Community Association Management Insider®

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INSIDE THIS ISSUE

HOA Flood Rebates Nixed by FEMA

Florida condos and HOAs may soon be weathering a financial storm, thanks to the Federal Emergency Management Agency (FEMA). FEMA announced recently that it will prohibit continued rebating of amounts paid for flood insurance in the Sunshine State. Many Florida communities that are susceptible to natural disasters there, including hurricanes, currently receive these rebates.

In an April memorandum, the federal government ended the practice of providing associations with rebates on flood insurance premiums. The change will take effect on Oct. 1, 2012.

The Federal Insurance and Mitigation Administration said that a system of uniform national pricing that will ensure that policyholders pay the same price for the same risk is better for the National Flood Insurance program (NFIP) than the current situation. As part of the change, Write Your Own (WYO) flood carriers will no longer allow agents to rebate any portion of their commission, namely, on all new or renewal NFIP policies.

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FEATURE

Avoid Liability for Member Hazards in Age-Restricted Community

Age-restricted communities provide a great alternative for elderly people who want to stay active and remain in their homes rather than move into to a nursing or assisted living facility. If you manage an age-restricted community, you'll face some special management concerns about the declining health of the community's members. As time goes on and residents get older, some may start to suffer from dementia or other mental problems that can lead to sometimes violent or otherwise dangerous behavior. You must know how to deal with these issues when they become apparent or when there's an actual emergency. Having a plan in place to deal with problems stemming from the needs of aging members can help you avoid liability and better serve the needs of your community.

Obligation to Take 'Reasonable' Action

Common problems that you should be aware of in age-restricted communities include fire hazards, like forgetting to turn the stove off and

(continued on p. 2)

Q&A

Do Board Members' Oral Promises Trump Declaration?

Q I live in a small condo co-op. When I've seen board members in the building, we've discussed that portions of the balcony outside my unit need to be either repaired or replaced. They've agreed that the association should be responsible for the cost of this and similar repairs to other units in the building. But when I formally asked the association to pay for the repairs, it said that it's my responsibility under the declaration and bylaws. If I decide to sue the association for the cost of making the repairs, can I rely on the oral promises made by the board members?

A No, according to a recent similar Illinois case, where there was a controversy over whether the association of a condo building was responsible for paying for upgrades to deteriorating windows in an owner's unit.

(continued on p. 5)

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Member Hazards (continued from p. 1)

hoarding; hygiene issues that offend other members; and members wandering, starving themselves, or closing themselves away from the community. However, other problems—banging on walls, name calling, and threats—can escalate into a very dangerous situation for the member, other members, and you—not to mention the association if it results in a lawsuit.

Cases of fatal criminal conduct at age-restricted communities have ended up in litigation for the associations. The issue of negligence pops up particularly when victims of age-restricted community violence feel that the manager, association, or board hasn't taken sufficient action. Associations are often sued for the outcome of a member's criminal conduct if there was a long history of threats and misbehavior and they didn't do enough to stop it. While such cases are state- and fact-specific, managers generally do have some obligation to get involved.

"In New Jersey, if there is a foreseeable risk of criminal harm, a landlord has an obligation to take 'reasonable action,'" note attorneys Jennifer A. Loheac and J. David Ramsey, who represent community associations throughout New Jersey and New York, including homeowner and condominium associations, as well as co-ops. In age-restricted communities, the association steps into the shoes of a landlord, and is required to carry out that obligation, they say. In some cases, the victim or person suing the association argues that "reasonable action" is *more* than just what the manager, association, or board did. Some states that are community association-heavy, such as Arizona and California, require associations to take reasonable action when there's a foreseeable risk of criminal harm, as well. The problem, says Ramsey, is that this standard is vague. In these cases, the concern is *what* is reasonable.

Put Guidelines in Formal Resolution

To help fight a claim that you didn't do enough to prevent and manage age-related danger, clearly state ahead of time the actions that the association will take in these types of situations. You may do this by creating a formal resolution to be passed by the board, suggest Loheac and Ramsey. This resolution should include steps that the association will follow in an attempt to head off an incident and manage one should it occur.

It's important to consult with the association's attorney when deciding on what steps you'll include in the resolution, stresses Loheac. She warns that creating a resolution that's overly detailed can lead to liability later if you didn't diligently follow every step. "A person who was affected by an incident in the community could

come back later and argue that, if you had followed the steps in the resolution perfectly, the incident wouldn't have happened," says Loheac. You don't want your resolution to work against you.

Consider including the following steps in your formal resolution:

Step #1: Collect key information. The first thing a manager can do before any member poses a problem is to collect as much information as possible to put in the member's file, recommends Loheac. This includes the member's phone numbers, another person to contact in case of emergency, special needs the member may have, and most important, relatives' names and their contact information. "Contacting a loved one is the first and best step managers can take," Loheac emphasizes.

You can collect key pieces of information as part of basic administration or when the member is moving in. Gather this information for each person in the community; every member should fill out an emergency contact form.

Step #2: Investigate situation. When there's a complaint about a member or you suspect on your own that there's a problem, you'll have to verify that the person is a danger to himself or others, says Ramsey. There are personal freedom issues in these situations, he notes. You can't tell a person that he can't live the way he does if it's not dangerous, he says.

For example, clutter is a common problem among elderly residents, but unless a fire department makes an independent decision that it rises to the level of a health issue, you won't be able to ban it. However, to protect the association, call 911 without hesitation for anything that seems to be an imminent danger, say Loheac and Ramsey.

"We often see communities that use their security gate personnel to handle these cases, which is a bad idea. That's because if one of your staff members intervenes when he had no basis to do so and causes damage, the association could be held liable," Ramsey warns.

Utilize the police in situations where a member has become violent or just hasn't been heard from recently and could be in trouble in his unit. The police will determine if they have a basis to go into the unit, but an association shouldn't assume that role, he adds.

Step #3: Use emergency contacts, resources. Contacting and getting assistance from the member's relative is a crucial part of solving the problem. A member who's engaging in harmful behavior might listen to a person he's familiar with, rather than you, board members, or police. Explain clearly what's going on when you speak with the relative.

Sometimes, relatives aren't available or willing to help, in which case you should work with your county's social welfare agency—for example, New Jersey managers could contact Adult Protective Services. The agency typically will send a caseworker to your community to interview the troubled member and decide whether he's a danger to himself or others. The caseworker will make sure that appropriate action is taken. Under some circumstances, a guardian will be appointed for the member.

If there's any kind of safety issue, it's fair to involve the police and reach out to social services agencies to take the burden off the manager, say Loheac and Ramsey.

Step #4: Keep log to support court action. If these steps don't work, and you continue to experience problems with a member, consider seeking to have a court impose restraints or remove the person from your community. But be prepared to explain in detail the behavior, even if it's bizarre. While the court might not be willing to order the member to move out, it might be willing to impose an injunction requiring him to ameliorate the problem. At age-restricted communities, this can involve having social workers visit the member's home on a scheduled basis.

Before going to a court for help, however, you must have a lot of documentation that this person created a problem, says Loheac. She recommends creating a log with complaints about the member's behavior, including the dates, times, details of the behavior, and the name of the person who made the complaint.

Members who make a complaint may be afraid that they'll

(continued on p. 4)

Member Hazards

(continued from p. 3)

be retaliated against if their identities are exposed to the problem resident or anyone associated with him. To what extent can you keep complainants' identities confidential and still effectively use the log to support your attempts to resolve a situation?

Let the member know that you won't disclose his name without permission, but that he'll have to understand that there's only so much the association can do about the situation without being able to identify him at some point, especially if a court becomes involved. If a relative of the dangerous member wants to know who made complaints in the log, you can tell him that you're not at liberty to say, but that the issue is that there have been *enough* different people who have complained for the association to believe those complaints are credible.

If the association goes to court, however, you'll need to disclose that information. Keep in mind that exceptions are sometimes made when a member is very dangerous, in which case the information about the people who complained may be disclosed to only the judge.

Loheac and Ramsey both agree that detail is the key when it comes to record keeping for this kind of matter. They advise boards that they have a right and a duty to ask for specific follow-up information, even when a member has asked for an accommodation for a routine disability. Having that kind of detail in the record protects the association, says Loheac.

PRACTICAL POINTER: When sending letters or emails to the member or other parties, take care not to be sarcastic or inflammatory in your written communications. "There's a lot of emotion involved in communities, especially when a person has a history of creating problems and nuisances for members and managers before these problems rise to the level of becoming dangerous to himself or others," Loheac points out. Even good managers can end up making this mistake. The best way to handle these situations is to remain professional and collect as much written evidence as possible.

Carefully Update Concerned Members

Members, especially those who live near the problem resident, might want you to assuage their fears, especially if the resident's conduct has been violent or criminal. This can be tricky, though, because of confidentiality issues for both the resident and any person who has complained about him.

It's fair to warn members without getting into specifics about the person's disability, say Ramsey and Loheac. Let concerned members know simply that: (1) the association is working with the resident to try to resolve the problem at issue; (2) the police have been notified; (3) in the meantime, there are concerns about the potential for violence; and (4) members should do all reasonable things to protect themselves. However, never use specifics and avoid editorializing, says Ramsey.

In the aftermath of dealing with a situation, do you have an obligation to tell members what's happened? A short factual statement is fine, say Loheac and Ramsey. But it's often beneficial to orally state things or update members at a meeting, so that they're in the meeting minutes, rather than in a statement, says Loheac.

Always contact your association's attorney for state-specific information about dealing with dangerous situations in your age-restricted community and for help drafting your formal resolution and determining the steps you should take when a situation arises. For more information, you can also check with your county's Council on Aging.

Insider Sources

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RECENT COURT RULINGS

➤ Manager Had Knowledge of Association's Fair Housing Violation

Facts: A son submitted one application for himself and another for his mother to rent two units in a condo building that was run by an association. The lease for the son's unit was conditioned on approval of the lease for both units. Along with their applications, the mother and son requested an exception to the association's no-pet policy so that the 95-year-old mother, who suffered from mental and physical disabilities, could keep her emotional support dog.

The community association manager wrote a letter on behalf of the association to the son, letting him know that the application for his mother was denied. But the letter left open the possibility of approving the son's application if he would amend his application to remove the condition that both applications be approved.

After the son's attorney wrote a letter demanding reconsideration in light of his mother's rights as a disabled person, the manager "on behalf of the association" informed the son that the decision to deny the rental had been reconfirmed.

The son then sued the manager and the association for violating federal, state, and local fair housing laws by "failing to make a reasonable accommodation of the association's no-pet rule, and by denying or making a dwelling unavailable for rental by a person with a disability." The manager and association asked a Florida court to dismiss the claims.

Decision: The court refused to dismiss the case.

Reasoning: The manager and association argued that the son shouldn't have been allowed to sue them in his individual capacity. That's because he has no disability himself and his application to lease was never denied. "While it's true that he does not have a disability, the federal and state statutes at issue specifically grant him standing as a 'person associated with' that handicapped buyer or renter," the court noted.

The court pointed out that the son is clearly associated with his mother. For example, his application to rent was contingent upon the approval of her application. Because the Fair Housing Act permits a "person associated with" a disabled person, such as the son in this case, to make a claim on the disabled person's behalf, the court wouldn't dismiss this claim against the manager and association.

The court also determined that the manager had individual liability under the Fair Housing Act. The manager and association asserted that the case against the manager should be dismissed because all of his actions were taken *on behalf of* the association. Whether an individual agent can be held liable depends upon whether he personally committed or contributed to a Fair Housing Act violation, stated the court. That was true here, because the manager wrote the denial letter on behalf of the association *and* the letter reconfirming the denial, both *with knowledge* that a Fair Housing Act issue had been raised. So the court refused to dismiss that portion of the son's complaint against the manager and association.

■ Falin v. Condominium Association of La Mer Estates, Inc., March 2012

Q&A (continued from p. 1)

Informal Conversations About Repairs

In that case, a unit owner in an eight-unit condominium in Chicago expressed a number of concerns about the way the association was being operated, including problems with the internal and external structure of the units that needed to be addressed, such as windows and balconies and a lack of maintenance in the common areas. Specifically, the owner wanted the association to pay for the cost of replacing the bay window in her unit. In response, the board considered adopting a policy in which the association would pay for bay windows while the unit owners would remain responsible for all other windows.

In the meantime, during casual conversations with the owner when they stopped to talk in the building, board members repeatedly promised that her window frame

(continued on p. 6)

Q&A (continued from p. 5)

would be repaired. But before making a final decision, the board consulted with its attorneys, who informed them that the declaration required all unit owners to "maintain, repair, and replace *all* of the windows" in their units. The board informed the owner that she would have to pay for the replacement of her bay window.

The owner didn't accept the board's decision that she was responsible for maintaining, repairing, and replacing her own windows pursuant to the declaration. She sued the association.

Differing Interpretations of Definition

The owner asserted that the association had avoided responsibility for maintaining common elements and for repairing or replacing a deteriorating frame in her unit's front bay window, even after a "long history of discussion with regard to these elements and assurances from both the current and prior board members, by excluding these items from the building's definition of what constitutes a 'common element.'"

The association said that it based its determination on the declaration, which provided that the duties of the board included paying for "maintenance, decorating, repair, and replacement of the common elements but not including the windows and glass doors appurtenant to the unit, if any, which the unit owners shall maintain and repair, except if necessitated by repairs to the common elements."

However, the owner claimed that the declaration didn't exclude the association's responsibility to maintain the window *frames,* as opposed to the windows themselves, and that the problem with her bay window arose from structural defects in the *building* itself and not from the *windows* that she was responsible for maintaining. The owner argued that, moreover, the board has paid for correcting such problems in the past when they occurred in the units of board members and that the association had assessed all of the unit owners previously in order to pay for repairs to balconies. She also claimed that promises repeatedly made by the board members that the window frame would be repaired should be considered to have been on behalf of the board and association.

A trial court ruled in favor of the association. It noted that: (1) the association's bylaws stated that the windows and interior surfaces of the units are to be maintained, repaired, and replaced by the *unit owners;* (2) the declaration provides that in the event of any question of interpretation or application of the declaration or bylaws, the determination of the board shall be final and binding; and (3) the declaration provides that the members of the board aren't liable to the unit owners for "any mistake of judgment or any acts or omissions made in good faith"—including making oral promises in casual conversations like the ones in this case.

The court noted that the board members had told the owner that the association would pay to replace her bay window, but that the assurances were given *prior* to the board consulting with its lawyer, who advised it that the windows were the unit owners', not the association's, responsibility. The court pointed out that the board was free to rely upon legal advice when making decisions. The owner appealed.

Declaration Is Determining Factor

The appeals court upheld the lower court's decision, concluding that the board members were entitled to interpret the declaration so that the board didn't have the authority to pay for the owners' windows and surrounding structures after seeking and relying on legal advice to reach its decision. The appeals court pointed out that when a controversy regarding the rights of a condo unit owner arises, it must examine any relevant provisions in the Condominium Property Act, and the declaration or bylaws of the association together. Here, both parties agreed that the declaration requires all unit owners to maintain, repair, and replace all of the windows in their units. The owner argued that "windows" doesn't mean the structure that holds a window; the board found that it does.

The appeals court stated that the real issue in the case was whether the declaration authorized the board to approve the owner's window renovation. The appeals court acknowledged that, initially, some members of the board may have agreed with the owner, but they changed their minds on the advice of counsel, which was per-

missible. Because the association's bylaws state that the windows and interior surfaces of the units are to be maintained, repaired, and replaced by the unit owners, the board acted properly, according to the appeals court. Additionally, the association "obtained a legal opinion on the window issue and acted on that opinion finding that the owner was responsible both for the window replacement *and* the structures holding the windows [Goldberg v. Astor Plaza Condo. Assn., March 2012].

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DOS & DON'TS

✗ Don't Let Painting Contractor Set Terms of Job

If your community's spring cleaning plans include painting, don't agree to a "time and materials" paint job, where the contractor charges you at the end of the job for all the time it spent on the job and the materials it bought to do the job. With time and materials jobs, you run the risk of having an inflated bill. There are too many variables involved in a painting job that can add to the cost in that type of agreement.

For example, upon starting the job, the painting contractor may realize that it must sand walls before painting. The time required to do that can make the paint job very expensive. But if you've agreed ahead of time to a fixed price for the entire job, the contractor must complete the job at the agreed-upon cost, despite any glitches that arise that may make the job longer or more complicated. Another benefit is that you won't have to spend your time monitoring the contractor to make sure it's not dallying simply because it's getting paid by the hour and not by the job.

Remember to supply your own paint, also. Don't let the painting contractor supply the paint. If you do it yourself, you'll have the paint at the job site when you want the painting job to begin, helping to prevent delays in starting the job. You'll also have better control over how the paint is used; when the contractor supplies the paint, you can never be sure that all the paint is being used to paint *your* community. A contractor could order and charge you for more paint than needed, and then use the excess paint at a different job site and charge that community for the paint, too. And if you choose the paint yourself, you'll know that you're getting the paint quality you want. Sometimes contractors substitute paint of a lesser quality for the paint you've requested.

✓ Implement Employee Email Usage Policy

Community association management offices commonly use email as their main communication tool. Because of that, your employees may need to frequently send and receive emails in order to do their jobs. However, personal or inappropriate emails that come from your management company or association's email system could, at the very least, reflect poorly on your ability to manage your staff and also on the community, and at the worst, make you or the association liable if the emails cause any damage. To prevent employees from abusing email, establish a policy that will help your staff understand the legal guidelines associated with email use. Then, have staff members sign and acknowledge that they understand the policy. Consult your attorney about drafting an effective email usage policy.

Your policy should tell employees that email is one of the company's communication tools, which they're required to use in a "responsible and lawful manner." Also note in the policy that your company's email system shouldn't be used in the following ways:

- Sending or forwarding emails with any libelous, defamatory, offensive, racist, or obscene remarks;
- Unlawfully forwarding confidential information;
- Sending an attachment that contains a virus; and
- Unauthorized use, or forging, of email header information.

Remember to specify that employees who receive any emails with this content from any staff members should report the matter to their supervisor immediately.

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