kept in different sections of the city if the property contained a minimum amount of acreage. *Id.* The superior court agreed with the Mignaccas' interpretation of this zoning issue, allowing the horse to be kept on their four acre property. *Id.* at *6. The Supreme Court of Rhode Island reversed this portion of the opinion as well, finding that the Superior Court Justice exceeded his authority in reviewing the Zoning Board of Review's decision. *Ridgewood Homeowners Assoc. v. Mignacca*, 813 A.2d 965, 976–77 (R.I. 2003).

442 *Mignacca*, 2001 WL 873004 at *6.

443 *Id.* at **6–7 (citing to R.I. Gen. Laws §§ 4-13-1.2(5), 4-13-1.1(8) (2001)).

444 *Id.* at *4.

445 *Id.* at **2, 10.

446 *Mignacca*, 2001 WL 873004 at **7–8.

447 *Id.* at *9.

448 *Id.* at *11. In addition to the restrictive covenant relating to horses, this case also considered a restrictive covenant relating to the shed in which the horse was housed. *Id.*

On appeal, the Supreme Court of Rhode Island reversed the judgment of the superior court on the restrictive covenant action.[449] The decision referenced the "therapeutic" reasons for the purchase of the horse, but did not compare the horse to other domesticated animals nor reference the role that the horse played in the life of Christian.[450] The restrictive covenant was not ambiguous and had not been enforced arbitrarily.[451] The Superior Court was directed to enter a judgment "permanently enjoining the Mignaccas from keeping the miniature horse on their property."[452]

This case illustrates some recognition of the role that animals can play in the lives of their human companions. Although both courts utilized general principals of statutory construction, the role of animals in the lives of their human caretakers was a factor in finding for the Mignaccas, as indicated by the emphasis in the Superior Court's opinion on the specific circumstances of the relationship between this miniature horse and Christian.[453] Conversely, the Supreme Court virtually ignored the role of the horse in Christian's life in its finding the restrictive covenant valid.[454] What is clear, based on the FHA, is that if Christian was disabled, and the horse was a service animal, the analysis would be whether a reasonable accommodation would need to be made to the restrictive covenant rather than considering the language of the covenant itself.

This section illustrates the broad power of local governments to regulate the presence of animals on private property. If an ordinance is properly drafted, it is likely to withstand judicial scrutiny. If animal owners wish to have more flexibility in the number or type of animals that they want to harbor, it will be necessary to utilize the local or state legislative system to make such a change.

E. The "Bite Issue"

There are significant issues raised by keeping companion animals in urban areas. This article has focused on the problems that animal owners have obtaining and retaining housing. These issues presume that the persons wanting the animals in their lives are responsible owners and their pets do not fall within the definition of a dangerous animal. Unfortunately, many people are not responsible for their companion animals, and this causes significant problems. Issues relating to welfare of abused and abandoned animals are beyond the scope of this paper, but are all obviously of great concern to urban planners.

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449 *Mignacca*, 813 A.2d at 968.

450 *Id.* The Supreme Court briefly referenced the view that occurred in connection with the Superior Court case. *Id.* at 970.

451 *Id.* at 971–72.

452 *Id.* at 977.

453 *Mignacca*, 2001 WL 873004 at **2, 4. The superior court also considered the equities of the case. *Id.* at **10–11.

454 *Mignacca*, 813 A.2d at 969, 977.

Another issue that is beyond the scope of this paper is the significant problem of companion animals causing injury to people.[455] In the housing context, it is obviously a concern to landlords that they could be held liable for an action of an animal being harbored by one of their tenants. The most recent published statistic is that there were 4.7 million dog bite incidents in the U.S. in 1999.[456] One estimate is that the number of dog bite victims who require medical attention in the U.S. ranges from five hundred thousand to one million annually.[457] It is estimated that seventy percent of the incidents occur on the dog owners' property and that half of all children will be bitten by age twelve.[458]

Under most state laws, if a person's dog bites someone, the owner will be responsible for expenses and damages.[459] According to the Insurance Information Institute (I.I.I.), "[d]og bites now account for one-third of all homeowner's insurance liability claims, costing roughly $310 million . . . ."[460] The I.I.I. reports that "homeowners and renters insurance policies typically cover dog bite liability."[461] One problem is that some insurance companies are now refusing to insure households that contain certain breeds, regardless of that particular animal's history; and if a dog bites someone, it may be difficult for the owner to find

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455 *See generally* Am. Veterinary Med. Assn. Task Force on Canine Aggression & Human-Canine Interactions, *A Community Approach to Dog Bite Prevention*, 218 J. Am. Veterinary Med. Assn. 1732 (AVMA 2001) (available at http://www.avma.org/pubhlth/dogbite/dogbite.pdf (accessed Nov. 4, 2004)) (setting forth the problem and approaches to preventing dog bites in communities); Beck & Katcher, *supra* n. 8, at 206–26 (discussing the problem of dog bites).

456 Ins. Info. Inst., *Dog Bite Liability*, http://www.iii.org/media/hottopics/insurance/dogbite/content.print (March 2004); *see also* Am. Veterinary Med. Assn. (AVMA), *CDC Release Epidemiologic Survey of Dog Bites in 2001*, http://www.avma.org/onlnews/javma/sep03/030915i.asp (Sept. 15, 2003). One difficulty in determining the extent of this problem is that no centralized reporting system for dog bites exists. *Id.*

457 Am. Veterinary Med. Assn. (AVMA), *Don't Worry, They Won't Bite*, http://www.avma.org/pubhlth/dogbite/dogbitebroc.asp (Apr. 28, 2004) "Children make up more than 60 percent of all dog bite victims." *Id.* at "Who's Being Bitten?"

458 E-mail from Alejandra Soto, Ins. Info. Inst., to Rebecca J. Huss, Prof. of L., Valparaiso U. Sch. L. (Feb. 10, 2004, 12:26 p.m. CST) (on file with Author).

459 Ins. Info. Inst., *Who Let the Dogs Out? – Avoid Being Bitten With a Lawsuit, Warns I.I.I.*, http://www.iii.org/media/updates/press.622080_content.print/ (May 6, 2002).

460 *Id.*

461 *Id.* Of course if the claim exceeds the limit of the holder's policy, the insured will be personally responsible for excess. *Id.*

insurance.[462] If a dog owner is a tenant, it is common that a landlord will also be sued for damages.[463]

At common law, owners (or keepers) of animals that did not know or have reason to know of the vicious propensity of an animal would not be liable unless they were negligent.[464] Some states have changed this common law rule by adopting statutory language that provides for strict liability for injuries caused by dogs.[465] Liability for landlords is often predicated on their ability to control the situation.[466] Obviously landlords have less control over what happens within the unit itself than over common areas.[467] Some states' case law establishes that landlords are not liable for the actions of dogs belonging to their tenants, even in cases where the landlord knew the danger of a foreseeable harm.[468] It may be necessary to show that the landlord had both

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462 Ins. Info. Inst., *supra* n. 456; *see also* Karyn Grey, *Breed-Specific Legislation Revisited: Canine Racism or the Answer to Florida's Dog Control Problems?* 17 Nova L. Rev. 415, 419–21 (2003) (discussing insurance issues relating to dangerous dogs); Harold W. Hannah, *Survey of Illinois Law: Liability for Animal Inflicted Injury*, 24 S. Ill. U. L.J. 693, 694 (2000) (discussing Illinois law relating to dog bites); Brian Sodergren, *Insurance Companies Unfairly Target Specific Dog Breeds*, http://www.hsus.org/ace/18624 (accessed Mar. 12, 2005) (discussing insurance issues related to ownership of large, powerful dogs).

463 Favre & Borchelt, *supra* n. 315, at 129–30, 162.

464 Soave, *supra* n. 18, at 165; *see also* Favre & Borchelt, *supra* n. 315, at 126–27. This common law scheme is the genesis of the (now incorrect in many jurisdictions) belief by many animal owners that there is a "one-bite free" rule. Soave, *supra* n. 18, at 165.

465 Favre & Borchelt, *supra* n. 315, at 141–44; *see e.g.* Fla Stat. Ann. § 767.04 (West 2004) (stating that the "owner of any dog that bites any person while such person is on or in a public place, or lawfully on or in a private place, including the property of the owner of the dog, is liable for damages suffered by persons bitten, regardless of the former viciousness of the dog or the owners' knowledge of such viciousness"); *see also* Anna Sibylle Ehresmann, *Torts:* Smith v. Ruduiso: *Tightening the Leash on New Mexico's Dogs*, 32 N.M. L. Rev. 335, 339–40 (2002) (discussing the evolution of New Mexico's law on dog bite liability).

466 Ramona C. Rains, Clemmons v. Fidler: *Is Man's Best Friend a Landlord's Worst Enemy?* 19 Am. J. Tr. Advoc. 197, 200 (1995) (discussing the rationales that courts utilize when considering whether landlords should be held liable for the actions of a tenant's animal).

467 Favre & Borchelt, *supra* n. 315, at 162 (analyzing landlord cases using the physical location where the injury occurred).

468 *Fair v. U.S.*, 513 S.E.2d 616, 617 (S.C. 1999) (holding that a landlord is not liable to a tenant's invitee for harm caused by the tenant's dog); *Mitchell v. Bazzle*, 404 S.E.2d 910, 911–12 (S.C. App. 1991) (finding that even though the landlord knew of the dog's viciousness, had adequate time to terminate the tenant's lease, and failed to terminate the tenant's lease, the landlord was not liable for the acts of the tenant's dog over which the landlord had no control). A 1996 Iowa Supreme Court case found that a landlord who does not have any right to control a tenant's dog would not be liable to an invitee of a tenant. *Allison v. Page*, 545 N.W.2d 281, 283 (Iowa 1996). The Iowa Supreme Court began its analysis by citing to the general rule that "a landlord is not liable for injuries caused by the unsafe condition of the property arising after it is leased, provided there is no agreement to repair" subject to several exceptions. *Id.* Those exceptions include if a landlord retains control of the property and will retain liability for unsafe conditions and defects in areas available to the public. *Id.* The common principle is that liability is

control of the premises as well as knowledge of the vicious propensities of the dog in order to find liability.[469] Normally, landlords are not liable for injuries caused by a tenant's animal that occur off a landlord's premises, but there are cases to the contrary.[470] Landlords may ultimately prevail in cases where they do not have knowledge or control; however, the mere fact that they are likely to be sued encourages the imposition of a no-pets policy.

In order to reduce the impact of tort lawsuits based on the actions of tenants' animals on innocent landlords, state statutes should clarify the circumstances under which landlords should be held liable for injuries caused by animals. Certainly if the landlord has actual knowledge of a dangerous animal and is able to remove the threat, it is reasonable to expect a landlord to do so. However, it is often difficult for a landlord (or even an owner) to determine which animals may cause a threat to people, and the responsibility for the animals should ultimately remain on the owner.

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premised upon control. *Id.* This rule would apply even though the landlord in this case knew or had reason to know that the dog was dangerous. *Id.* at 282. Note that a later Supreme Court of Iowa case dealt with the issue of "whether a landlord has a duty to keep common areas reasonably safe by excluding a dog with known vicious propensities." *Fouts v. Mason*, 592 N.W.2d 33, 38 (Iowa 1999). *Fouts* was remanded for further proceedings based on the facts that indicated that the landlord knew or had reason to know that a dog posed a danger to people in a common backyard and had a "duty to protect those lawfully in the common area." *Id.* at 40. *See also Smaxwell v. Bayard*, 682 N.W.2d 923, 942 (Wis. 2004) (holding that "common law liability of landowners and landlords for negligence associated with injuries caused by dogs is limited to situations where the landowner or landlord is also the owner or keeper of the dog causing injury").

469 *Twogood v. Wentz*, 634 N.W.2d 514, 520 (N.D. 2001). The North Dakota Supreme Court has stated "a duty to protect others from harm by an animal on the premises arises only when the landlord knows that the animal is dangerous and presents an unreasonable risk of harm." *Amoytte v. Rolette Co. Hous. Auth.*, 658 N.W.2d 324, 328 (N.D. 2003). In *Amoyotte*, a minor tenant was clawed by a stray cat while she was playing outside the complex. *Id.* at 325. *But see Alaskan Village, Inc. v. Smalley*, 720 P.2d 945, 948 (Alaska 1986) (finding that a mobile home park had a duty to exercise reasonable care to enforce its rules and regulations regarding vicious dogs and could be held liable after a pit bull of one tenant attacked another tenant). *Smalley* has been distinguished by cases from other jurisdictions, including *Amoyotte*. *Amoyotte*, 658 N.W.2d at 328; *see also Matthews v. Amberwood Assocs. LP*, 719 A.2d 119, 131–32 (Md. 1998) (stating in a case where a tenant's invitee was mauled "we do not suggest that a landlord is responsible for most negligent conditions in leased apartments including conditions covered by provisions in a lease. . . . however, where a landlord retained control over the matter of animals in the tenant's apartment, coupled with the knowledge of past vicious behavior by the animal, the extremely dangerous nature of pit bull dogs, and the foreseeability of harm to persons and property in the apartment complex, the jury was justified in finding that the landlord had a duty to the plaintiffs and that the duty was breached"). *Matthews* had an extensive dissent and has been criticized as unnecessarily broadening and clouding a landlord's duty to police a tenant's actions within a premise, and as providing a disincentive for including "no-pets" provisions in leases. Wade B. Wilson, *The Maryland Survey: 1998-1999: Recent Decisions: The Court of Appeals of Maryland*, 59 Md. L. Rev. 1254, 1254 (2000).

470 Favre & Borchelt, *supra* n. 315, at 163.

V. CONCLUSION

The focus of this article has been on the impact of including animals in the lives of humans. It is also important to consider the well-being of the animals. Despite the best efforts of humane societies and other charitable organizations, an overwhelming number of companion animals are euthanized each year.[471] Continued efforts to educate pet owners about the benefits of spaying and neutering, and of the provision of affordable veterinary services, are essential in combating this problem. Providing for additional housing options can also play a role in preventing the euthanasia of animals that are otherwise adoptable.

An issue raised by one author is whether it is a reasonable expectation to require animals to act as the primary emotional support for their human companions.[472] Pet owners clearly appreciate the benefits of having these animals in their lives—but animals' interest in having a positive and safe environment should also be considered.

Pet ownership can be facilitated by improved housing design.[473] Attention to a dog or cat's environment can reduce behavioral problems as well as improve a pet's quality of life.[474] Proper fencing and windows that allow for a view provide enrichment while keeping a pet secure.[475]

Clear guidelines on the proper disposal of excrement and/or sufficient disposal units can help eliminate the potential health problems associated with this waste, especially in urban areas.[476] Setting aside

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[471] The Humane Society of the United States estimates that three to four million animals are euthanized by shelters each year. The Humane Socy. of the U.S., *Common Questions about Animal Shelters and Animal Control*, "How Many Animals Enter Shelters Each Year? And How Many Are Euthanized?" http://www.hsus.org/ace/20231#3 (accessed Mar. 12, 2005).

[472] *See generally* Jon Katz, *The New Work of Dogs Tending to Life, Love and Family*, (Villard Books 2003). Mr. Katz provides a view of several relationships between humans and dogs over a year-long period in the author's town of Montclair, New Jersey. *Id.* at xxi. Among other issues, Mr. Katz considers the appropriateness of the role of dogs as an emotional support system. *Id.* at 14–26. Mr. Katz's work includes several instances where a dog was not properly socialized or trained, and thus, the relationship between the owner and dog was poor, or the dog was eventually surrendered. *Id.* at 196, 199, 204–05.

[473] Virginia Sarah Sandford Jackson, BTRP (Hons), *Facilitating Pet Ownership through Improved Housing Design*, 209 JAVMA 1076 (Sept. 15, 1996). Although the report is based on an Australian study, most of the recommendations are directly applicable to housing issues in the U.S. *Id.* at 1076.

[474] *Id.* at 1077; *see also* Trey Clark, *Pet Happy Housing*, Desert Sun (Palm Springs, Cal.) F1 (Aug. 10, 2003) (available at 2003 WL55977749) (discussing ways to improve the quality of life for animals that live in condominiums or apartments).

[475] Jackson, *supra* n. 473, at 1077–78.

[476] An example of setting aside sanitary spaces for the use of dogs is the city of Paris. Delta Socy., *Dogs in Paris*, http://www.deltasociety.org/dsz205.htm (accessed Mar. 12, 2005). Paris installed spaces along a boulevard and in public gardens covered with materials dogs liked and installed signs to direct owners in the use of them. *Id.* Reportedly the areas that have the sanitary spaces stay clean. *Id.* The City of Rennes in France also installed dog toilets and dog areas in the city center as part of ongoing

park areas specifically for the use of dogs is one way to provide a positive experience for animals as well as to encourage the responsible control over animals.[477] Educating people about their responsibilities as owners of an animal will also be key to successfully integrating animals into housing.[478]

Some of these issues must be supported by an increased demand by pet owners, such as requesting housing that considers the needs of animals. Other issues can be dealt with at the appropriate governmental level. Some cities and states have been proactive in developing projects that allow for companion animals to be part of the lives of humans.[479] Pet owners should exercise their right to vote for public officials that consider issues relating to companion animals as an important priority of their jobs.[480] By balancing the valid interests in public safety and the benefits of being able to include companion animals in the lives of those who desire this relationship, it will be possible to change laws to support responsible pet ownership.

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urban planning. Delta Socy., *Integrating Animals into the Community*, http://www.deltasociety.org/dsz201.htm (accessed Mar. 12, 2005).

[477] Huss, *Separation*, *supra* n. 2, at 184–85 (discussing dog parks). Many times community groups that advocate for responsible pet ownership instigate the setting aside of park land for use as a dog park. *Id.*; *see also* Delta Socy., *Park Liebrecht: Green Space Designed for City People and Pets*, http://www.deltasociety.org/dsz209.htm (accessed Mar. 12, 2005) (discussing the planning of an urban green space that took the interests of several constituencies into account including dog owners).

[478] Delta Socy., *Good Dog Campaign and Poop Scoop Scheme*, http://www.deltasociety.org/dsz210.htm (accessed Mar. 12, 2005) (reporting on the actions in Warwickshire, England, that include a major health education initiative encouraging responsible dog ownership and materials that encouraged the proper disposal of dog waste); Delta Socy., *The Responsible Pet Ownership Neighborhood Program*, http://www.deltasociety.org/dsz208.htm (accessed Nov. 4, 2004) (discussing a program implemented successfully in Tallahassee, Florida designed to improve the behavior of companion animal owners).

[479] Delta Socy., *AFIRAC: Towards Better Integration of Animals in the City*, http://www.deltasociety.org/dsz202.htm (accessed Mar. 12, 2005). The French Association on Human and Animal Interaction (AFIRAC) has assisted at least sixty municipalities in France in developing projects that are intended to improve "the quality of urban life through a harmonious integration of pets in cities . . . ." *Id.*

[480] An example of an animal-conscious official would be Congressman Earl Blumenauer (U.S. Representative for the State of Oregon) who stated that "a livable community promotes the humane treatment of animals" and that "animals enrich our lives on a daily basis." Earl Blumenauer, *The Role of Animals in Livable Communities*, 7 Animal L. i, ii (2001). AIFRAC offers several recommendations to ensure the success of programs designed to integrate animals in cities including consideration of a variety of interests, education and training of dog owners and city officials, and follow up. Delta Socy., *Success Factors of Programs that Integrate Animals in Cities*, http://www.deltasociety.org/dsz203.htm (accessed Mar. 12, 2005).