Community Association Management Insider®

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INSIDE THIS ISSUE

Fla. HOAs Get Right to Demand Rent from Tenants

Does a community association have the right to demand rent from an owner's tenant? Yes—at least in Florida.

Especially during the last economic downturn, associations have struggled to collect assessments from owners. In an effort to stabilize property values, the Florida legislature has empowered condominium and homeowners associations to demand rent from tenants occupying property where the owner is delinquent on his or her monetary obligations to the association.

Under Florida Statutes §720.3085 and §718.116, homeowners and condominium associations have the right to demand rent payments directly from tenants when the property owner has fallen behind in his assessments. If the

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FEATURE

Keep Restricted Breed Dogs on Short Leash in Community

After a spate of pit bull terrier attacks in recent years, many community associations have questioned the wisdom of permitting members to keep pit bulls and other so-called "restricted breed" dogs, including German shepherds, rottweilers, and Doberman pinschers, as pets. Frequent reports of dog attacks have also reignited the debate between pit bull critics and supporters of the breed. Critics say that while pit bulls don't bite as often as other dogs, their jaw strength and behavior when they do attack make them the most dangerous of all breeds. Supporters of the breed, who resist or resent restrictions on their pets, believe that any dog, regardless of its breed, is capable of causing severe injury. They typically assert that an animal's behavior is a product of its environment, its lineage, and how the dog was bred.

Many communities ban all dogs. But if you manage a dog-friendly community, should you consider prohibiting members from keeping restricted breed dogs as pets? And how should you implement a ban if you choose to create one? Finally, how should you respond when a

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PREMISES LIABILITY

Train Employees What *Not* to Say After Incident in Community

From time to time there may be an accident or other incident at your community. It's human nature to try to comfort a victim, and well-trained employees should also be polite to members and guests, helping them when they can under ordinary circumstances. But if an employee speculates on what caused the incident or says something to try to make the victim feel better, like "It was our fault" or "I told maintenance to repair those steps," it could help bolster the victim's argument that the accident was your fault if he or she sues the association.

Unintentional remarks can be damaging and have been used to pin liability for incidents on associations or managers. Many associations have ended up having to settle a lawsuit for a large sum because of what an employee said to the victim, witnesses, or attorneys. The wrong statement can effectively destroy any chance the association has of winning the case, forcing it to settle.

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Editor: **Elizabeth Purcell-Gibney, J.D.**

Executive Editor: **Heather Ogilvie**

Director of Production: **Kathryn Homenick**

Director of Operations: **Michael Koplin**

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To Place an Advertisement, Please email Erin Tyler, *etyler@vendomegrp.com*, or call (216) 373-1217.

Restricted Breed Dogs (continued from p. 1)

member requests to use a service animal that happens to be a restricted breed? Here's what you need to know.

State Rulings Create Major Change

In most states, a dog owner is liable for any damage caused if his or her dog bites someone. In a few states, including Maryland and Virginia, the so-called "one-bite" rule is the law. The victim must prove that the dog was dangerous or that the bite was due to the negligence of the dog owner. In other words, if the dog hasn't bitten anyone in the past, it will be difficult to prove liability.

Recently, however, the Maryland Court of Appeals rejected the one-bite rule when the dog is a *pit bull.* It ruled that pit bulls are inherently dangerous, and a dog owner—and a landlord who allowed the dog to reside in a rented apartment—could be held "strictly liable."

The trial court in that case, which involved a pit bull that attacked two different boys on the same day, determined that the one-bite rule applied. But the Court of Appeals reversed, and established a strict liability standard in respect to the owning, harboring, or control of pit bulls. According to the Court, "it is not necessary that the landlord (or the pit bull's owner) have actual knowledge that the specific pit bull involved is dangerous" [Tracey v. Solesky, August 2012].

In July, the Kentucky Supreme Court ruled that a landlord who permits tenants to keep dogs could be as liable for a dog bite as the owner of the dog [Pauley v. Reynolds, July 2012]. Both these decisions extend beyond apartment buildings to associations, as well.

Impact on Associations

Most pet-friendly associations have specific rules regarding dogs—for example, some rules mandate that dogs must be on a leash while on community property, that the dog walker must pick up and discard any dog waste, or that dogs mustn't disturb other owners or tenants. The Maryland ruling made it clear that any person who has the right to control a pit bull's presence will be held liable for any such dog bite—and by setting and enforcing dog-related rules, community associations clearly "control" the dog's presence, says Maryland attorney Benny L. Kass.

The Maryland legislature attempted to modify or even repeal the court opinion. But in the most recent special session this past sum-

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proper procedures are followed by the association, the tenant is required to immediately begin tendering his monthly rent payments directly to the association instead of the owner. These statutes also allow the association to evict those tenants who refuse to comply. Many associations have found that the threat of eviction generally results in compliance. ♦

mer, there was a deadlock between the House and the Senate, and no action was taken. So pit bulls still are considered to be "inherently" dangerous.

This is still a highly controversial issue in the state, says Kass, and later this year, the Maryland legislature may resolve the matter. During the recent special session, the Senate judiciary committee passed a measure that removed the one-bite rule. But if it had been enacted, the bill would also have protected landlords—and presumably community associations—from liability, Kass points out. However, the House of Delegates balked, and the court opinion wasn't repealed or modified.

The ruling applies to Maryland associations, but not to associations in other states. For example, the laws in Virginia and the District of Columbia accept the one-bite rule, but they don't protect a dog owner who allows his dog to be off the premises without a leash. Such conduct would be considered negligent. The laws in those jurisdictions also don't distinguish between breeds of dogs; whether a dog is a pit bull or a German shepherd, the same law applies.

So, if a member's dog bites and injures someone in the District or in a state with Virginia's rule, which says that no animal will be considered dangerous because of its breed, can the association be held liable? It depends on the facts, says Kass. If the association has a rule requiring all dogs on common property to be leashed, and takes no action against a dog owner who routinely allows his pet to run loose, the association may be held responsible for any injury, he specifies.

Take Three Steps

To find out whether your state's laws—or courts—have recently changed how they determine liability for dog attacks, check with your association's attorney. Then do the following:

Review pet policy. All community associations should review their pet policies, says Kass. Some associations haven't updated their pet rules for many years. The recent Maryland court case should be a wake-up call, he warns.

Check insurance coverage. If the association allows pets—including restricted dog breeds—contact your master insurance carrier to determine if your insurance will cover the association in the event an owner's or tenant's pit bull bites someone, recommends Kass. "If not, the association might be able to purchase an insurance rider," says Tammy McAdory, the executive director at Kiawah Island Community Association, Inc. in South Carolina.

Many insurers, however, automatically exclude pit bulls and other restricted breeds from coverage. These exclusions are often based on a study of dog bites from 1982 to 2006 that showed that restricted breed dogs were responsible for 74 percent of the attacks, 65 percent of the deaths, and 68 percent of the maimings by dogs. In more than two-thirds of the cases the attack was the first-known dangerous behavior by the dog. Or the coverage exclusion may be based on insurance regulations, which vary from state to state. For instance, one national insurer doesn't specifically exclude any breed, but in a state whose insurance regulations label a breed as a "vicious dog," it won't offer coverage for that breed.

However, at least one major insurer has started allowing owners of specific prohibited breeds to obtain a homeowners policy if they can prove their dog successfully completed the AKC Canine Good Citizen program and provide an original copy of the certificate, along with meeting traditional underwriting requirements. So even if your association has adequate coverage for dog-related incidents, consider requiring members who own restricted breeds to get their own insurance as well.

Consider changing pet rules. Depending on your current pet rules and insurance policy (or whether appropriate coverage is available), the association should consider whether to adopt rules regarding pit bulls and other restricted breeds, Kass says. Such rules could range from prohibiting pit bulls outright to requiring those dogs to be muzzled when on common grounds, he suggests. (Find out the specific requirements for making such rule changes in your state. For example, the Maryland Condominium Act requires that any proposed rule must first be provided to all owners, and an open meeting must be held to allow owners' comments. Consult your association's attorney before taking formal action.)

If any owners currently have pit bulls or restricted breeds, they're likely to oppose any new rules that would suddenly force them to remove their dogs. But should they be grandfathered, meaning that the new rules won't apply to them?

"One possible solution is to require by rule that such owners indemnify and hold the association harmless should their dog

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Restricted Breed Dogs

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bite and injure someone," says Kass. "The association should also insist that each dog owner provide proof that he has his own adequate insurance," he adds.

The pet bylaws could also state that if the association implements a rule or regulation restricting the type of pet an owner may keep, the new rule or regulation shall not apply to prohibit an owner from continuing to keep any pet that the owner currently keeps, if the pet otherwise conforms with the previous rules or regulations relating to pets.

Changing Face of Service Animals

Even if you've banned restricted breeds from being kept as pets, that doesn't mean that you won't have to deal with any in the community. You can't deny a member's request to keep a service animal, defined by the Americans with Disabilities Act (ADA) as a dog that's "individually trained to do work or perform tasks for a person with a disability," even when it's on a restricted breed list. Although golden retrievers and Lab mixes are commonly used as service dogs, the face of service animals has been changing, with more pit bulls and other restricted breeds being used. According to the ADA, any breed can work as a service dog. And the Fair Housing Act (FHA) protects the right of people with disabilities to keep service animals, even when a community's rules explicitly prohibit or impose strict limitations on pets.

Nonetheless, breed-specific bans by associations have presented challenges for individuals who use restricted breeds as service dogs—and for associations as well. Seeing a pit bull in the community may raise concerns among owners if they don't realize that it's a service dog. But under fair housing law, you can't require service animals to be identified as such by wearing their licenses, a special identification tag, or the like, as proof of their status. (You can, however, require all animals in the community, including service animals, to wear appropriate identification or inoculation tags if that's required by state or local law.)

The question for associations is how to take responsibility and handle liability if the service dog happens to bite somebody, which could result in lawsuits and higher insurance premiums. It's important to discuss this with your association's attorney as soon as there's a request for a service dog that raises safety concerns.

"People need to be smart about dogs in general and service animals in particular," points out McAdory. "It's not safe to suddenly approach an animal you don't know and especially to allow children to approach it," she emphasizes. "It's a matter of all members knowing the facts and being good neighbors, and associations can certainly help accomplish this by educating members about pet dogs and service dogs," she points out. For example, service dogs mustn't be interacted with when they're working unless the handler approves.

Consider holding an optional meeting to give homeowners dog safety tips and guidelines on service animal etiquette. You can find helpful information at *www.cdc.gov/homeandrecreationalsafety/dog-bites/biteprevention.html* and *www.cci.org/site/c.cdKGIRNqEmG/b.4011011/k.F407/Etiquette.htm.* ♦

Insider Sources

Benny L. Kass, Esq.: Kass, Mitek & Kass, PLLC, 1050 17th St., NW, Ste. 1100, Washington, DC 20036; *www.kmklawyers.com.*

Tammy McAdory, CMCA, AMS, PCAM: Executive Director, Kiawah Island Community Association, Inc., Governance Department, 23 Beachwalker Dr., Kiawah Island, SC 29455; *www.kica.us.*

DOS & DON'TS

✗ *Don't Try to Sway Election*

Don't try to influence your association's election by stating that if a certain person is elected, you or your management company will cancel its contract. While it's not illegal to seek to influence association elections, generally it's inappropriate for community association managers, whether they're on-site employees or representatives of a management company, to try to sway an election.

In some cases, there may be some "history" between a board candidate and a manager. There are some people who simply will never be able to get along. If you feel that the election of one individual will prevent you from doing your job properly, then you should probably resign. Of course, you must follow the procedures in your contract. ♦

Q & A

Paying Assessments on Vacant Lot

Q Our homeowners' association recently acquired a vacant lot with no mortgage through foreclosure. We plan to sell it. Does the association need to pay assessments on a lot that it owns?

A Assuming that vacant lots are subject to assessment under your declaration of covenants, then the current record title holder is responsible for payment of assessments. In your case, that's the association, which can't excuse any lot owner from paying assessments unless all other lot owners are likewise excused, or unless provided otherwise in the governing documents. However, since the only source of funds the association has is assessment of its members, the association is basically assessing itself in this situation.

Say, for example, that you have 100 lots and your annual expenses are $100,000. Each lot must contribute $1,000 to the annual operation of the association. But if one of those lots is owned by the association, you would need to assess the other 99 lot owners for their share of the association's $1,000 assessment obligation for the lot the association owns—dividing expenses by 99. But your budget and financial records must show expenses divided on a 1/100 basis. Accordingly, there should be a line item in the budget for paying the association's assessments on its lot (and other obligations, such as taxes and insurance) associated with ownership of the property. ♦

Premises Liability (continued from p. 1)

How to Reduce Risk of Liability

Although there's no way to control what people say, you can train your employees what not to say, reducing the risk that they'll say something damaging. Don't discourage your employees from assisting an injured person. Instead, tell them what *not* to say to a victim or to the attorneys and investigators who may later seek to interview them.

To help you do this, you can adapt our Model Memo: Don't Comment About Incident Without Authorization, to train employees at your community. Like our memo, yours should tell your employees that anything they say about an incident regardless of the context could be used in court as evidence against the association or manager. It's better to err on the side of saying too little than saying something damaging or untrue. Give your employees the following guidelines on what they shouldn't say:

Don't volunteer information or opinions about the incident. A good rule of thumb to follow is: Don't offer information or opinions about the incident to anyone—especially the victim. In particular, there's no reason for an employee to offer an opinion about why an incident happened. Not only could it hurt you if the victim sues, but there's no guarantee that the employee's opinion is correct.

Don't respond to statements about the incident from the victim. The victim may say something like "I can't believe that railing was so weak," or "That lock hasn't worked for months." Here too, you don't want your employees to offer their opinions. Instruct them not to respond to statements from the victim about the incident. While that may make your employees seem detached or unsympathetic, it's better than leaving yourself open to a lawsuit.

Don't answer victim's questions about the incident. The victim may not know what caused the incident and may ask a question like "Did you see what I fell on?" or "How did that man get into the building?" The victim might even ask something like, "What's the community going to pay me for this?" Instruct your employees not to answer these questions. Also, tell them that if the victim persists and repeats the question, they can respond by saying, "I'm sorry, but community policy doesn't permit me to comment on that." If pressed, they can refer the victim to you.

Don't talk to representatives. After the incident, someone representing the victim may come to the community to find more about it and help the victim prepare a

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Premises Liability

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lawsuit. You don't want employees giving their opinions to these representatives, who may twist or misrepresent what your employees say, or manipulate your employees into saying something favorable to the victim's case. To avoid these problems, tell your employees to refer these representatives to you. You should then refer them to the association's attorney—and to speak to these representatives only if instructed to by you or the association's attorney. ♦

MODEL MEMO

Don't Comment About Incident Without Authorization

The following memo tells employees what not to say to the victim of a crime or accident in your community. Distribute the memo to your employees, and periodically remind them about it when you review community procedures with them. Emphasize the point—which appears several times in the memo—that they should refer a victim with questions to you as the manager.

STATEMENTS BY EMPLOYEES ABOUT INCIDENTS AT THE COMMUNITY

To: **ALL EMPLOYEES**

From: [*Insert name of manager*]

Date: [*Insert date*]

Please study this memo carefully and retain it for future reference. If you have questions about it or about the community's policies, ask the manager.

If someone is the victim of a crime or accident at our community and you are at the scene, be courteous and helpful, and summon police and medical assistance, if needed. However, unless you have authorization from [*insert name of manager or designated person*], do not comment about an incident to anyone. In particular, be careful to offer no opinions or conclusions about any aspect of the incident, either at the scene or if approached later by an attorney, investigator, or insurance representative of the victim. Certain remarks and phrases—even if well intentioned—may open the community to liability if it is ever sued over the incident. Many courts have found communities liable for incidents based on casual statements made by community employees about the circumstances of an incident.

Here are guidelines to follow when reacting to specific situations that you may encounter:

1. **Don't volunteer information or opinions about the incident.** Don't offer information or your opinions about the incident to anyone—including the victim. Your opinion about the cause of the incident is not an appropriate subject for conversation.
2. **Don't respond to statements about the incident from the victim.** If a victim makes a statement about the cause of the incident, do not respond. For instance, an accident victim might say, "I can't believe that railing was so shaky." Simply refrain from making any comment or response.
3. **Don't answer victim's questions about the incident.** The victim may not know what caused the incident and ask a question like, "Did you see what I fell on?" or "How did that man get into the building?" It's not appropriate for you to engage in such conversations. Don't answer any questions, even if the victim persists and repeats a question. If you're interviewing a victim for an incident report, simply ask your questions without responding to the victim's. If the victim continues to press you for an answer, you can say, "I'm sorry, but community policy doesn't permit me to comment on that." You can also refer questions to [*insert name of manager or designated person*].
4. **Don't talk to attorneys, investigators, or insurance representatives.** After the incident, someone representing the victim may come to the community to find out more about it and help the victim prepare a lawsuit. These representatives may not identify themselves. Therefore, don't talk to either identified representatives of the victim or anyone else that you don't know unless you have authorization from [*insert name of manager or designated person*]. Instead, simply say, "I'm sorry, but you'll have to direct all questions on that subject to [*insert name of manager or designated person*]."

RECENT COURT RULINGS

➤ Member Can't Sue Association for Punitive Damages

Facts: A member of a condominium association sued the association, alleging that its property manager, its manager's employees, and the employees of a contractor performing balcony work in the building had made misrepresentations regarding the project. The member later requested that the trial court allow him to amend, or change, his original lawsuit to add a claim for punitive damages—that is, damages awarded by the court against a defendant as a deterrent or punishment to redress an egregious wrong. To support his motion, he claimed that the alleged misconduct of the property manager and other workers should be imputed—or attributed—to the association.

The court granted the member's request. The association appealed.

Decision: A Florida appeals court granted the association's request and quashed the trial court's order.

Reasoning: The property managers and construction workers weren't officers or members of the board of directors of the association, the appeals court noted. Without more, their actions didn't impute misconduct to the association. The member needed to show that the association itself participated in misconduct, clarified the appeals court.

The appeals court noted that while the member's amended lawsuit described numerous alleged misrepresentations, acts, and omissions on the part of the property manager and management employees, those materials didn't comply with the legal procedure to impute the alleged misconduct to the association as the employer of the defendants for purposes of punitive damages. The member needed to show: (1) the association actively and knowingly participated in such conduct; (2) the officers, directors, or managers of the association knowingly condoned, ratified, or consented to such conduct; or (3) the association engaged in conduct that constituted gross negligence and that contributed to the loss, damages, or injury suffered by the member.

Instead, the member's amended complaint assumed that the alleged misconduct of the individual property manager, its employees, and the construction workers—who weren't officers or members of the board of directors of the association—was misconduct of the association. The building manager was a licensed community association property manager, *not* a controlling officer, director, or "manager" of the association as a corporate entity, the appeals court pointed out. Similarly, the member's allegations regarding the contractor's employees' trespass and use of the member's bathroom, damage to the walls of his unit, and removal of carpeting and plumbing parts didn't involve active, knowing participation by, or the consent or gross negligence of, the association as an entity.

- Coronado Condominium Assn., Inc. v. La Corte, December 2012

➤ Unit Owners Liable for Worker's Nail Gun Injury

Facts: A worker was injured while using a nail gun to install base moldings in a condo unit when a nail ricocheted and struck his eye. The worker sued the condo association, including its board and manager, for negligence and labor law violations. The worker claimed that the association was the "owner" of the unit because the association owned the land beneath the building, and that the board and the manager were its "agents" as a result.

The worker asked the trial court for a judgment in his favor without a trial. The trial court granted his request. The association, board, and manager appealed, asserting that ownership of the premises where an accident occurred—standing alone—isn't enough to impose liability under state labor law in a situation where the property owner didn't contract for the work resulting in a worker's injuries. Instead, any lawsuit should be brought against the unit owners who actually contracted with the worker for repairs to be done to their unit. The association argued that there must be "some nexus between" the non-contracting owner—here, the association—and the worker, whether "by a lease agreement, grant of an easement, or other property interest."

The appeals court reversed the trial court's decision, and the worker appealed.

Decision: The Florida Court of Appeals upheld the decision.

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Recent Court Rulings (continued from p. 7)

Reasoning: The Court of Appeals found that there was no "lessor-lessee relationship" between the association, board, and manager and the unit owners. Rather, the owners owned their unit in fee simple absolute—the owners' unit was real property *separate and apart* from the land beneath the condominium building. The worker's accident occurred while he was working in their unit. Therefore, since the unit owners—not the association, board, and manager—owned the unit, the board and the manager weren't the owners' agents within the meaning of the labor law. Accordingly, the appeals court had properly ruled in favor of the association without a trial. ♦

- Guryev v. Tomchinsky, December 2012