SB1302

Measure Title:	**RELATING TO FAIR HOUSING REASONABLE ACCOMMODATIONS.**
Report Title:	**Fair Housing; Reasonable Accommodations**
Description:	**Makes the reasonable accommodations provisions in state fair housing law consistent with federal Fair Housing Act case law and interpretations.**
Companion:	**HB1075**
Package:	**Gov**
Current Referral:	**CPN, JDL**

DISABILITY AND COMMUNICATION ACCESS BOARD

919 Ala Moana Boulevard, Room 101 • Honolulu, Hawaii 96814
Ph. (808) 586-8121 (V/TDD) • Fax (808) 586-8129

February 9, 2011

TESTIMONY TO THE SENATE COMMITTEE ON COMMERCE AND CONSUMER PROTECTION

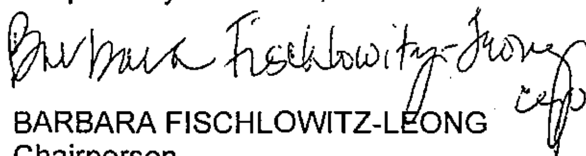
Senate Bill 1302 – Relating to Fair Housing Reasonable Accommodation

The Disability and Communication Access Board supports Senate Bill 1302 relating to fair housing and the provision of reasonable accommodation for persons with disabilities. The purpose of the bill is to conform Hawaii's housing discrimination law in §515-3, Hawaii Revised Statutes, to the current Fair Housing Act with respect to the provision of service animals and comfort animals.

We note that there is another bill, Senate Bill 892 Relating to Service Animals, which is broader and addresses the issue of service animals in places of public accommodation/public conveyances as well as in real estate transactions under §515-3, Hawaii Revised Statutes. We believe that these two (2) bills could possibly be combined.

Thank you for the opportunity to testify.

Respectfully submitted,



BARBARA FISCHLOWITZ-LEONG
Chairperson
Legislative Committee

FRANCINE WAI
Executive Director

HAWAI'I CIVIL RIGHTS COMMISSION

830 PUNCHBOWL STREET, ROOM 411 HONOLULU, HI 96813 ·PHONE: 586-8636 FAX: 586-8655 TDD: 568-8692

February 9, 2011
Conference Room 229
8:30 a.m.

To: The Honorable Rosalyn Baker, Chair
Members of the Senate Committee on Commerce and Consumer Affairs

From: Coral Wong Pietsch, Chair
and Commissioners of the Hawai'i Civil Rights Commission

Re: S.B. No. 1302

The Hawai'i Civil Rights Commission (HCRC) has enforcement jurisdiction over state laws prohibiting discrimination in employment, housing, public accommodations, and access to state and state-funded services. The HCRC carries out the Hawai'i constitutional mandate that "no person shall be discriminated against in the exercise of their civil rights because of race, religion, sex or ancestry". Art. I, Sec. 5.

The HCRC supports S.B. No. 1302 which amends the state's fair housing law to be consistent with provisions found in the federal Fair Housing Act (FHA) by: 1) clarifying the definition of "service animal"; 2) clarifying that a request for a reasonable accommodation by a person with a disability may include the use of a service animal or comfort animal; and 3) defining "comfort animal". The proposed amendments conform with current interpretation of state and federal fair housing law and they clarify the statutory language rather than change the law.

Currently H.R.S. §515-3(8) prohibits an owner or person engaging in a real estate transaction from denying equal opportunity to use and enjoy a housing accommodation to a person with a disability who uses a guide dog, signal dog, or service animal. The terms "guide dog" and "signal dog" are unnecessary and should be deleted because they are included in the definition of the term "service animal".

In addition, H.R.S. §515-3(11) prohibits any owner or person engaging in a real estate transaction from refusing to make reasonable accommodations in rules, policies, practices or services, if the accommodations may be necessary to afford a person with a disability an equal opportunity to use and enjoy the housing unit. Under current federal and state law interpretations, a reasonable accommodation can include the use of a service animal or comfort animal. See, Joint Statement of HUD and the DOJ on Reasonable Accommodations, Question 6 Example 3, May 17, 2004; see also, Janush v. Charities Housing Development Corp., 169 F.Supp.2d. 1133, 1136 (N.D.Cal.2000) (in which the court found a triable issue of fact as to whether a tenant's birds and cats could constitute a reasonable accommodation for her mental disability);); Auburn Woods I Homeowners Association v. Fair Employment and Housing Commission, 121 Cal. App. 4th 1578, 18 Cal. Rptr. 3d 669 (2004) (reasonable housing accommodation under California Fair Employment Housing Act could include the use of a companion dog); Sec'y, U.S. Dep't of Hous. and Urban Dev. v. Dutra, HUD ALJ 09-93-1753-8, 1996 WL 657690 Nov. 12, 1996 (cat providing emotional support that eased anxiety and fibromyalgia symptoms a reasonable accommodation); Sec'y, U.S. Dep't of Hous. and Urban Dev. v. Riverbay Corp., HUD ALJ 02-93-0320-1, 1995 WL 108212 Mar. 1, 1995 (companion dog a reasonable accommodation). Therefore, the proposed amendments move the service animal provisions from H.R.S. §515-3(8) to the reasonable accommodations subsection and also include the clarification that a reasonable accommodation can include the use of a comfort animal. The amendments also contain a definition of the term "comfort animal".

For these reasons, the HCRC supports S.B. No. 1302 and urges your favorable consideration.

P.O. Box 976
Honolulu, Hawai`i 96808

The Honorable Rosalyn H. Baker, Chair
Committee on Commerce and Consumer Protection

RE: BILL: SB 1302
DATE: February 9, 2011
TIME: 8:30 a.m.
PLACE: Conference Room 229

Dear Senator Baker and Members of the Committee:

This testimony is submitted on behalf of the Hawai`i Legislative Action Committee of the Community Associations Institute ("CAI"). CAI is a non-profit national and statewide organization whose members include condominium associations, planned community associations, residential cooperatives, homeowners, managing agents, and others involved in creating, managing, servicing, and living in common interest communities. The Hawai`i LAC is committed to protecting the rights of handicapped and disabled persons, but is concerned that the Committee may not understand the full context of this bill and that it is not the simple housekeeping matter that it purports to be.

It is, of course, the Legislature's prerogative to amend Chapter 515 to achieve the purposes which the Legislature believes are necessary and desirable and its function to weigh competing interests and opinions, including whether private contracts (such as condominium governing documents) must yield to the public good. Indeed, the purpose of Chapter 515 is to invalidate discriminatory clauses of many kinds that were once commonly imbedded in deeds and covenants and discriminatory practices that were once considered acceptable in real estate transactions. The Hawai`i LAC would note, however, that this bill, as drafted, may actually be contrary to the aim of protecting the rights of the handicapped and disabled and may actually put more obstacles in their path than now exist. We respectfully urge, therefore, that the bill be amended to create a task force or some other mechanism by which all of the stakeholders affected by this complex issue will have an opportunity to participate collaboratively without the pressures created by legislative deadlines and the adversarial context of committee hearings.

The stated purpose of this bill is to make "the reasonable accommodations provisions in state fair housing law consistent with federal Fair Housing Act case law and interpretations." However, the proponent of the bill, presumably the Hawai`i Civil Rights Commission, conveniently ignores, and apparently assumes that the Legislature won't be aware of, the fact that **the bill is contrary to the governing federal case law in Hawai`i and therefore is not consistent with the FHA case law and interpretation in the District of Hawai`i or, for that matter, in the U.S. Ninth Circuit**.

In *Prindable v. Association of Apartment Owners of 2987 Kalakaua,* 304 F. Supp. 2d 1245 (D. Hawai`i 2003), affirmed on other grounds by *Dubois v Association of Apartment Owners of 2987 Kalakaua,* 453 F. 3d. 1175 (9th Cir. 2005), U.S. District Court Judge Alan C. Kay ruled:

> The term "service animal" is not defined by the FHA or the accompanying regulations, but it is understood for purposes of the Americans with Disabilities Act of 1990 ("ADA") to include "any guide dog, or other animal ***individually trained*** to do work or perform tasks for the benefit of an individual with a disability ...." [Footnote omitted] 28 C.F.R. § 36.104 (2002). This description comports with the example of a reasonable accommodation for a blind rental applicant provided by the agency regulations to the FHA, see 24 C.F.R. § 100.204(b) (2002), and with case law. [Citations Omitted]. The Court agrees with and adopts the ADA definition for purposes of the reasonable accommodation requirement of § 3604(f)(3)(B). . . .
>
> Plainly, most animals are not equipped "to do work or perform tasks for the benefit of an individual with a disability." See Bronk, 54 F.3d at 429 n. 6. There must instead be something--***evidence of individual training***--to set the service animal apart from the ordinary pet. [Citations omitted.] The primary handicap at issue in this case is mental and emotional (specifically, depression, anxiety and dizziness) rather than physical in nature. It therefore follows that the ***animal at issue must be peculiarly suited to ameliorate the unique problems of the mentally disabled*** . . . This is not a taxing requirement, however, and there are no federally-mandated animal training standards.

Id. at 1256. In footnote 25 of the opinion, Judge Kay further explained that a pet that simply makes an owner feel better does not qualify as a service animal. Otherwise, as Judge Kay notes, there would be no stopping point as every person suffering from depression, anxiety, or low self-esteem would be entitled to an animal of his/her choice. Judge Kay found that there must be some type of training to make the animals into service animals:

> Plaintiff's counsel suggested canines (as a species) posses the ability to give unconditional love, which simply makes people feel better. Although this may well be true, counsel's's reasoning permits no identifiable stopping point: every person with a handicap or illness that caused or brought about feelings of depression, anxiety or low self esteem would be entitled to the dog of their choice, without regard to individual training or ability. And if certain people liked cats, fish, reptiles or birds better than dogs, there would be no logical reason to deny an accommodation for these animals. The test would devolve from "individually trained to do work or perform tasks" to "of some comfort." The FHA–a sweeping enactment–is not quite so broad. Certainly, "some type of training is necessary to transform a pet into a service animal." *In re Kenna Homes,* 557 S.E.2d at 797.

The law in this area is not settled, however, again contrary to the impression given by the bill's proponents. For example, in *Overlook Mutual Homes, Inc. v. Spencer*, 666 F.Supp.2d 850 (S.D. Ohio), the U. S. District Court disagreed with Judge Kay, noting that the ADA and the FHA had different purposes and that, in its opinion, "reasonable accommodation" in the FHA context should be interpreted to include untrained comfort animals.[1] Given this division of opinion, it is respectfully suggested that the Committee not accept as gospel that this is merely a housekeeping bill that reflects settled law.

Beyond these legal arguments, however, there is a basic philosophical issue. The governing documents of many condominium associations expressly prohibit owners and occupants from keeping animals of any kind. The existence of these prohibitions reflects the desire of the owners to avoid the problems that can be caused by even well-trained pets kept by responsible pet owners. In some cases, owners or tenants may have chosen to live in a no-pets building due to severe allergies or even a pathological fear of dogs or other animals.[2] This would be bad enough if the claims of people demanding the right to keep pets as service or comfort animals were all legitimate. However, even a cursory search of the internet discloses a plethora of sites boasting that, for a modest fee and completion of a simple application, they will provide an impressive certificate stating that any animal is a trained service or comfort animal without ever seeing the animal or verifying that it has been trained in any way or actually assists the allegedly disabled person or requesting any verification of the person's disability. Some of these sites specifically promote their services as a means of evading no-pets rules. One site states:

> **Yes, You Can Take Your Dog With You!** It's no secret that many businesses simply aren't pet-friendly, even though most of the population is. A large number of our clients register their dogs as Certified Service Animals or Emotional Support Animals (ESAs) not just to accompany them into stores, restaurants, motels, or on airline flights (for no extra cost), but to successfully qualify for housing where pets aren't allowed. Our Service Dog Certification documents formalize and simplify these processes and make qualifying for special housing hassle-free. If you and your service dog become certified with NSAR, both of you are immediately protected under federal law (ADA).
> ***Complete Service Animal Certification Kit - ONLY $64.95!***

See http://www.nsarco.com/. We respectfully suggest that Committee members visit this site to see for themselves how easy it is for anyone to self-certify that they are disabled (without even specifying their disability) and to self-certify that their animal is a service or emotional support animal (without providing any proof of training or information as to how the animal enables them to overcome their disability).

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[1] Note, also, that the ADA Title III rules and regulations have now been amended, effective March 1, 2011, to expressly exclude untrained comfort animals from the definition of "service animal."

[2] For example, a person already living in a no-pets building who was attacked by a dog as a child, or even as an adult, may be terrified by all dogs, no matter how small or well-behaved. Is allowing even a trained service animal a "reasonable accommodation" under those circumstances? Whose disability has priority?

Sad to say, it is evident that many non-disabled "scam artists" are perfectly willing to hijack the ADA and fair housing laws and to bully public accommodations and housing providers with threats of complaints to civil rights enforcement agencies in order to take ordinary pets into places where they are otherwise prohibited.

Also, as Judge Kay noted, defining "comfort animal" to mean "any animal that provides support, well-being, companionship or therapy for a person with a disability," means that "if certain people liked cats, fish, reptiles or birds better than dogs, there would be no logical reason to deny an accommodation for these animals." That being the case, if this bill is enacted in its present form, there would be no limit on the kinds of creatures that condominiums could be forced to allow as comfort animals.

What this means is that enacting this bill will not end the battle over reasonable accommodation requests for comfort animals and service animals. It will simply shift the battle to "dueling experts" as to the issues of whether the person requesting the accommodation is disabled as defined by Chapter 515[3] and whether allowing the requested animal is actually necessary to afford the person an equal opportunity to enjoy the use of the person's apartment. This, in turn, is likely to lead to more, rather than less, litigation. What is needed is rational, thoughtfully written legislation that addresses the interests of all stakeholders and truly protects the handicapped and disabled by preventing scammers from hijacking protective legislation.

Thank you for the opportunity to submit this testimony. If you have any questions, I can be reached at 697-6004 or by email at plahne@alf-hawaii.com.

COMMUNITY ASSOCIATIONS INSTITUTE
HAWAI'I LEGISLATIVE ACTION COMMITTEE

PHILIP L. LAHNE

[3] "[W]here a tenant suffers from a disability which is not apparent to a person untrained in medical matters, it is reasonable for a landlord or person similarly situated to require a second concurring opinion from a qualified physician selected by the landlord or person similarly situated to substantiate the tenant's need for a service animal." *In re Kenna Homes,* 557 S.E.2d at 799.

Jacqueline Earle
1221 Victoria Street, Apt. 3105
Honolulu, HI 96814
February 7, 2011

The Honorable Rosalyn H. Baker, Chair
The Honorable Brian T. Taniguchi, Vice Chair
Senate Committee on Commerce and Consumer Protection

RE: Bill: SB 1302
Date: February 9, 2011
Time: 8:30 a.m.
Place: Conference Room 229

Dear Senators Baker and Taniguchi and Members of the Committee:

This testimony is submitted on behalf of the Board of the Association of Apartment Owners of The Admiral Thomas Apartments ("The Admiral Thomas"), in opposition to SB 1302 as currently written. The Admiral Thomas is a member of the Community Associations Institute ("CAI"). We join in the written testimony submitted by CAI in opposition to this Bill, and add several insights drawn from our own building.

The Admiral Thomas is a small, vertical community, with 148 residential apartments on 35 floors. We do permit animals and pets in accordance with our House Rules, which limit the number and types of animals per apartment and the size of dogs. In addition, our House Rules give us the right to order the removal of any animal which is a nuisance or causes unreasonable disturbance to any resident or guest on the premises. As we understand SB 1302, its lack of important definitional details and its requirement that buildings accept an amorphous category of "comfort animals" in addition to "service animals" would constitute an open-ended override of our House Rules and would add an increased potential for discord in our building.

In fact, although our House Rules permit certain animals and pets, only a small number of residents actually have a pet; most do not. All owners in the building purchased with knowledge of what the House Rules permit regarding animals and pets. Prospective tenants are also apprised of the Rules. Thus, those who have or wish to have pets move into our building with knowledge and acceptance of the limitations in our Rules, and those choosing not to have pets move into our building with knowledge and acceptance of the level of exposure to animals they may have, per the Rules. Expectations are important and are part of the contract of high-rise living.

We understand that disabilities occur. We have no objection to permitting suitable[1] "service animals," as understood for purposes of the Americans with Disabilities Act of 1990 to include "any guide dog, or other animal individually trained to do work or perform tasks for the benefit of an individual with a disability." 28 C.F.R. § 36.104 (2002). We understand that, in addition to being trained in specific service skills, service animals are trained to have a non-threatening demeanor, which is particularly important in a high-rise setting, where residents and guests must ride elevators to come and go from their apartments.

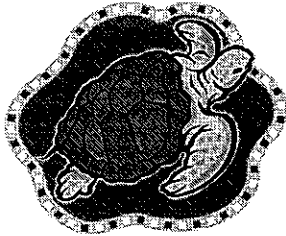
To require anything other than a "service animal," as specifically defined, would negatively impact high-rise buildings and would create an unwarranted intrusion on the ability of condominium boards to govern our communities for the benefit and in the best interests of all residents. Accordingly, we urge the Committee not to approve SB 1302 as written.

Thank you for the opportunity to present written testimony regarding this Bill. If you have questions, I can be reached at 531-7214 or by e-mail at jacq.earle@gmail.com.

Very truly yours,

Jacqueline Earle
President of the Board
The Admiral Thomas Apartments

[1] All types of animals would not be suitable for high-rise living, but most breeds of dogs, if properly trained, should be.



FRANCINE MAE AONA KENYON

dba Kuli Ike Kokua

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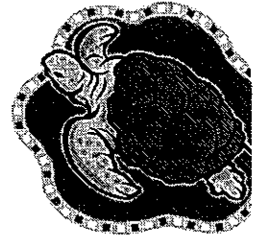

COMMITTEE ON COMMERCE
AND CONSUMER PROTECTION
Senator Rosalyn H. Baker, Chair
Senator Brian T. Taniguchi, Vice-Chair

SENATE BILL NO. 1302
RELATING TO FAIR HOUSING REASONABLE ACCOMMODATIONS

Aloha, my name is Francine Mae Aona Kenyon. I am deaf and a strong advocate for service animals because I love dogs.

I am testifying in support with intent of Senate Bill No. 1302, Relating to Fair Housing Reasonable Accommodations that makes the reasonable accommodations provisions in state fair housing law consistent with federal Fair Housing Act case law and interpretations.

I myself love dogs and cats very much. I grew up with kittens and cats. I once hated dogs because they scared me out of the street whenever they barked at me all of my childhood and teen years. But years later, a puppy followed me everywhere I went and even climbed up on me to licking my face. When Sparky (that was his name) approached at the door with his tail wagging at me and looked up to me, I thought he wanted to go outside. But when I opened the door, all of suddenly there was deaf friend at the door! But when a hearing person came to the door, he barked fiercely. He knew which person at the door was deaf or hearing. He can read sign language whenever I signed to him. I missed him very much. He was not trained but was very smart and knew we are deaf.

I recommend that comfort animals need to behave well, not to bite anybody or to hurt anybody. Comfort animals are not like service animals because service animals are trained and comfort animals are not. If comfort animals are trained by the owners to be quiet or not to bite or to bark for no reasons, they are fine as long as they behave well like service animals.

Mahalo nui loa for allowing me to testify on this important bill.

Sincerely,

Francine Mae Aona Kenyon
Deaf Advocate & Animal Lover

LAW OFFICES OF PHILIP S. NERNEY, LLLC
A LIMITED LIABILITY LAW COMPANY
737 BISHOP STREET, SUITE 2780, HONOLULU, HAWAII 96813
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February 3, 2011

Honorable Rosalyn H. Baker
Honorable Brian Taniguchi
Commerce and Consumer Protection
415 South Beretania
Honolulu, Hawaii 96813

Re: SB 1302 OPPOSE

Dear Chair Baker, Vice-Chair Taniguchi and Committee Members:

This letter is written in my individual capacity, as an attorney who has represented community associations full-time for over twenty years. I do, however, concur with CAI's testimony.

Section 1 of SB 1302 provides that: "The purpose of this Act is to make the reasonable accommodations provisions in state fair housing law consistent with federal Fair Housing Act case law and interpretations by clarifying the definition of 'service animal', clarifying that a request for a reasonable accommodation may include the use of a service animal or comfort animal, and by defining the term 'comfort animal'.

The first point to make, therefore, is that comfort animals are **not** provided for under applicable case law from Hawaii. If the proponents of "comfort animals" want to convince the legislature to *change* the law, then it would be more forthright to say so.

A federal judge sitting in the District of Hawaii noted that "every person with a handicap or illness that caused or brought about feelings of depression, anxiety or low self-esteem would be entitled to the dog of their choice, without regard to individual training or ability." Prindable v. AOAO of 2987 Kalakaua, 304 F. Supp. 2d 1245 (D. Hawaii 2003). The judge then ruled against the owners seeking to keep a dog.

The question of whether the desire of an individual to own a pet should supersede pet restrictions in the by-laws of a condominium association is significant. Condominium law presently enables associations to prohibit pets in their by-laws. See, H.R.S. Section 514B-156. By-laws may be amended by owners holding 67% of the common interest. See, H.R.S. Section 514B-108(e).

If such a substantial majority prefers to prohibit pets, then only weighty policy considerations should overcome that preference. There is a more than reasonable basis to suggest that forcing associations to accept "comfort animals" is unsupported by weighty policy considerations.

There have been times when I have counseled clients that an owner's request to keep a "service animal" was an appropriate "reasonable accommodation" under federal and state law. There have been more times, however, when such requests were patently without merit and when the alleged support for such requests was absurdly flimsy.

The practical effect of SB 1302, as written, would be that anyone who wants a pet can have one. The desire of individuals and groups to make decisions about the use of real property would be overcome without a compelling basis for encroaching on truly fundamental rights.

If the legislature chooses to recognize "comfort animals" as being within the scope of the fair housing laws, then substantial amendments to SB 1302 should be required. It is reasonable to expect that abuse of the law would be the norm, and that unscrupulous people would profit handsomely from selling comfort animal documentation.

I hold a certain perspective about laws to protect the disabled because my younger brother has Down syndrome. He and I were born before significant protections existed for the benefit of disabled persons. I appreciate and value legislative efforts to protect defenseless members of society who deserve protection.

At the same time, I regret efforts by some to stretch the limits of such laws beyond a reasonable scope. Such efforts demean and devalue core principles upon which this country is founded.

Very truly yours,

Philip S. Nerney

Testimony for CPN 2/9/2011 8:30:00 AM SB1302

Conference room: 229
Testifier position: oppose
Testifier will be present: No
Submitted by: Jo-Ann M. Adams, Esq.
Organization: Individual
Address: 411 Hobron Ln #801 Honolulu, HI 96815
Phone: 808-528-2100
E-mail: jadamsesq@aol.com
Submitted on: 2/3/2011

Comments:
SB1302 defines comfort animal too broadly. Under this definition, any animal that provides support, well-being, companionship or therapy for a person with a disability qualifies.

If I was deaf and a tarantula provided companionship, the tarantula would qualify as a comfort animal under the HCRC definition.

The ADA and the DOJ use a much narrower definition, limiting the types of animals that are eligible and requiring that the animal be individually trained to perform a specific task(s) related to support, well-being, companionship or therapy of the disabled person.

This bill should be amended so that the person must provide proof of: 1) disability from a doctor or governmental agency e.g., Social Security; 2) the specific tasks that constitute support, well-being, companionship or therapy to be provided by the comfort animal to the disabled person as indicated by the doctor or perhaps a social worker;, and 3)that this animal has been individually trained to perform one or more of the specific tasks. Only State-licensed facilities should be allowed to provide the training.

In practice, Resident A sees Resident D with a dog. Resident A think that dogs are allowed in the building. Resident A gets a dog. Resident A is told that dogs are not allowed in the building. Resident A asks why Resident D is allowed to have a dog and is informed that Resident D has a comfort animal. Resident A asks Resident D, how did you get you dog qualified as a comfort animal? Resident D replies, I just had my doctor write a note and provides the name and phone number of the doctor. Resident A pays the doctor for a visit and to write a note that Resident A needs a comfort animal.

As a result, Waikiki is going to the dogs! They are seen in parks where City Ordinances do not allow dogs. They are seen in condos where pets are not allowed. They are seen in far greater numbers in restaurants.

The loose authorization of comfort animals must be brought quickly under control. It is ruining the environment for those who purchased a condo in a "no pet" building, because the purchaser did not want to be surrounded by dogs.

Testimony for CPN 2/9/2011 8:30:00 AM SB1302

Conference room: 229
Testifier position: oppose
Testifier will be present: Yes
Submitted by: Jim Dodson
Organization: Ewa by Gentry Community Association
Address: 91-1795 Keaunui Drive Ewa Beach, HI
Phone: 808 685-0111
E-mail: jdodson@ebgca.net
Submitted on: 2/2/2011

Comments:
The Department of Justice has implemented new regulations that take affect on March 15, 2011. The changes impact the definition of "service animals" to be dogs, and with one exception, miniature horses. While the definition of "disability" has been expanded somewhat, animals used for emotional support, wellbeing,comfort, or companionship are not considered service animals. The purported purpose of the bill is to make the Federal & Hawaii laws the same, the existing bill will need to be amended a bit to include these changes and avoid ambiguities.