SELECTED PROPERTY MANAGEMENT ISSUES: RECENT LANDLORD/TENANT LAWS, RESERVATION FEES & REASONABLE ACCOMMODATIONS AND MODIFICATIONS

Outline:

Learning Objective: To make licensees aware of:

1) recent legislative changes impacting *residential* landlords,
2) considerations in charging "reservation fees," and
3) fair housing "reasonable modifications" and "accommodations" with a focus on assistance animals and permissible inquiries that may be made of tenants with a handicapping condition or disability.

REVISIONS IN RESIDENTIAL LANDLORD - TENANT LAW

This subsection will briefly review changes in North Carolina law enacted by the General Assembly since 2011. These changes impact brokers managing *residential* property *for others or for themselves*.

Procedural Matters

Several revisions shortened time frames within the ***summary ejectment process*** so that ***as of September 1, 2013***:

● Magistrates are required to enter judgment on the same day as presentation of the evidence and legal argument concludes *unless* the parties agree on an extension of time for entry of the judgment ***or*** it is a "complex" summary ejectment case, i.e., one involving claims of criminal activity, breaches other than nonpayment of rent, Section 8 or public housing, or cases with counterclaims, in which case the magistrate must pronounce judgment within five business days of the hearing. [GS 7A-222(b).]

● Hearings in summary ejectment may now be held within seven (7) days of filing the Summons (formerly ten days) and once the appeal period has expired, the Sheriff shall execute the writ of possession within five (5) days of receipt (formerly seven days).

● As of October 1, 2012, the monetary amounts for personal property left by a tenant increased from $100 to $500 and from $500 to $750 while the holding periods were reduced. If the abandoned property is worth $500, but less than $750, the landlord must hold the property for seven (7) days prior to disposing or selling it (formerly ten days). Alternatively, the landlord may immediately deliver the property to a non-profit organization that provides household furnishings and clothing to people in need *so long as* the non-profit agrees to separately store the property and return it to the tenant if requested within thirty days. If the personal property left by the tenant is worth less than $500, the landlord must hold it for five days (formerly seven) and allow the tenant to collect it if requested within that period. Thereafter, the landlord may dispose of the property.

There were additional amendments to the appeal procedure, but since most summary ejectment actions are decided by a magistrate and no appeal is taken, these revisions will not be discussed here.

Substantive Changes

Landlord's obligations under GS 42-42

● As of October 1, 2010, a landlord's obligation to install a ***carbon monoxide alarm*** *on every level* of a dwelling was limited to those *units that have a fossil-fuel burning heater, appliance or fireplace and in all dwellings having an attached garage.* "***Fossil fuels***" include coal, kerosene, oil, wood, fuel gases, and other petroleum or hydrocarbon products that emit carbon monoxide as a byproduct of combustion. Thus, any rental home with *either*:

- a gas stove, wood stove, kerosene or oil heater, gas water heater, wood-burning or gas log fireplace, or other fossil-fuel burning appliance
  or
- an attached garage

must be equipped with a carbon monoxide alarm on every level of the dwelling. If the unit has none of the foregoing, then the landlord is only obligated to install a smoke alarm.

● A landlord installing or replacing a smoke alarm on or after **December 31, 2012** now must install a tamper-resistant, **10-year lithium battery** smoke alarm ***unless*** the dwelling unit:

- is equipped with a hardwired smoke alarm with a battery backup
  or
- has a combination smoke and carbon monoxide alarm that meets the requirements of the statute. [See GS §42-42(a)(7) reprinted at the end of this Section.]

A landlord's failure to provide smoke or carbon monoxide alarms when required is an infraction and may result in a $250 fine per violation. [GS 42-44(a1).] A tenant is prohibited from deliberately or negligently destroying any part of the premises, including the alarms, and is to notify the landlord *in writing* if an alarm needs repair or replacement. If a tenant disables or damages an alarm, the tenant is liable to the landlord for the reasonable and actual cost of repairing or replacing the alarm within thirty days of the tenant receiving written notice from the landlord. The tenant's failure to reimburse the landlord may result in an infraction and a fine of $100.00 per violation.

Vacation Rental Act

Licensees handling vacation rentals should be aware that in addition to charging reasonable administrative/processing fees, as of October 1, 2012, the vacation rental agreement may include a cleaning fee "...reasonably calculated to cover the costs of cleaning the residential property upon the termination of the tenancy...." [See GS 42A-11(b) and 42A-17(d).] The standard "Vacation Rental Agreement" (Form 411-T) was amended effective January 1, 2014 to include a provision for cleaning fees. What is "reasonable" depends on a variety of factors such as the size of the unit, the duration of the tenant's occupancy and use, the frequency of turnover, how the cleaning services are provided (salaried staff, per unit fee, outsourced?) and what the owner's actual costs are for that service. A broker should be prepared to explain how the amount of the cleaning fees charged to the vacation rental tenant was determined.

If the cleaning fee is not paid prior to the commencement of the tenancy, may it be deducted from the tenant security deposit? Probably *not*, as the Vacation Rental Act adopts the provisions of the Residential Tenant Security Act and states that the only permissible deductions from the tenant security deposit are the eight purposes set forth in G.S. 42-51 (reprinted at the end of this Section) and any unpaid long distance or per call telephone charges and cable television charges that were the tenant's obligation under the vacation rental agreement.

EDITORIAL NOTE: Two other statutes with very limited application were enacted or revised in the past three years. One provides an alternate procedure to summary ejectment when a *tenant who is the sole occupant of a dwelling dies* and the other statute provides a method for a landlord to allocate the cost of electric service in the landlord's name among tenants *where the landlord has a separate lease for each bedroom in the unit.* Additionally, a landlord may now choose to provide natural gas or electric service in the landlord's name to a tenant as part of the monthly rent amount. These issues are discussed at the end of this Section Two, but ***instructors are not required to review these materials in class***.

"RESERVATION FEES"

Long-Term Residential Leasing

What *are* "reservation fees" (also called "binder fees" or "holding fees" or similar terms) when charged in conjunction with residential leasing? That's a good question, since nothing in the landlord/tenant laws nor in the vacation rental laws define a "reservation" fee. Are they legal? Residential landlord-tenant law only mentions permissible late fees, complaint filing fees and court appearance fees a lessor may charge and limits the amount of each. [See GS 42-46, "Authorized Fees."] The only other fees or deposits mentioned in Chapter 42 are pet deposit fees and tenant security deposits. Thus, *what is a "reservation fee" and what is its purpose?*

In those markets where the practice has arisen in long-term residential leasing, it appears that the purpose is to allow a prospective tenant to basically claim or reserve a property prior to signing a written lease agreement where both parties contemplate entering into a written lease. What is the tenant actually "reserving"? How much is the fee and who is entitled to receive the fee under what conditions? When will the fee be disbursed? All of this should be specified in a written reservation fee agreement, rather than by mere oral agreement, to promote clarity among the parties.

[**ASIDE:** Recall that under the Statute of Frauds leases that will be fulfilled within three years from the making *are not required to be in writing.* This means that an oral lease agreement for a one year term may be valid and enforceable so long as there was mutual agreement on all material terms. Of course, the Commission **strongly** recommends that brokers engaging in leasing for others **always** require written agreements with the tenants to eliminate proof problems as to the terms of the agreement.]

Additional issues that should be addressed in the reservation agreement include disposition of the reservation fee if:

- the tenant is approved, but then declines to enter into a written lease?
- the tenant is approved and signs a written lease (is the fee credited against rent)?
- the tenant is not approved and the owner declines to rent to the tenant?
- the tenant is approved, but the owner receives a better offer prior to the tenant signing a written lease and chooses to rent to tenant #2?

Query: If the landlord, after accepting a reservation fee from Tenant #1, is at liberty to change his/her mind and rent to some other party, what "benefit of the bargain" did Tenant #1 receive? What *consideration* or "thing of value" has the landlord provided to support the tenant's payment of the reservation fee? Refunding the entire reservation fee doesn't make tenant #1 whole, as s/he still lacks what s/he wanted to reserve or secure - the right to rent that particular property beginning on a stated date.

If a prospective tenant wishes to rent a particular property beginning on a specified date, then the tenant should enter into a written lease, subject to the landlord's approval of the rental application. Payment of a security deposit could be delayed until the rental application is approved. If a prospective tenant doesn't want to sign a written lease, but wants to have an option to rent a particular property as of a certain date, then, as previously stated, the written reservation fee agreement should clearly specify all the terms and conditions of the option to lease and should be accompanied by a written lease that will be signed by the prospective tenant if s/he decides to lease the property, assuming tenant approval by the lessor. Note too that if the reservation fee agreement states that the reservation fee will be applied towards the tenant security deposit, then it may be viewed as a security deposit from the outset and be subject to the limitations of G.S. 42-51.

Who is entitled to the reservation fee?

Understand that the parties to the lease agreement are the owner and the tenant, even though the owner may be acting through his/her broker-agent. The broker, as an agent, acts on behalf of his/her principal but isn't transformed into the principal by the agency relationship. Since the owner is entitled to the rent monies, it would seem that the owner should be the one who receives the reservation fee to help mitigate his/her costs if the tenant decides not to rent the property after being approved as a tenant. *If, however, the broker intends to retain any portion of the reservation fee for the broker's services, then the property management agreement must*

address this issue and specify when and how much of the reservation fee may be paid to the broker, rather than the owner.

Three Banking Day Rule

Assuming that the reservation fee belongs to the owner and not the broker, then a broker who receives a reservation fee, whether in cash, by check, money order or other negotiable instrument, *must deposit that reservation fee into their brokerage trust account within **three banking days of receipt*** regardless of whether a written lease has been signed by all parties. Commission Rule A.0116(b)(3) only permits licensees to hold and safeguard checks or other negotiable instruments received for an *earnest money deposit* or *tenant security deposit* pending contract/lease formation. The only other exception to the general rule that all monies received by a broker belonging to others must be deposited into a trust or escrow account within three banking days of receipt relates to option fees and due diligence fees "made payable to a *seller of real property*." There is no "seller of real property" in a lease transaction; thus, that exception doesn't apply even if the parties call the reservation fee an option fee.

Leasing Vacation Properties

The Vacation Rental Act (Chapter 42A) allows an owner to "... require a tenant to pay all or part of any required rent, security deposit, or *other fees permitted by law* in advance of the commencement of the tenancy ..." **if** expressly authorized in the vacation rental agreement. Be aware that brokers still must maintain all advance monies, subject to permissible disbursements, *in a trust or escrow account in an insured bank or savings and loan **in North Carolina*** per GS 42A-15. Thus, the account must be opened at a bank or savings and loan physically located in North Carolina, notwithstanding the definition of "bank" found in Real Estate License Law. [See GS 93A-6(g).]

In addition to the rental amount, tenant security deposit, and collection of sales and occupancy taxes, what additional fees do the vacation rental statutes allow? GS 42A-17 only mentions the following:

1) "... **administrative fees**, the amounts of which shall be provided in the agreement, *reasonably calculated to cover the costs of processing the tenant's reservation, transfer or cancellation of a vacation rental*;" and

2) "... **cleaning fees** ... reasonably calculated to cover the costs of cleaning the residential property upon the termination of the tenancy."

[Italics added.]

While the Vacation Rental Act never mentions "pet fees," because such fees are legal under Chapter 42, they most likely could also be charged in vacation rentals *except* when dealing with assistance or service animals, which topic will be discussed shortly. Note too that there is a *default presumption* under GS 42A-18(a) that:

> *...all funds* collected from a tenant and *not identified* in the vacation rental agreement as occupancy or sales taxes, fees, or rent payments *shall be considered a tenant security deposit* and shall be subject to the provisions of the Residential Tenant Security Deposit Act ...

While the standard Form 411-T, Vacation Rental Agreement, has a line item for "reservation fee," that term is believed to reference the amount of the reasonable "administrative fee" allowed by law to cover costs *related* to a tenant's reservation. *Since the Vacation Rental Act allows an owner to collect virtually all monies related to the tenant's occupancy in advance of the tenancy, there is little, if any, reason to charge a "reservation fee" to hold a property pending a written lease agreement when leasing vacation properties.*

However, it appears that some brokers managing vacation rental property do charge a "reservation fee" to hold a property for a tenant the following year, rather than enter into a lease agreement for the next year because the rental amounts for the next season have not yet been determined. Brokers who charge reservation fees for this purpose should have a *clear written understanding* with the prospective tenant and the owner regarding:

1) what is being reserved and what will happen to the reservation fee if the tenant decides to lease or not to lease the property once the rental fee is established,
   or
2) what will happen if the property is no longer in the broker's rental pool because the management agreement has not been renewed.

FAIR HOUSING: REASONABLE ACCOMMODATIONS & MODIFICATIONS

Brokers who engage in residential leasing must be thoroughly familiar with fair housing laws. Not only must the broker be aware of limits and obligations imposed under state and federal fair housing laws, but the broker must ensure that any unlicensed salaried employees the broker employs to assist him/her in managing property for others [G.S. 93A-2(c)(6)] are well trained in fair housing requirements. Brokers may be held accountable in civil lawsuits, administrative actions, and by the Real Estate Commission for their employees' statements and actions.

To refresh brokers' understanding, this subsection will briefly review the protected classes and prohibited actions, but will then focus specifically on handicapping condition or disability, requests for accommodations or modifications, and permissible inquiries and restrictions under both the Americans with Disabilities Act and fair housing laws. For a ***more extensive review*** of fair housing laws, exceptions, advertising considerations, and recent administrative charges filed by HUD's Fair Housing & Equal Opportunity (FHEO) Division, licensees are referred to the article ***"Fair Housing Review" from the 2013-2014 BICAR course materials*** *found on the Commission's website under "Publications" and then click on Update/BICAR.*

Protected Classes and Prohibited Conduct

The *protected classes are the same under both federal and North Carolina fair housing laws*. The North Carolina Fair Housing Act is found at **Chapter 41A of the North Carolina General Statutes**. The law broadly defines a "***real estate transaction***" as "*... the sale, exchange, rental, or lease of real property.*" "***Real property***" is equally broadly defined as: "*... a building, structure, real estate, land, tenement, leasehold, interest in real estate cooperatives, condominium, and hereditament, corporeal or incorporeal, or any interest therein.*" [G.S. 41A-3(7) & (8).] The protected classes under federal and state law prohibit discrimination based upon:

- Race
- Color
- National origin
- Religion
- Sex/Gender
- Handicap (Disability)
- Familial status (children under the age of 18 living with parents or legal custodians; pregnant women and people having custody of children under 18)

Brokers should understand that *marital status* is not a protected class. "***Familial status***" *relates solely to the presence of children, not the marital status of the parents or custodians*. Thus, an owner may legally refuse to rent to a heterosexual couple if they aren't married, so long as the owner consistently applies this policy to all unmarried heterosexual couples without regard to any protected class. Also, while it may be illegal to discriminate based on age in hiring and lending situations, *age is not a protected class under fair housing laws*, other than for minors under familial status.

Unless an owner falls within one of the limited exemptions (selling own property or leasing space in owner-occupied rental property), **no one** may take any of the following actions based on race, color, national origin, religion, sex, familial status or handicap:

- refuse to engage in a real estate transaction;
- refuse to rent or sell property;
- set different terms, conditions, or privileges for a sale or rental;
- provide different housing services or facilities;
- refuse to receive or fail to transmit a bona fide offer;
- indicate that a property is not available when it actually is;
- refuse to negotiate;
- steer a person towards or away from particular property;
- threaten, intimidate, retaliate against or otherwise interfere with the use and enjoyment of property;
- for profit, persuade owners to sell or rent because persons from a protected class are moving into the area ("blockbusting").

No owner may claim any exemption if the owner employs a broker or pays any other person to assist him/her in the sale or lease of his/her property.

Additional Prohibitions Affecting Brokers

Generally, all of the foregoing apply to *any person in a real estate transaction*. This means that the law applies to owners, buyers, tenants, brokers, lenders, attorneys, etc. Additionally, ***Commission Rule A.1601*** states: "Conduct by a licensee which violates the provisions of the State Fair Housing Act constitutes improper conduct in violation of G.S. 93A-(6)(a)(10)." Thus, a broker who personally discriminates as described in the law or who is aware that the broker's owner-principal intends to discriminate against others based on a protected class in a sale or lease transaction violates the law. *To retain a listing or property management agreement violates the NC Fair Housing Act which simultaneously violates both Commission rules and License Law, subjecting the broker to both civil liability and disciplinary action.* To avoid violating the law, the broker should relinquish the listing or stop managing the property.

Most Common Violations

According to HUD, the majority of housing discrimination complaints nationally arise from either *familial status* or *disability*. According to the North Carolina Human Relations Commission that handles fair housing discrimination complaints, over the last several years the complaints received are nearly equally divided between discrimination based on *race* and discrimination based on *disability*, with only 10% or so related to familial status and another 10% arising from the four remaining protected classes.

Discrimination claims based on disability often arise due to the owner's refusal to make accommodations or modifications. It therefore is important to understand what constitutes a "reasonable request" for an accommodation or modification. What is the difference between those terms? What verification of the disability may the owner request from the prospective tenant? When must the owner permit the tenant to have an assistance or service animal? *In a nutshell, the owner can't inquire into the extent or duration of the condition, but may request verification from a physician or other appropriate professional both that the condition exists and that the animal alleviates one or more symptoms of the individual's condition.*

"Handicapping Condition" / Disability & Reasonable Requests

Under both state and federal fair housing laws, an individual has a "handicapping condition" if the individual:

1) has a physical or mental disability (including hearing, mobility, or visual impairments, chronic alcoholism, chronic mental illness, AIDS, AIDS Related Complex, autism, and mental retardation) *that substantially limits one or more major life activities, or*
2) has a record of such a disability, *or*
3) is regarded as having such a disability.

In addition to protections afforded under fair housing laws, federal laws under the Americans with Disabilities Act (ADA) afford protection to certain individuals who have a handicapping condition regarding access to places of public accommodation and commercial, educational, or governmental facilities. ***Depending on the facility and its use, the owner may be subject to both ADA and fair housing laws***.

"Physical or Mental Disability" and "Major Life Activity"

The Code of Federal Regulations (see 24 CFR §100.201) defines *physical or mental impairment* as:

(1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; *or*

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term *physical or mental impairment* includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, Human Immunodeficiency Virus infection, mental retardation, emotional illness, drug addiction (other than addiction caused by current, illegal use of a controlled substance) and alcoholism.

Major life activities include the ability to: care for yourself, perform manual tasks, walk, talk, see, hear, breathe, learn and work.

"Reasonable Accommodations or Modifications"

What is the difference between an "accommodation" and a "modification?" An ***accommodation*** is a *change or variance in rules, services, practices or policies that allows a person with a handicapping condition to enjoy the housing, but doesn't alter application of the rule, policy, service or practice as to other tenants*. Landlords *may not refuse to make reasonable **accommodations** in rules, policies, practices, or services if necessary for the disabled person to use the housing*. Examples of reasonable accommodations include:

- assigning a reserved parking space to a mobility-impaired tenant near his/her apartment when the complex offers tenants ample, unassigned parking;
- providing written material either orally or in large print or Braille to a visually-impaired tenant;
- reminding a developmentally challenged tenant that rent is due in three days;
- permitting a live-in aide to reside with a disabled tenant even if it violates "normal" policy;
- altering chemicals used for pest control or maintenance or, if alternate chemicals are ineffective, at least providing an allergic tenant with several days' notice prior to using the chemicals in his/her building.

A ***modification*** *alters the physical characteristics of the dwelling or common areas of a building*. These requests generally arise only in lease transactions, because in a purchase, the buyer acquires and controls the property and may make whatever changes s/he wishes.

In *lease transactions*, prospective tenants with a handicapping condition may request a landlord to *allow reasonable modifications to the dwelling or common use areas to enable the tenant to use the housing*. Generally, landlords may not refuse such reasonable requests, but the landlord may require the tenant to pay for the modifications. Further, if internal modifications would interfere with a future occupant's use, then the landlord may require the tenant, if reasonable and necessary, to restore the dwelling to its original condition at the end of the tenancy. The same is not true of external modifications, such as a wheelchair ramp; typically tenants may not be required to remove the external modification at the end of the tenancy.

Modifications fall within one of the following three classifications, namely:

1. ***Modifications that don't need to be restored to the original condition***. These include modifications that don't interfere with future occupants' use of the unit and modifications to the public and common use areas (often external), such as widening interior doorways, grab bars in bathrooms, and ramps to afford ingress and egress.

2. ***Modifications that must be restored to original condition but don't require an escrow account***. Typically these modifications are relatively minor, easy to restore, and inexpensive, such as replacing a cabinet underneath a bathroom sink that was removed to allow wheelchair access.

3. ***Modifications that must be restored but are moderately expensive and require an escrow account***. An owner who permits more extensive modifications that will cost more to remediate, such as lowering kitchen and bathroom counters or replacing all the kitchen cabinets, may lawfully request the tenant to deposit a reasonable agreed sum into an escrow account that will be held until the end of the tenancy and used to pay for the restoration of the premises. Any unused funds from such deposits that are not needed to pay for the restoration should be returned to the tenant.

Must Requests for Accommodation/Modification Be in Writing?

According to Joint Statements issued by HUD and the DOJ in May 2004 and March 2008 regarding reasonable accommodations and modifications respectively, an *owner/landlord* ***may not require*** *that an accommodation or modification* ***request be in writing***. Rather, a request is made whenever a tenant "... makes clear to the housing provider that [the tenant] is requesting an exception, change, or adjustment to a rule, policy, practice, or service because of [a] disability" or is requesting a structural change; the tenant should explain the type of accommodation/modification sought and, if the need is not apparent, the relationship between the requested accommodation or modification and the disability. The Joint Statements note that a request under the Fair Housing Act:

- need not be made in any particular manner or time period,
- may be requested by another person acting on behalf of the disabled individual,
- need not reference the FHAct or use the term "reasonable accommodation/ modification,"
- may be oral or in writing, (although written helps prevent misunderstandings), and
- can't be refused merely because the tenant didn't follow the landlord's request procedure.

The Commission strongly recommends that licensees desiring more guidance on these topics download, read and distribute to agents and salaried employees both of the DOJ/HUD Joint Statements referenced below, as well as the April 2013 Fair Housing Equal Opportunity Notice discussed in the next subsection.

Reasonable Accommodations under the Fair Housing Act, May 17, 2004. Found at:
www.hud.gov/offices/fheo/library/huddojstatement.pdf

Reasonable Modifications under the Fair Housing Act, March 5, 2008. Found at:
www.hud.gov/offices/fheo/disabilities/reasonable_modifications_mar08.pdf

"Assistance" or "Service" Animals

Perhaps the request most frequently encountered by brokers or owners is from tenants who have an assistance or service animal. An assistance animal may also be referred to as a "support animal," "therapy animal," or "service animal." Owners who have a "no pet" policy are prohibited by both state and federal law from refusing to rent to a person who has a service or assistance animal, whether in a vacation rental or short or long-term lease. *Brokers-in-charge should seek to ensure that their associated agents and employees clearly understand that* ***"assistance" or "service" animals are NOT "pets."*** While the Americans with Disabilities Act (ADA) now defines a service animal as a canine, the Fair Housing Act imposes no such limitations on assistance animals; assistance animals may include cats, birds, ponies, monkeys or guinea pigs, to name a few. What verification requests are legally permissible if a tenant's need for an assistance animal is not obvious will be discussed shortly. *Typically both elements, disability and need, must be present and verified before an owner is obligated to make an accommodation under fair housing.*

If a community has a policy allowing pets that don't exceed a certain size and weight, that policy may need to be waived to accommodate the assistance animal. Brokers-in-charge might want to develop two policies: one that addresses animals or pets in general, and separate rules that apply to assistance animals. Most likely there would be an overlap to some extent between the policies, such as requirements for vaccinations, neutering, cleaning up after the animal, using a leash, keeping the animal quiet and under control, and prohibiting aggressive or dangerous animals. Differences, however, would include that owners may not charge a pet deposit for assistance or service animals, although they may deduct from the tenant security deposit any damage caused by the assistance animal. If a tenant with an assistance animal adds another animal to the household without proof of its assistance nature, the owner may charge a pet deposit for the unverified animal, but not for the assistance animal.

April 2013 HUD Notice

The US Department of Housing and Urban Development issued a Notice on April 25, 2013 titled "*Service Animals and Assistance Animals for People with Disabilities in Housing and HUD-Funded Programs*." [**FHEO-2013-01**.] The purpose of the Notice was to explain owners' obligations under both the Fair Housing Act and the ADA regarding assistance or service animals. In an April 30, 2013 press release (HUD No. 13-060A), John Trasvina, HUD Assistant Secretary for Fair Housing and Equal Opportunity, commented:

> The vital importance of assistance animals in reducing barriers, promoting independence, and improving the quality of life for people with disabilities should not be underestimated, particularly in the home. Disability-related complaints, including those that involve assistance animals, are the most common discrimination complaint we receive. *This Notice will help housing providers better understand and meet their obligation to grant reasonable accommodations to people with disabilities that require assistance animals to fully use and enjoy their housing*."

[Italics added.]

The Notice distinguishes between "assistance animals" under the Fair Housing Act (and Section 504 of the Rehabilitation Act of 1973), and "service animals" as defined under the Americans with Disabilities Act and "applies to all housing providers covered by the FHAct, Section 504 and/or the ADA." The Notice explains owners' obligations and the appropriate test to apply under each Act. Below is a summary of that discussion; for a copy of the Notice go to www.hud.gov and enter **FHEO-2013-01** in the search field. The Notice states:

> "In situations where the ADA and the FHAct/Section 504 apply simultaneously (e.g., public housing agency, sales or leasing offices, or housing associated with a university or other place of education), housing providers must meet their obligations under both the reasonable accommodation standard of the FHAct/Section 504 and the service animal provisions of the ADA.... [P]ublic accommodations that operate housing facilities may not use the ADA definition of service animal as a justification for reducing their FHAct obligations."

The following chart summarizes what properties are subject to which laws, what animals are covered, and what questions an owner/landlord may ask to verify the existence of a disability and the need for the animal, unless the disability and service provided by the animal are obvious. Each law is explained in greater depth after the chart.

Applicable Law	**Property Subject To Law**	**Type of Animal**	**Permissible Inquiries**
ADA: Americans with Disabilities Act	Public entities, e.g., commercial, governmental, & educational facilities & places of public accommodation*	"Service animal" defined as a CANINE only, with limited exception for miniature horse.	Does this person need this dog due to a disability? AND What work or tasks has the dog been trained to perform?
FHAct: Fair Housing Act	Residential dwelling units	"Assistance" animals may include multiple species, e.g., dogs, cats, monkeys, birds & others.	Does this person have a disability? AND Does the animal provide assistance, perform tasks or services or provide emotional support that alleviates the symptom or effect of the person's disability?

*Commercial facilities and places of public accommodation include all places open to the public, e.g., restaurants, hotels, taxis, shuttles, grocery, department and other retail stores, hospitals, medical offices, theaters, health clubs, parks, zoos, etc.

Americans with Disabilities Act Applicability

The ADA applies to "public entities," i.e., federal, state, and local governmental programs, services, activities, and facilities (Title II), as well as to commercial facilities, educational facilities, and public accommodations (Title III), including leasing offices, shelters, assisted living facilities, guest lodging, most retail establishments, and many others. In 2010, the US Department of Justice revised the **ADA** regulations to narrowly define a "**service animal**" as:

> "any ***dog*** that is *individually trained to do work or perform tasks* for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. *Other species of animals*, whether wild or domestic, trained or untrained, *are not service animals for the purposes of this definition*. The work or tasks performed by a service animal must be directly related to the individual's disability...." [Emphasis added. See 28 CFR Part 35.104 and Part 36.104.]

While only canines may be service animals under the ADA according to the foregoing definition, other ADA regulations provide a limited exception for **miniature horses** that may also be service animals to whom access must be allowed pursuant to 28 CFR §35.136(I) and §36.302(c)(9).

The regulations provide that *the work or tasks performed by the service animal must be **directly related** to the person's disability* and mention the following examples:

- assisting persons who are blind or have low vision to navigate and other tasks;
- alerting persons who are deaf or hard of hearing to the presence of people or sounds;
- providing non-violent protection or rescue work;
- assisting an individual having a seizure;
- pulling a wheelchair;
- alerting a person to the presence of allergens;
- retrieving items such as medicine, or the telephone;
- providing physical support and assistance with balance or stability to a mobility-impaired person;
- preventing or interrupting impulsive or destructive behaviors in persons with psychiatric or neurological disabilities.

NOTE: The ADA definition of service animal expressly states: "The crime deterrent effects of an animal's presence and *the provision of emotional support, well-being, comfort, or companionship **do not constitute** work or tasks for the purposes of this definition*." Thus, "service animals" are now a defined term under the ADA and comprise a much smaller group than "assistance animals" under fair housing laws.

Permissible Inquiries under the ADA

HUD's April 2013 Notice observes that if an animal meets the ADA definition of "service animal" then *public entities and public accommodations must allow the service animal into the covered facility*. **Where the individual's disability and the work or tasks performed by the animal are apparent, the ADA covered facility** (including broker-property managers and owners) **may not request any further documentation or verification**. However, *where either the disability or the work/tasks performed are **not** apparent, then the only two questions the covered facility may ask are*:

1) Does this person need this animal to accompany him/her due to a disability?
   and
2) What work or tasks has the animal been trained to perform that relate to the disability?

Typically, there must be a nexus between the disability and the task performed by the trained service animal. The covered facility *may **not** ask about the nature or extent of the disability nor require medical records or proof that the animal has been certified, trained or licensed as a service animal, nor may it charge any fee for the service animal's admittance*. If it either is apparent or the individual verifies the existence of a disability and the related work or tasks performed by the animal, then the service animal must be admitted to all areas of the facility to which the public has access *unless*:

1) the animal is out of control and the handler doesn't take effective action to control the animal; *or*
2) the animal is not housebroken; *or*
3) the animal poses a direct threat to the health or safety of others that can't be eliminated or reduced to an acceptable level by a reasonable modification to other policies, practices, and procedures.

Federal Fair Housing Act & Assistance Animals

In contrast to the ADA's narrow definition of "service animal," what constitutes an "assistance animal" under both federal and state fair housing laws is much broader and may include cats, birds, dogs, monkeys and other species. The vast majority of residential property owners who seek to rent their property and any agents they employ will be subject to and must comply with both federal and North Carolina fair housing laws that require owners to make ***reasonable accommodations*** for persons with disabilities, including those who wish to have an assistance animal. Owners or their agents must respond to requests for accommodations or modifications. *The failure to respond to an accommodation/modification request is in itself a violation of the Act*. In its April 2013 Notice, HUD comments that:

> An assistance animal is not a pet. It is an animal that works, provides assistance, or performs tasks for the benefit of a person with a disability, or provides emotional support that alleviates one or more identified symptoms or effects of a person's disability.

Permissible Inquiries under the Fair Housing Act

An "assistance animal" under the FHAct is not required to be individually trained or certified as are service animals. As under the ADA, if the disability and the disability-related need is either readily apparent or already known to the housing provider, then no further documentation may be requested. *If either the disability or the need for the animal is not readily apparent*, e.g., a person prone to seizures who has a seizure alert service animal), *then an owner/agent may ask the following two questions when faced with a request for an accommodation to allow an assistance animal under fair housing laws*, namely:

1) Does the person seeking to use the animal have a disability, i.e., a physical or mental impairment that substantially limits one or more major life activities?
   and
2) Does the animal work, provide assistance, perform tasks or services for the benefit of the person with the disability or provide emotional support that alleviates one or more of the identified symptoms or effects of the person's disability?

If the answer to either question is "no," then the request for accommodation may be denied, but *if the answer to both questions is "yes," then the owner generally must grant an accommodation* to existing policy and allow the animal access to all areas of the premises where

persons are permitted entry. If the disability is obvious, but the need for and tasks performed by the animal are not apparent, then the housing provider may only ask the tenant for documentation of the disability related need for the animal. The April 2013 HUD Notice (FHEO-2013-01, p. 3-4) says the following regarding an *emotional support animal*.

> For example, the housing provider may ask persons who are seeking a reasonable accommodation for an assistance animal that provides emotional support to provide documentation from a *physician, psychiatrist, social worker, or other mental health professional* that the animal provides emotional support that alleviates one or more of the identified symptoms or effects of an existing disability. *Such documentation is sufficient if it establishes that an individual has a disability and that the animal in question will provide some type of disability-related assistance or emotional support*. [Emphasis added.]

Providers ***may not ask*** an applicant or tenant to *provide access to his/her medical records or medical providers or to provide extensive information or documentation of the person's physical or mental impairments*. An otherwise substantiated request may be denied only if making the accommodation:

1) would impose an undue financial or administrative burden or would fundamentally alter the housing provider's services, or

2) if the specific animal poses a direct threat to the safety and health of others that can't be reduced by other reasonable accommodations, or

3) the specific animal would cause substantial physical damage to the property of others that can't be reduced or eliminated by other reasonable accommodations.

The determination of either #2 or #3 "...must be based on an *individualized assessment* that relies on *objective evidence about the specific animal's actual conduct* - not on mere speculation or fear about the types of harm or damage an animal may cause and not on evidence about harm or damage that other animals have caused." [Italics added.]

Housing Providers Subject to Both ADA and FHAct

Brokers managing commercial properties, whether shopping centers, office buildings or other commercial properties that don't provide any lodging, generally must only comply with the ADA laws and regulations regarding "service animals" and need not assess or address the assistance animal question under the FHAct. The sale, purchase or lease of most residential property clearly will be subject to fair housing laws, but leasing certain residential property may also be subject to the service animal requirements under the ADA if the property is a "place of public accommodation." It would appear that leasing rooms in a bed and breakfast, or vacation rental properties, or units in an apartment or condominium complex would qualify as a "place of public accommodation" (as would a broker's business office), thus requiring compliance with both laws. When dealing with multiple laws, HUD's April 2013 Notice recommends that a provider first apply the ADA "service animal" test, because if the animal qualifies as a service animal then the animal **must** be permitted to accompany the individual in all areas of the facility that persons normally may go unless the animal is uncontrollable or not housebroken or presents a direct threat to others' health and safety.

If the animal doesn't qualify as a service animal, whether because it's not a canine or because it provides emotional support, then the housing provider must evaluate the request under the "assistance animal" standards under fair housing laws. The preamble to the 2010 ADA regulations acknowledges this reality noting:

> ... an individual with a disability may have a right to have an animal other than a dog in his or her home if the animal qualifies as a "reasonable accommodation" that is necessary to afford the individual equal opportunity to use and enjoy a dwelling, assuming that the use of the animal does not pose a direct threat.... [Further], *emotional support animals that do not qualify as service animals under the ADA may nevertheless qualify as permitted reasonable accommodations for persons with disabilities under the FHAct*.
> [Italics added.]

Fair Housing Design & Construction: Access to Public Buildings

In addition to ADA requirements, ***federal* fair housing laws *also impact the construction of "covered multifamily buildings" certified as ready for occupancy on and after March 13, 1991***. "*Covered multifamily buildings*" are: 1) buildings having one or more elevators *and* four or more units, and 2) ground floor units in buildings with four or more units. [42 U.S.C. §3604(f)(3)(C).] These buildings must satisfy the following requirements, namely:

- Public and common areas must be accessible to persons with disabilities
- Doors and hallways must be wide enough for wheelchairs
- All units must have:
  - An accessible route into and through the unit,
  - Reinforced bathroom walls to allow later installation of grab bars,
  - Kitchens and bathrooms that can be used by people in wheelchairs, and
  - Accessible light switches, electrical outlets, thermostats & other environmental controls,

Understand that if a building with four or more units *has no elevator* (and had its first occupancy after March 13, 1991), *the above standards apply only to ground floor units*. ***If building standards are more stringent under State or local law than the foregoing requirements, then the State or local standards prevail***.

***HUD vs. H&H Development Group, et.al.,* FHEO 07-11-0533-8**

This case is an example of HUD's enforcement arm which in late 2012 charged the owner, an architect, the builder, and designers of a condominium complex in Pevely, Missouri with building a multifamily complex that was inaccessible to persons with disabilities (3 story building with 36 units total and no elevator). The complaint was filed by the non-profit Metropolitan St. Louis Equal Housing Opportunity Council (EHOC). Among the barriers were steps and inaccessible curb ramps that prevented people in wheelchairs from accessing the units, the clubhouse and many of the common areas and lack of any designated parking. Additionally, the kitchens were too narrow to use a wheelchair, thermostats and mailboxes could not be reached by persons in wheelchairs, and there was knob-style hardware on the front doors. Terri Porter, a HUD Regional Director commented: "Everyone involved in the design and construction of new multifamily dwellings needs to be aware of their responsibility under the Fair Housing Act and do all they can to build housing that meets the law's requirements." Those requirements

include accessible common areas, bathrooms and kitchens, wider doors, and environmental controls that can be reached by people in wheelchairs.

The case was resolved in February/March 2014 by the entry of a consent order under which the architect agreed to pay a total of $35,000 of which $32,200 funded a Retrofit Fund to pay to bring the property into compliance and $2800 was paid to the local housing agency (EHOC) that initiated the complaint. A contractor for the property agreed to perform in-kind work to correct inaccessible features in the common areas. See also ***HUD v. Fourth Street Realty, Inc., et.al***, FHEO 01-12-0064-8 in which a builder-developer in New Hampshire entered into a conciliation agreement with HUD to retrofit a multifamily building that failed to comply with fair housing accessibility requirements.

North Carolina Investigations

According to the NC Human Relations Board as of Spring, 2014, the Fair Housing Project of Legal Services of North Carolina, a non-profit agency, is investigating four different cases of builders who constructed multi-family dwellings in North Carolina that don't appear to comply with the design and construction requirements of the Fair Housing Act.

Other Recent HUD Administrative Actions re: Disability

The following cases involved discrimination against persons with disabilities. Information regarding current administrative investigations and lawsuits may be found at HUD's website under fair housing, enforcement activities.

Case 1: A woman who was the legal guardian and caregiver for her adult brother who is autistic responded to an ad for a house for rent in Charleston, West Virginia. When the woman told the landlord that her brother had been diagnosed with autism, the landlord required her to purchase a $1 million insurance policy, to sign a document accepting all legal liability for her brother and his actions, and to provide him with a doctor's note confirming her brother's condition before he would rent the house to her. The woman filed a complaint with HUD.

At the trial, the landlord acknowledged that he never met the brother, that he never imposed similar insurance and liability requirements on non-disabled tenants, and that he believed that "persons diagnosed with autism and mental retardation pose a greater risk in terms of liability" and he worried the brother might start a fire or attack neighbors. HUD found the landlord guilty of discrimination (disparate treatment) based on disability and ordered the landlord to pay $18,000 in damages to the woman and her brother and $16,000 in civil penalties to the government.

Case 2: The owner and management company of an apartment complex in Atlanta, Georgia was charged with failing to make a reasonable accommodation to a disabled tenant. The tenant already resided at the complex, but experienced a health event that required her to have a ground floor apartment. She requested to move to a ground floor apartment and provided the manager with medical documentation from her physician verifying her disability and need, but the manager denied the tenant's request, even though a ground floor apartment was available. The owner and manager entered into a settlement agreement with HUD in which they agreed to pay $10,000 to the tenant, inform all of the company's agents, employees, officers and board members of the settlement terms, and require all management staff at the complex to attend fair housing training conducted by HUD or an agency/facility approved by HUD.

Case 3: In 2012 HUD filed charges against Bank of America for imposing unnecessary and burdensome requirements on borrowers who relied on disability income to qualify for home loans. Such borrowers were required to provide personal medical information and documentation of their disability as well as proof that their disability benefits would continue in order to qualify for a loan. The Fair Housing Act makes it illegal to inquire about the nature and severity of a disability except in limited circumstances that were not applicable in this situation. A HUD Assistant Secretary for Fair Housing and Equal Opportunity stated: "Mortgage companies may verify income and have eligibility standards but they may not single out homebuyers with disabilities to delay or deny financing when they are otherwise eligible." The case was referred to the Department of Justice.

Case 4: ***Scott v. Croom***, 12 CV-00680-MCA-ACT and ***U.S. v. Croom***, 12-CV-1132 JAP-RHS, United States District Court, New Mexico.

Facts:

Mr. Scott, his wife and twin children began renting a single family home from Mr. Croom, the owner and a retired attorney, in October 2008 for a one year term. They renewed the lease for additional one-year terms in 2009 and 2010 with no change in the monthly rent; they also discussed the tenants' possible purchase of the property. Mr. Scott was unexpectedly diagnosed with multiple sclerosis in January 2011. His health declined precipitously and within a matter of months he was wheelchair bound. He could no longer enter many of the rooms in the house with his wheelchair, including the bathrooms, and had to use a portable toilet when his wife wasn't home to assist him into the bathroom.

When the lease was subject to renewal in October 2011, Mr. Scott wrote the landlord a letter explaining his situation and requesting permission to install a wheelchair ramp, to remove a shower door, to install a higher commode and lower the kitchen sink. He stated his willingness to use licensed contractors, to pay the expenses related to the modifications, and, if necessary, pay to restore the property to its original condition at the end of the tenancy. Mr. Croom, the landlord, granted the request to install a ramp, but denied all other requests and offered to renew the lease only on a month to month basis, rather than the annual lease the Scotts previously had enjoyed. When Mr. Scott, through a lay advocate, renewed his written request for modifications and sent Mr. Croom the applicable federal fair housing laws, Mr. Croom withdrew his offer to renew the Scott's lease on a monthly basis, terminated the lease and ordered them to vacate by December 31, 2011.

Result - Scott v. Croom:

In November 2012 the United States filed a lawsuit on behalf of the Scotts against Mr. Croom in the United States District Court for New Mexico alleging multiple violations of the federal Fair Housing Act. Mr. Croom owned three residential rental properties and a four-plex in Albuquerque. On March 27, 2013 the parties entered into a Consent Order resolving the issues. Mr. Croom was ordered to pay the Scotts, through their counsel, **$200,000** within ten days of the Order. Additionally, Mr. Croom is subject to supervision, reporting, training and policy requirements to be implemented and reported by him quarterly or semi-annually to counsel for the United States until March 2016.

Statutes Referenced in materials

§ 42-42. Landlord to provide fit premises.

(a) The landlord shall:

(1) Comply with the current applicable building and housing codes, whether enacted before or after October 1, 1977, to the extent required by the operation of such codes; no new requirement is imposed by this subdivision (a)(1) if a structure is exempt from a current building code.

(2) Make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition.

(3) Keep all common areas of the premises in safe condition.

(4) Maintain in good and safe working order and promptly repair all electrical, plumbing, sanitary, heating, ventilating, air conditioning, and other facilities and appliances supplied or required to be supplied by the landlord provided that notification of needed repairs is made to the landlord in writing by the tenant, except in emergency situations.

(5) Provide operable smoke alarms, either battery-operated or electrical, having an Underwriters' Laboratories, Inc., listing or other equivalent national testing laboratory approval, and install the smoke alarms in accordance with either the standards of the National Fire Protection Association or the minimum protection designated in the manufacturer's instructions, which the landlord shall retain or provide as proof of compliance. The landlord shall replace or repair the smoke alarms within 15 days of receipt of notification if the landlord is notified of needed replacement or repairs in writing by the tenant. The landlord shall ensure that a smoke alarm is operable and in good repair at the beginning of each tenancy. Unless the landlord and the tenant have a written agreement to the contrary, the landlord shall place new batteries in a battery-operated smoke alarm at the beginning of a tenancy and the tenant shall replace the batteries as needed during the tenancy, except where the smoke alarm is a tamper-resistant, 10-year lithium battery smoke alarm as required by subdivision (5a) of this subsection. Failure of the tenant to replace the batteries as needed shall not be considered as negligence on the part of the tenant or the landlord.

(5a) After December 31, 2012, when installing a new smoke alarm or replacing an existing smoke alarm, install a tamper-resistant, 10-year lithium battery smoke alarm. However, the landlord shall not be required to install a tamper-resistant, 10-year lithium battery smoke alarm as required by this subdivision in either of the following circumstances:

a. The dwelling unit is equipped with a hardwired smoke alarm with a battery backup.
b. The dwelling unit is equipped with a smoke alarm combined with a carbon monoxide alarm that meets the requirements provided in subdivision (7) of this section.

(6) If the landlord is charging for the cost of providing water or sewer service pursuant to G.S. 42-42.1 and has actual knowledge from either the supplying water system or other reliable source that water being supplied to tenants within the landlord's property exceeds a maximum contaminant level established pursuant to Article 10 of Chapter 130A of the General Statutes, provide notice that water being supplied exceeds a maximum contaminant level.

(7) Provide a minimum of one operable carbon monoxide alarm per rental unit per level, either battery-operated or electrical, that is listed by a nationally recognized testing laboratory that is OSHA-approved to test and certify to American National Standards Institute/Underwriters Laboratories Standards ANSI/UL2034 or ANSI/UL2075, and install the carbon monoxide alarms in accordance with either the standards of the National Fire Protection Association or the minimum protection designated in the manufacturer's instructions, which the landlord shall retain or provide as proof of compliance. A landlord that installs one carbon monoxide alarm per rental unit per level shall be deemed to be in compliance with standards under this subdivision covering the location and number of alarms. The landlord shall replace or repair the carbon monoxide alarms within 15 days of receipt of notification if the landlord is notified of needed replacement or repairs in writing by the tenant. The landlord shall ensure that a carbon monoxide alarm is operable and in good repair at the beginning of each tenancy. Unless the landlord and the tenant have a written agreement to the contrary, the landlord shall place new batteries in a battery-operated carbon monoxide alarm at the beginning of a tenancy, and the tenant shall replace the batteries as needed during the tenancy. Failure of the tenant to replace the batteries as needed shall not be

considered as negligence on the part of the tenant or the landlord. A carbon monoxide alarm may be combined with smoke alarms if the combined alarm does both of the following: (i) complies with ANSI/UL2034 or ANSI/UL2075 for carbon monoxide alarms and ANSI/UL217 for smoke alarms; and (ii) emits an alarm in a manner that clearly differentiates between detecting the presence of carbon monoxide and the presence of smoke. This subdivision applies only to dwelling units having a fossil-fuel burning heater, appliance, or fireplace, and in any dwelling unit having an attached garage. Any operable carbon monoxide detector installed before January 1, 2010, shall be deemed to be in compliance with this subdivision.

(8) Within a reasonable period of time based upon the severity of the condition, repair or remedy any imminently dangerous condition on the premises after acquiring actual knowledge or receiving notice of the condition. Notwithstanding the landlord's repair or remedy of any imminently dangerous condition, the landlord may recover from the tenant the actual and reasonable costs of repairs that are the fault of the tenant. For purposes of this subdivision, the term "imminently dangerous condition" means any of the following:

a. Unsafe wiring.
b. Unsafe flooring or steps.
c. Unsafe ceilings or roofs.
d. Unsafe chimneys or flues.
e. Lack of potable water.
f. Lack of operable locks on all doors leading to the outside.
g. Broken windows or lack of operable locks on all windows on the ground level.
h. Lack of operable heating facilities capable of heating living areas to 65 degrees Fahrenheit when it is 20 degrees Fahrenheit outside from November 1 through March 31.
i. Lack of an operable toilet.
j. Lack of an operable bathtub or shower.
k. Rat infestation as a result of defects in the structure that make the premises not impervious to rodents.
l. Excessive standing water, sewage, or flooding problems caused by plumbing leaks or inadequate drainage that contribute to mosquito infestation or mold.

(b) The landlord is not released of his obligations under any part of this section by the tenant's explicit or implicit acceptance of the landlord's failure to provide premises complying with this section, whether done before the lease was made, when it was made, or after it was made, unless a governmental subdivision imposes an impediment to repair for a specific period of time not to exceed six months. Notwithstanding the provisions of this subsection, the landlord and tenant are not prohibited from making a subsequent written contract wherein the tenant agrees to perform specified work on the premises, provided that said contract is supported by adequate consideration other than the letting of the premises and is not made with the purpose or effect of evading the landlord's obligations under this Article.
(1977, c. 770, s. 1; 1995, c. 111, s. 2; 1998-212, s. 17.16(I); 2004-143, s. 3; 2008-219, ss. 2, 6; 2009-279, s. 3; 2010-97, s. 6(a); 2012-92, s. 1.)

§ 42-42.1. Water and electricity conservation.

(a) For the purpose of encouraging water and electricity conservation, pursuant to a written rental agreement, a landlord may charge for the cost of providing water or sewer service to tenants who occupy the same contiguous premises pursuant to G.S. 62-110(g) or electric service pursuant to G.S. 62-110(h).

(b) The landlord may not disconnect or terminate the tenant's electric service or water or sewer services due to the tenant's nonpayment of the amount due for electric service or water or sewer services.
(2004-143, s. 4; 2011-252, s. 2.)

§ 42-46. Authorized fees.

(a) In all residential rental agreements in which a definite time for the payment of the rent is fixed, the parties may agree to a late fee not inconsistent with the provisions of this subsection, to be chargeable only if any rental payment is five days or more late. If the rent:

(1) Is due in monthly installments, a landlord may charge a late fee not to exceed fifteen dollars ($15.00) or five percent (5%) of the monthly rent, whichever is greater.

(2) Is due in weekly installments, a landlord may charge a late fee not to exceed four dollars ($4.00) or five percent (5%) of the weekly rent, whichever is greater.

(3) Repealed by Session Laws 2009-279, s. 4, effective October 1, 2009, and applicable to leases entered into on or after that date.

(b) A late fee under subsection (a) of this section may be imposed only one time for each late rental payment. A late fee for a specific late rental payment may not be deducted from a subsequent rental payment so as to cause the subsequent rental payment to be in default.

(c) Repealed by Session Laws 2009-279, s. 4, effective October 1, 2009, and applicable to leases entered into on or after that date.

(d) A lessor shall not charge a late fee to a lessee pursuant to subsection (a) of this section because of the lessee's failure to pay for water or sewer services provided pursuant to G.S. 62-110(g).

(e) Complaint-Filing Fee. – Pursuant to a written lease, a landlord may charge a complaint-filing fee not to exceed fifteen dollars ($15.00) or five percent (5%) of the monthly rent, whichever is greater, only if the tenant was in default of the lease, the landlord filed and served a complaint for summary ejectment and/or money owed, the tenant cured the default or claim, and the landlord dismissed the complaint prior to judgment. The landlord can include this fee in the amount required to cure the default.

(f) Court-Appearance Fee. – Pursuant to a written lease, a landlord may charge a court-appearance fee in an amount equal to ten percent (10%) of the monthly rent only if the tenant was in default of the lease; the landlord filed, served, and prosecuted successfully a complaint for summary ejectment and/or monies owed in the small claims court; and neither party appealed the judgment of the magistrate.

(g) Second Trial Fee. – Pursuant to a written lease, a landlord may charge a second trial fee for a new trial following an appeal from the judgment of a magistrate. To qualify for the fee, the landlord must prove that the tenant was in default of the lease and the landlord prevailed. The landlord's fee may not exceed twelve percent (12%) of the monthly rent in the lease.

(h) Limitations on Charging and Collection of Fees.

(1) A landlord who claims fees under subsections (e) through (g) of this section is entitled to charge and retain only one of the above fees for the landlord's complaint for summary ejectment and/or money owed.

(2) A landlord who earns a fee under subsections (e) through (g) of this section may not deduct payment of that fee from a tenant's subsequent rent payment or declare a failure to pay the fee as a default of the lease for a subsequent summary ejectment action.

(3) It is contrary to public policy for a landlord to put in a lease or claim any fee for filing a complaint for summary ejectment and/or money owed other than the ones expressly authorized by subsections (e) through (g) of this section, and a reasonable attorney's fee as allowed by law.

(4) Any provision of a residential rental agreement contrary to the provisions of this section is against the public policy of this State and therefore void and unenforceable.

(5) If the rent is subsidized by the United States Department of Housing and Urban Development, by the United States Department of Agriculture, by a State agency, by a public housing authority, or by a local government, any fee charged pursuant to this section shall be calculated on the tenant's share of the contract rent only, and the rent subsidy shall not be included.

(1987, c. 530, s. 1; 2001-502, s. 4; 2003-370, s. 1; 2004-143, s. 5; 2009-279, s. 4.)

§ 42-51. Permitted uses of the deposit.

(a) Security deposits for residential dwelling units shall be permitted only for the following:

(1) The tenant's possible nonpayment of rent and costs for water or sewer services provided pursuant to G.S. 62-110(g) and electric service pursuant to G.S. 62-110(h).

(2) Damage to the premises, including damage to or destruction of smoke alarms or carbon monoxide alarms.

(3) Damages as the result of the nonfulfillment of the rental period, *except* where the tenant terminated the rental agreement under G.S.42-45, G.S.42-45.1, or because the tenant was forced to leave the property because of the landlord's violation of Article 2A of Chapter 42 of the General Statutes or was constructively evicted by the landlord's violation of G.S.42-42(a).

(4) Any unpaid bills that become a lien against the demised property due to the tenant's occupancy.

(5) The costs of re-renting the premises after breach by the tenant, *including any reasonable fees or commissions paid by the landlord to a licensed real estate broker to re-rent the premises*.

(6) The costs of removal and storage of the tenant's property after a summary ejectment proceeding.

(7) Court costs.

(8) Any fee permitted by G.S. 42-46.

(b) The security deposit shall not exceed an amount equal to two weeks' rent if a tenancy is week to week, one and one-half months' rent if a tenancy is month to month, and two months' rent for terms greater than month to month. These deposits must be fully accounted for by the landlord as set forth in G.S. 42-52.

(1977, c. 914, s. 1; 1983, c. 672, s. 3; 2001-502, s. 5; 2004-143, s. 6; 2011-252, s. 3; 2012-17, s. 4; 2012-194, s. 59(a), (b).)

§ 28A-25-7. Removal of tangible personal property by landlord after death of residential tenant.

(a) When a decedent who is the *sole occupant of a dwelling unit* dies leaving tangible personal property in the dwelling unit, the landlord may take possession of the property upon the filing of an affidavit that complies with the provisions of subsection (b) of this section if all of the following conditions have been met:

(1) At least 10 days has elapsed from the date the paid rental period for the dwelling unit has expired.

(2) No personal representative, collector, or receiver has been appointed for the decedent's estate under the provisions of this Chapter, Chapter 28B, or Chapter 28C of the General Statutes in the county in which the dwelling unit is located.

(3) No affidavit related to the decedent's estate has been filed under the provisions of G.S. 28A-25-1 or G.S. 28A-25-1.1 in the county in which the dwelling unit is located.

(b) The affidavit required by subsection (a) of this section shall be on a form approved by the Administrative Office of the Courts and supplied by the clerk of court. The affidavit shall state all of the following:

(1) The name and address of the affiant and the fact that the affiant is the lessor of the dwelling unit.

(2) The name of the decedent and the fact that the decedent was the lessee and sole occupant of the dwelling unit and died leaving tangible personal property in the dwelling unit. The affiant shall attach to the affidavit a copy of the decedent's death certificate.

(3) The address of the dwelling unit.

(4) The date of the decedent's death.

(5) The date the paid rental period expired and the fact that at least 10 days has elapsed since that date.

(6) The affiant's good faith estimate of the value of the tangible personal property remaining in the dwelling unit. The affiant shall attach to the affidavit an inventory of the property which shall include, at a minimum, the categories of furniture, clothing and accessories, and miscellaneous items.

(7) That no personal representative, collector, or receiver has been appointed for the decedent's estate under the provisions of this Chapter, Chapter 28B, or Chapter 28C of the General Statutes in the county in

which the dwelling unit is located and that no affidavit has been filed in the county under the provisions of G.S. 28A-25-1 or G.S. 28A-25-1.1.

(8) The name of the person identified in the rental application, lease agreement, or other landlord document as the authorized person to contact in the event of the death or emergency of the tenant; that the affiant has made a good faith attempt to contact that person to urge that action be taken to administer the decedent's estate; and that either the affiant was unsuccessful in contacting the person or, if contacted, the person has not taken action to administer the decedent's estate. The affiant shall state the efforts made to contact the person identified in the rental application, lease agreement, or other landlord document.

(c) The affidavit shall be filed in the office of the clerk of court in the county in which the dwelling unit is located. The affidavit shall be filed by the clerk upon the landlord's payment of the fee of thirty dollars ($30.00) and shall be indexed in the index to estates. The landlord shall mail a copy of the affidavit to the person identified in the rental application, lease agreement, or other landlord document as the authorized person to contact in the event of the death or emergency of the tenant. If no contact person is identified in the rental application, lease agreement, or other landlord document, the landlord shall cause notice of the filing of the affidavit to be posted at the door of the landlord's primary rental office or the place where the landlord conducts business and at the county courthouse in the area designated by the clerk for the posting of notices.

(d) The filing of an affidavit that complies with the provisions of subsection (b) of this section shall be sufficient to require the transfer of the property remaining in the decedent's dwelling unit to the landlord. Upon the transfer, the landlord may remove the property from the dwelling unit and deliver it for storage to any storage warehouse in the county in which the dwelling unit is located or in an adjoining county if no storage warehouse is located in that county. The landlord may also store the property in the landlord's own storage facility. Notwithstanding any provision of Chapter 42 of the General Statutes, after removing the property from the dwelling unit as provided in this subsection, the landlord shall be in possession of the dwelling unit and may let the unit as the landlord deems fit.

(e) If, at least 90 days after the landlord filed the affidavit required by subsection (a) of this section, no personal representative, collector, or receiver has been appointed under the provisions of this Chapter, Chapter 28B, or Chapter 28C of the General Statutes in the county in which the dwelling unit is located and no affidavit has been filed in the county under the provisions of G.S. 28A-25-1 or G.S. 28A-25-1.1, the landlord may take any of the following actions related to the decedent's property:

(1) Sell the property as provided in subsection (f) of this section.

(2) Deliver the property into the custody of a nonprofit organization regularly providing free, or at a nominal price, clothing and household furnishings to people in need for disposition in the normal course of the organization's operations. The organization shall not be liable to anyone for the disposition of the property.

(f) If the landlord delivers the property to a nonprofit organization as authorized in subdivision (2) of subsection (e) of this section, the landlord shall provide an accounting to the clerk stating the nature of the action and the date on which the action was taken. A landlord who elects to sell the property as authorized in subdivision (1) of subsection (e) of this section may do so at a public or private sale. Whether the sale is public or private, the landlord shall, at least seven days prior to the day of sale, give written notice to the clerk and post written notice of the sale in the area designated by the clerk for the posting of notices and at the door of the landlord's primary rental office or the place where the landlord conducts business stating the date, time, and place of the sale, and that any surplus of proceeds from the sale, after payment of unpaid rents, damages, packing and storage fees, filing fees, and sale costs shall be delivered to the clerk. The landlord may apply the proceeds of the sale to the unpaid rents, damages, packing and storage fees, filing fees, and sale costs. Any surplus from the sale shall be paid to the clerk, and the landlord shall provide an accounting to the clerk showing the manner in which the proceeds of the sale were applied. The clerk shall administer the funds in the same manner as provided in G.S. 28A-25-6.

(g) If, at any time after the landlord files the affidavit required by subsection (a) of this section but before the landlord takes any of the actions authorized in subsection (e) of this section, the landlord is presented

with letters of appointment or another document issued by a court indicating that a personal representative, collector, or receiver has been appointed for the decedent's estate or an affidavit filed under the provisions of G.S. 28A-25-1 or G.S. 28A-25-1.1, the landlord shall deliver the decedent's property to the personal representative, collector, or receiver appointed or to the person who filed the affidavit.

(h) Notwithstanding the provisions of subsections (a) through (g) of this section, if the decedent dies leaving tangible personal property of five hundred dollar ($500.00) value or less in the dwelling unit, the landlord may, without filing an affidavit, deliver the property into the custody of a nonprofit organization regularly providing free, or at a nominal price, clothing and household furnishings to people in need upon that organization agreeing to identify and separately store the property for 30 days and to release the property to a person authorized by law to act on behalf of the decedent at no charge within the 30-day period. Prior to delivering the property to the nonprofit organization, the landlord shall prepare an inventory of the property which shall include, at a minimum, the categories of furniture, clothing and accessories, and miscellaneous items. A landlord electing to act under this subsection shall immediately send a notice by first-class mail containing the name and address of the property recipient and a copy of the inventory to the person identified in the rental application, lease agreement, or other landlord document as the authorized person to contact in the event of the death or emergency of the tenant and shall post the same notice for 30 days or more at the door of the landlord's primary rental office or the place where the landlord conducts business. The notice posted shall not include an inventory of the property. Any nonprofit organization agreeing to receive personal property under this subsection shall not be liable to the decedent's estate for the disposition of the property, provided that the property has been separately identified and stored for release to a person authorized by law to act on behalf of the decedent for a period of 30 days.

(i) If any lessor, landlord, or agent seizes possession of the decedent's tangible personal property in any manner not in accordance with the provisions of this section, any person authorized by law to act on behalf of the decedent shall be entitled to recover possession of the property or compensation for the value of the property and, in any action brought by any person authorized by law to act on behalf of the decedent, the landlord shall be liable to the decedent's estate for actual damages, but not including punitive damages, treble damages, or damages for emotional distress.

(j) The procedure authorized in this section may be used as an alternative to a summary ejectment action under Chapter 42 of the General Statutes. A landlord shall, in his or her discretion, determine whether to proceed under the provisions of this section or under Chapter 42 of the General Statutes.
(2012-17, s. 7.)

Death of Tenant-Sole Occupant

The General Assembly also created a procedure, *effective October 1, 2012*, by which a lessor may remove a former residential tenant's personal property from the rental unit upon the tenant's death in lieu of initiating a summary ejectment action. ***The procedure is only available where the decedent was the* sole occupant *of the dwelling*.** GS 28A-25-7 (reprinted above) sets forth the requirements. The new procedure allows a landlord to file an affidavit with the Clerk of Court of the county in which the dwelling is located to enable the landlord to remove the deceased tenant's personal property from the unit so it may be re-rented. The primary points are below.

1) The landlord may not file the affidavit until at least 10 days after the paid lease term expires and then only if no other affidavits have been filed by a personal representative, collector or receiver to initiate an estate proceeding.

> *Example:* Tenant/sole occupant pays current month's rent on July 3 and dies on July 22. Landlord can't file affidavit until August 11 (as rent is paid through July 31), and then only if no one else has come forward.

2) The landlord must:
- itemize the personal property remaining in the leased dwelling and provide a good faith estimate of its value;
- pay a $30.00 fee to file the affidavit; *and*
- mail a copy of the affidavit to the person named as emergency contact for the former tenant. If there is no known emergency contact, the landlord must post a Notice of the filing of the affidavit on the landlord's primary rental/business office and at the courthouse.

3) The landlord may remove the decedent's personal property *after* filing the affidavit *and obtaining a court order*. The landlord must *store the deceased tenant's personal property for at least ninety (90) days* and must release the property during that period to any individual duly appointed as personal representative, collector or receiver. If no such person appears, the landlord may either sell the decedent's property or donate it to a non-profit organization that provides clothing and household furnishings to people in need. The landlord must provide a written accounting to the Clerk of Court of how the property was disposed and any sale proceeds, if applicable, were distributed.

CAVEAT: The new law permits a landlord to avoid the procedure outlined above if the *value* of the personal property remaining in the dwelling is **$500 or less AND** the landlord delivers it to a nonprofit to hold for 30 days. The *landlord must first make a written inventory* itemizing property in one of four categories: furniture, clothing, accessories, and miscellaneous. Then, **without filing any affidavit**, the landlord may deliver the inventoried property to a non-profit organization providing clothing and household furnishings to people in need ***so long as*** the nonprofit agrees to separately store the property for 30 days and release it to any duly appointed personal representative, collector or receiver within that 30 day period. The landlord must mail a copy of the inventory and the name and address of the nonprofit to any person named in the lease or other document as an emergency contact and post the notice (*without* the inventory) on the door of the landlord's primary rental/business office *for 30 days*.

The Administrative Office of the Courts (AOC) has drafted a form affidavit for a landlord's use which is reprinted after the Utility Services discussion below. The draft is awaiting final approval and hopefully should be available by Fall 2014, if not earlier. Licensees may download any AOC forms by going to www.nccourts.org and click on "Forms" and then enter the form number, i.e., AOC-E-450. This new procedure is an *alternative* to filing a summary ejectment action when the deceased was the sole occupant of the premises, but landlords still have the option of proceeding under Chapter 42 summary ejectment laws if they wish.

Utility Services and Tenant Security Deposits

In 1977, the NC General Assembly decided that energy conservation would be enhanced if tenants had to pay their own utility bills. Accordingly, they enacted **GS 143-151.42** which made it unlawful after September 1, 1977 to have a new residential building served by a master meter for ***electric or natural gas service***. Rather, "...Each individual dwelling unit shall have individual electric service with a separate meter ... and individual natural gas service with a separate natural gas meter, *which service and meters shall be in the name of the tenant* or other occupant of said apartment or other dwelling unit." The law applied to any dwelling unit normally rented or leased for one month or longer, including apartments, condominiums and townhomes.

However, there are exceptions. For water and sewer services, owners have been able to apply to the NC Utilities Commission for a certificate of convenience and necessity that allows the owner to charge persons occupying the same contiguous premises for water and sewer services provided through the owner's account. The law [**G.S. 62-110(g)**] specifies how each tenant's costs are determined. As of ***October 1, 2011***, a similar procedure was created for ***electric service*** to allow a *lessor of individually metered units in the lessor's name to allocate the cost of electric service among the tenants "**when the lessor has a separate lease for each bedroom in the unit**."* For example, an owner of a condominium unit that has four bedrooms and four bathrooms who has separate leases with four different people to lease each bedroom could utilize the new procedure. The statute, **G.S. 62-110(h)**, lists the many attendant requirements, including what the monthly notice to the tenant must contain, and requires the lessor to retain records of tenant cost allocations for a minimum of 36 months, among other things. [Note: the Commission's record retention rule (A.0108) requires a broker to keep these records for three years *from the termination of the transaction*.]

Note that both of the foregoing limited exceptions for water/sewer service and/or electric service require the lessor to obtain written permission from the Utilities Commission which views the landlord/lessor as a "reseller" of utility services. When utilizing the GS 62-110(g) and (h) exceptions mentioned above, the tenant's obligation to pay water/sewer and/or electric service is *in addition to* the rent amount. In these situations, ***residential landlord/tenant law expressly prohibits a landlord from disconnecting either the landlord-provided water/sewer service or the electric service due to a tenant's non-payment*** [GS 42-42.1] and further states that "*...**an arrearage in costs owed by a tenant for water or sewer services ...or electric service ... shall <u>not</u> be used as a basis for termination of a lease**....* Any *payment* to the landlord *shall be applied first to the rent owed and then to charges* for electric service, or water or sewer service, unless otherwise designated by the tenant." [GS 42-26(b).] Further, GS 42-46 only allows a landlord to charge a late fee for ***rent*** and expressly prohibits any late charge being assessed for late utility payments. While a tenant's delinquency in paying either water/sewer service or electric service provided by the landlord may not be used to terminate the lease and may not be deducted first from future rent payments, the *arrearage may be deducted by the landlord from that tenant's tenant security deposit* **after** ***the termination of that tenant's tenancy***.

However, in 2013 the General Assembly revised the 1977 statute to provide an additional exception from the requirement that individual meters and utility service be in the tenant's name. Landlords may either provide electric service as a separate charge in addition to rent under G.S. 62-110(h) discussed in the preceding two paragraphs **OR** the tenant and landlord may agree in the lease that the cost of ***electric or natural gas service*** in the landlord's name be included as part of the monthly rental payments. For example, rather than paying $1,000 per month rent plus the prorated amount of the actual electric service to the premises, the parties could agree that the tenant pay a flat $1200 per month rent that also includes landlord provided electric or natural gas service. In the latter case, the landlord is solely responsible for paying the gas and electric service and if the tenant's consumption exceeds the landlord's estimate, the landlord is responsible for paying the excess charges and can't later recoup any of it from the tenant. For a more in-depth discussion of this issue, licensees are urged to google an *Advice Letter for Residential Apartment Owners* updated by the Public Staff of the NC Utilities Commission in July 2013.

Insert **AOC-E-450** Draft "Affidavit for Removal of Personal Property of Deceased Residential Tenant"

(TYPE OR PRINT IN BLACK INK)

STATE OF NORTH CAROLINA

_____ County

File No.

In The General Court Of Justice
Superior Court Division
Before The Clerk

IN THE MATTER OF THE ESTATE OF:		**AFFIDAVIT FOR REMOVAL OF PERSONAL PROPERY OF DECEASED RESIDENTIAL TENANT**	
Name, Street Address, City, State And Zip Code Of Deceased Tenant		G.S. 28A-25-7; 42-36.3; 42-40(3)	
Social Security No. (Last Four Digits)	*County Of Domicile At Time Of Death*	*Date Of Death*	*Place Of Death*
Name, Street Address, PO Box, City, State And Zip Code Of Landlord		*Good Faith Estimate Of The Value Of The Tangible Personal Property*	
		$ _____	
Telephone No.			
Legal Residence (County, State)		*Date Rental Period Expired*	
Street Address, PO Box, City, State And Zip Code Of The Leased Premises		*Name And Address Of Contact Person Identified In The Lease, Lease Application Or Other Document, if any*	

I, the undersigned, being first duly sworn, say that:

1. I am the owner/property manager and landlord for the above described leased premises. The tenant named above was the lessee and sole occupant of the leased premises, and died leaving tangible personal property in the dwelling unit. A copy of the death certificate is attached.

2. At least 10 days have elapsed from the date the paid rental period for the dwelling unit expired.

☐ 3. The undersigned certifies that no contact person was identified in the rental application, lease agreement, or other document.

☐ 4. The undersigned has made a good faith effort to notify the contact person, identified in the rental application, lease agreement or other document to urge that action be taken to administer the estate of the decedent. The undersigned hereby certifies that I have made the following efforts or taken the following steps to notify the contact person for the deceased tenant (for example, checking phone book listings, tax records, DMV records, etc.):

_____

_____

_____

_____

_____

_____

_____

5. The undersigned hereby certifies that listed below is a detailed itemization of the personal property remaining in the leased premises at the time of death of the deceased tenant (Attach additional pages as needed).

   a) Furniture:

   b) Clothing:

   c) Accessories:

   d) Miscellaneous:

6. No personal representative, collector, receiver, or collector by affidavit has been appointed or authorized under Chapters 28A, 28B or 28C of the General Statutes in the county where the dwelling unit is located.

7. The landlord has or immediately upon the filing of this Affidavit will mail a copy of this application to the contact person named above or, if no contact person is listed in the above named documents, the landlord has or will immediately post a copy of this Affidavit at the door of the landlord's primary rental office, or the place where the landlord conducts business, and, in addition, at the county courthouse in the area designated by the clerk for the posting of notices.

Name Of Owner/Property Manager/Landlord	*Signature Of Owner/Property Manager/Landlord*	*Date*

SWORN/AFFIRMED AND SUBSCRIBED TO BEFORE ME	
Date	
Signature of Person Authorized To Administer Oaths	
☐ *Deputy CSC* ☐ *Assistant CSC* ☐ *Clerk Of Superior Court*	
☐ *Notary*	*Date My Commission Expires*
SEAL	*County Where Notarized*