Community Association Management Insider®

SPECIAL ISSUE

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Florida HOA Pays $150K to Settle Discrimination Complaint

In August 2013, a Florida condominium association and its former management company agreed to pay $150,000 to settle a fair housing claim alleging that they enforced occupancy limits that discriminated against families with children.

The lawsuit arose from a HUD complaint filed by a family with six children living at the 249-townhome community. After moving into the four-bedroom unit, the family claimed, they were advised of a "problem" with having eight occupants in the home and threatened with eviction. At the time, they said, they were unaware that the community's rules allowed only six occupants in four-bedroom units. Allegedly, the community had similarly restrictive limitations on the number of people who could live in two- and three-bedroom units. The family eventually moved out.

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Proceed Cautiously When Responding to a Hoarding Problem

By Carol Johnson Perkins, Esq.

With the popularity of reality TV shows, hoarding is on everyone's mind. Many of us collect or keep objects—perhaps more than we should—because they have sentimental value or we may "need them someday." But compulsive hoarding is more than simply having too much clutter—it's now recognized as a mental health disorder, under the new Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-V) adopted by the American Psychiatric Association (APA) earlier this year.

Hoarding disorder is characterized by saving things that others may view as worthless, and persistent difficulty in getting rid of or parting with possessions, which leads to clutter that disrupts an individual's ability to use his living space, according to the APA. Newspapers, magazines, and clothing are commonly collected items, but many hoarders keep trash—even large numbers of animals.

In extreme cases, hoarding may lead to serious health and safety hazards not only to anyone living in the unit, but also to neighbors who may share walls, ceilings, floors, hallways—even HVAC systems. Among other things, risks include fire hazards, mold and other environmental dangers, pests and vermin, foul odors, and even structural damage.

At some point, it's likely that you'll be confronted with a hoarding problem, which mental health experts say affects between 2 and 5 percent of the U.S. adult population—that is, 6 to 15 million Americans. People with hoarding disorder rarely seek help on their own. That means conditions inside the unit may not come to light until an emergency crops up—or conditions inside seep out into neighboring units or common areas.

Associations generally have the right—indeed the duty—to enforce rules that ensure the health and safety of all members, but it's important to proceed cautiously when a hoarding problem comes to light. There's no easy solution—no matter what you see on TV. Men-

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tal health experts warn that a weekend clean-out of the affected property, without treatment for the underlying problem, is rarely effective. And it can actually make matters worse by triggering extreme anxiety in the individual, which may intensify hoarding impulses and lead to recurrence of the problem within only a few months.

Legal Considerations

In weighing your options, you'll also have to consider the legal ramifications—not the least of which is a fair housing complaint. Now that hoarding disorder is officially recognized as a mental health condition, a member engaged in compulsive hoarding would qualify as having a disability under fair housing laws.

The federal Fair Housing Act provides an array of protections for individuals with disabilities—including the right to a reasonable accommodation. It's unlawful for housing providers to refuse to make reasonable accommodations in rules, policies, practices, or services when necessary to afford a person with a disability an equal opportunity to use and enjoy her housing. In hoarding cases, it's often a request to delay taking legal action to give the member extra time to seek treatment or get help to address the problem.

Florida HOA Pays $150K (continued from p. 1)

Following a HUD investigation, the Justice Department sued the association and its management company, claiming that they engaged in a pattern or practice of violating fair housing law by adopting, maintaining, ratifying, and, along with the management company, enforcing overly restrictive occupancy standards.

In January 2013, while the lawsuit was pending, the association modified its occupancy limits to permit four occupants in two-bedroom townhomes, six occupants in three-bedroom townhomes, and eight occupants in four-bedroom townhomes. In March 2013, the court refused the association's request to dismiss the case.

Under the settlement, the defendants agreed to pay $45,000 to the family that filed the complaint, $85,000 into a fund to compensate other alleged victims, and $20,000 in civil penalties. In addition, the settlement prohibits the association and its management company from discriminating in the future against families with children and requires them to receive training on fair housing requirements.

"Twenty-plus years of HUD guidance and cases have put housing providers on notice that occupancy standards which unfairly limit or exclude families with children violate the Fair Housing Act," Bryan Greene, HUD's Acting Assistant Secretary for Fair Housing and Equal Opportunity, said in a statement. "HUD and the Department of Justice are committed to making sure that all people have equal access to the housing for which they financially qualify." ♦

Don't Take Matters into Your Own Hands

What you shouldn't do is to take matters into your own hands to clear away a member's possessions. You might believe that you're helping the member to conquer a problem that she has been promising to rectify for years. But that approach can backfire if a member raises disability-related reasons for the accumulation or inability to dispose of the possessions. Even if you win, as the homeowners association in New York did in the following case, what seems to be a simple solution can instead trigger years of litigation to resolve allegations of disability discrimination.

The case dates back to 2008, when the homeowners association president and some neighbors cleaned up a member's glass-enclosed patio. For years, neighbors complained about the messy patio, which was located on the community's main thoroughfare. The president said that she repeatedly asked the member to clean it up, and that the member repeatedly promised she would.

Twice, the member accepted her neighbors' help. In 2005, she let them remove a few things and, in 2008, she allowed them to put up trellises and curtains to block the view of the patio from the outside. Neighbors offered to help her clean it up, but she said she wanted to do it herself. According to the member, she told the president that if neighbors did it for her, it would set back her recovery.

A few weeks later, the member was away when a neighbor called to tell her that her garage door was open. She gave him permission to go inside to access her garage door opener, but the neighbor, joined by the president and another member, cleaned up the patio while they were inside. When the member came home, she complained to the president and the homeowners association and called police, accusing the neighbors of trespass and burglary.

Soon after, the member filed fair housing complaints. But the state human rights agency found no evidence of her disability or that the accumulation of, or clearing away, of clutter was related to a disability.

The member sued the homeowners association and its president, accusing them of refusing to accommodate her disability by letting her manage her messy patio in her own way. The complaint alleged that she had clinical depression, which "prevents her from maintaining her residence in a tidy manner."

Ruling against the member, the court found the association and the president were not liable for violating fair housing law. Because the member never asked for any accommodation, the court said that there was no reason for them to believe that their conduct might constitute some sort of discriminatory act, or harm of any conceivable kind.

On appeal, the court upheld the ruling—and ordered the member to pay more than $107,000 in attorney's fees to the president and homeowners association because her fair housing claims were groundless.

Even if the president knew about her disability, the court ruled that the member's claim for failure to accommodate failed because she never told the homeowners association that she needed an accommodation. The member said she told the president that it would set back her recovery if anyone came in and cleaned out her patio, but that statement was not a request for a reasonable accommodation.

Since there was no community rule requiring members to maintain patios in an orderly fashion, there was simply no way to make an exception to a policy that didn't exist. In fact, the member insisted that the homeowners association had no authority to tell her what she could keep on her patio, so she didn't need to request any special accommodation [Taylor v. Harbour Pointe Homeowners Assn., December 2012].

EDITOR'S NOTE: Although part of this court's ruling centered around the member not asking for a reasonable accommodation, the trend today is that if a housing provider or association "knew or should have known" that a disability was the underlying cause, that is enough to trigger the duty to try to accommodate before taking legal action.

What Can You Do About Hoarding?

Though problems can linger for months or years, fair housing experts say it's best to do as the president of the homeowners association did in the case above—to patiently try to work with the member to try to resolve hoarding issues. From the beginning, howev-

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Hoarding Problem (continued from p. 3)

er, be sure to document everything—from the initial complaint to all communications with the member and anyone else involved in the process.

There's no one-size-fits-all solution to resolving hoarding issues, so your response will depend on the severity and extent of the problem. Absent an emergency, such as a fire or gas leak, it's best to start with the most serious health and safety risks and work downward from there. Ask to meet with the member and, if possible, visit the unit to assess the conditions. When talking to the member, treat her with respect and consideration—and avoid comments about "junk," "trash," or "clutter" or the need to "clean up the mess."

If she's amenable, work with the member to identify health and safety issues, establish goals and timelines to address the problems, and set periodic dates for checking on progress. All are examples of reasonable accommodations—and demonstrate your good-faith efforts to work with her to address your legitimate health and safety concerns, according to fair housing attorney Lynn Dover, Esq., of the San Diego-based law firm Kimball, Tirey & St. John LLP.

And, remember, the goal is to meet minimal health and safety standards—not to create optimal living conditions. If available, family members may be able to help, though individuals engaged in hoarding often resist attempts to provide assistance or don't recognize that their behavior is a problem.

It's also important to recognize that there's a high incidence of relapse in individuals with hoarding disorder. Dover recommends a written accommodation agreement that encompasses the plan for bringing the unit into compliance, requires the member to maintain the unit going forward, and gives the member time to remedy the condition of the unit if it again falls into an unhealthy, unsafe, and unsanitary condition. The agreement should also spell out the consequences for failure to comply.

If you can't resolve the issue informally, you may enlist help from your local health department to address suspected health or sanitary code violations. It may send a health inspector—or put you in touch with the local or regional hoarding task force. A growing number of communities have launched task forces—comprised of representatives from health departments, social services agencies, police and fire officials, and others—to provide assistance in hoarding cases.

As a reasonable accommodation, you may have to work with these agencies and hold off on taking any legal action against the member during efforts to bring the unit into compliance, Dover says. Whatever the plan, make sure it addresses future recurrence of the problem, since it's common for hoarding issues to recur.

Responding to direct threat. Nevertheless, there are limits on your obligation to accommodate residents whose hoarding behavior poses ongoing safety and health hazards to other residents. Fair housing law does not protect anyone, with or without a disability, who poses a direct threat to the health and safety of others or would result in substantial physical damage to the property of others, if the threat cannot be substantially reduced or eliminated with a reasonable accommodation.

To determine whether a member with a hoarding problem poses a direct threat, the community must make an individualized assessment based on reliable, objective evidence, such as current conduct or recent history of overt acts. Federal officials say that the assessment must consider:

- The nature, duration, and severity of the risk of injury;
- The probability that injury will occur; and
- Whether there are reasonable accommodations that will eliminate or sufficiently mitigate the direct threat.

Because of these and other requirements, it's best to get legal advice if you believe a member's hoarding poses a direct threat to your property or the health and safety of other residents.

Check Governing Documents

Meanwhile, check your governing documents to determine your authority to take action against the member if efforts to address health and safety hazards associated with compulsive hoarding are unsuccessful. If you can document that the problems continue despite your good-faith efforts to accommodate the

member—and you have the legal documents to back you up—you can deal effectively with a hoarding problem.

That's what happened in a recent case in which a Tennessee homeowners association won the right to sell the member's unit to recoup $116,000 in attorneys' fees and a court order barring her from repurchasing that unit—or any other unit in the community—based on the language in its master deed, bylaws, and rules.

The problem came to light in 2008 when the community manager began to receive complaints about an offensive odor in the first-floor hallway in one wing of a multi-story building. The manager had the hallway carpets cleaned and the ceiling checked for leaks, but the source of the odor didn't become apparent until she responded to a complaint about a leak in a nearby unit.

Immediately upon entry into the member's unit, the manager said, she noticed a very offensive and overpowering odor, which she compared to rotting meat. Because of the extremely unsanitary conditions inside the unit, she told the member that she had to address the problem immediately.

Thus began years of repeated efforts by two community managers and numerous professionals, including a biohazard company specializing in the cleanup of crime scenes and hoarding situations, to address the grossly unsanitary conditions in the unit and extremely offensive odors emanating from her unit into the common areas. During the first attempt, cleaners removed three Dumpster loads of materials, the manager washed 38 loads of laundry, and moldy curtains were peeled from the walls and windows before painting.

When the cleanup was complete, the odor was no longer detectable in the common areas, but it returned less than six months later. Around this time, the member asked the painter to return for a repair, but when he entered the unit, he said the odor was so strong and offensive that it caused him to gag. The manager hired a professional services company and air quality expert to inspect the air stack shared by the member's unit, but she refused entry.

After the board notified her that she was in violation of the master deed, she let them in. When the manager entered, she said it was obvious that the unit was the source of the offensive odor—with piles of trash, food, newspaper, and paper all over the unit.

Over the next few months, the member allowed the manager, cleaning companies, and a family member to perform some cleanup. While working in the unit, a workman left the door open—leading to numerous complaints about the odor by neighbors—and a call to police when the member became upset. The manager was able to calm her down, but neighbors con-

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➤ *Will the Language in Your Governing Documents Protect You?*

Check the language in your master deed, bylaws, and association rules to compare how they stack up against the governing documents in the Tennessee case:

- Under the master deed, "The use, maintenance and operation of the Common Elements shall not be obstructed, damaged or unreasonably interfered with by a Unit Owner."
- The master deed also gave the board the authority to address repeated violations by the unit owner, after providing notice and an opportunity to cure, by terminating the owner's right to occupy the unit and going to court for an order to sell the unit and prevent the owner from reacquiring the unit during the sale. After paying off any mortgage and other liens, the proceeds were to be used to pay for court costs, expenses of the sale, and reasonable attorneys' fees; anything left over was to be paid to the unit owner.
- Under the bylaws, "No unlawful noxious or offensive activities shall be carried on in any Unit or elsewhere on the Property, nor shall anything be done therein or thereon which shall constitute a nuisance or which shall in the judgment of the Board cause unreasonable noise for disturbance to others. Each Unit Owner shall maintain his Unit in good condition and in good order and repair, at his own expense."
- The bylaws also provided, "Trash, garbage and other waste shall be kept only in sanitary containers, and shall be disposed of in a clean and sanitary manner."
- The association rules also prohibited residents from causing or permitting unreasonable disturbance to others.

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tinued to complain about the odor and said that the member was verbally harassing them.

After giving her 30-days' written notice, the manager inspected the unit and found the offensive odor was still present. After sending her another 30-day notice, the association sued the member, arguing that her actions violated the master deed, bylaws, and rules. The member denied that her unit was the source of the odor, but the court found otherwise after a four-day trial in early 2010.

Member violated master deed and bylaws. Finding for the association, the court ruled that the member violated the master deed and bylaws by failing to abate the odor, for her uncivil behavior toward neighbors, and for creating unsanitary conditions that caused the odor. The court granted the association's request to enforce terms of the master deed to prohibit her from living in the unit and to sell her unit and pay its attorneys' fees from the proceeds. Though the court gave her 30 days to clean the unit or move out, she failed to do so, and the court granted the association's request for $116,000 in legal fees.

A series of unsuccessful appeals followed, which didn't end until February 2013, when the state's highest court refused to hear the case. Along the way, the unit was sold, but the association had to get a court order to prevent her from buying the same unit—or any other unit at the community—after she tried to buy a neighboring unit [4218 Harding Road Homeowners Association v. Harris, December 2012].

It's common for association documents to have provisions that prohibit members from creating a nuisance and that require them to maintain their units in a healthy, safe, and sanitary manner. But the governing documents in this case specifically authorized the board to get court approval to sell the unit to pay legal fees and other expenses—and to bar the member from buying it back (see "Will the Language in Your Governing Documents Protect You?" on p. 5).

To be prepared to handle a hoarding situation at your community, you should check with your attorney about your options to address health and safety problems caused by a member's hoarding under the provisions of your governing documents and applicable state law. ♦

Carol Johnson Perkins, Esq. is the contributing editor of ***Fair Housing Coach*** (*www.FairHousingCoach.com*), the *Insider's* sister publication. Each month, the ***Coach*** presents a fair housing topic in a lesson-and-quiz format, and provides clear, plain English explanations of the law and helpful case study examples to share with staff. The ***Coach*** also summarizes recent housing discrimination cases and settlements, fair housing-related reports and studies, and new HUD guidance. Ms. Perkins is an attorney with extensive experience editing legal compliance newsletters on landlord-tenant, workers compensation, and employment law.

RECENT COURT RULINGS

➤ Association Enforced Weight Restrictions Against Member's Assistance Animal

Facts: A U.S. Air Force veteran lived in a Florida condominium unit for several years before getting a large dog in 2008. Although the homeowners association had a policy against keeping animals that weighed more than 25 pounds, the member agreed to take the dog from a coworker who couldn't care for it anymore.

In 2010, the homeowners association notified the member that he had to remove the dog because it exceeded the weight limit. He responded with a letter from his treating doctor that he needed the dog as an emotional support animal to alleviate limitations regarding social interactions and coping with anxiety and stress due to mental illness.

In response, the association sent the first of three letters requesting additional information to evaluate his request, including the nature and extent of his disability, details about his treatment, the specific training the dog received, and why he needed a dog that exceeded the weight restrictions for an equal opportunity to use and enjoy his dwelling.

The member responded with a second note from his doctor, stating that he was under treatment due

to anxiety related to military trauma. The doctor explained that it limited his ability to work directly with other people, a major life activity, but that he was able to work at home with the assistance of his emotional support animal.

Around this time, the member claimed an additional disability related to his knees. The association sent a second letter requesting detailed information about his disabilities, treatment, the dog's training, and specifically why he needed an oversized animal for his disabilities. The member didn't respond.

A few months later, the association sent a third letter requiring a sworn statement by the treating doctor asking for even more detailed information about his alleged mental disability, medications, treatment, need for the oversized dog, and its specific training. He was given a month to respond or remove the dog; otherwise, the association would pursue arbitration.

In 2011, the member filed a complaint with HUD and the state fair housing agency, and then sued the association for violating fair housing law.

In April 2013, the case went to trial, resulting in a jury award of $5,000 in damages. In June, both parties requested court rulings in their favor: The association asked the court to overturn the jury verdict and order a new trial, while the member asked the court for a permanent court order to keep the dog.

Decision: The court denied both requests.

Reasoning: The court upheld a $5,000 jury award to the member, but refused to issue a permanent injunction against the association.

In previous proceedings, the court ruled that the association had effectively denied the member's request to keep his dog as an assistance animal. From the three letters provided by his doctor, the court ruled that the association had enough information to evaluate his request. Yet it sent another letter for information that clearly went beyond the scope of a reasonable inquiry into his disability-related need to keep the dog as an assistance animal. Although it never removed the dog or otherwise punished him for the dog's presence, the association never granted a waiver and specifically demanded that he remove the dog. By persisting in its intrusive quest for more—and largely irrelevant—information, the association effectively denied his request.

In denying the request for a new trial, the court ruled that the jury had enough evidence to find that the member was disabled. Although he was able to work, there was evidence that he had post-traumatic stress disorder, with resulting depression and anxiety, which affected his ability to maintain any job that required social interaction. The evidence also showed that his requested accommodation was necessary. Both the member and his doctor testified that the dog alleviated his anxiety and depression, allowing him to maintain employment in his home.

To prove the association liable for denying his requested accommodation, the member didn't have to show that the association knew or was reasonably expected to know of the existence of both his disability and his need for accommodation. The law required only that the association receive notice of the alleged disability and the ability to conduct a meaningful review. A reasonable jury could have found that the association was sufficiently on notice of the member's disability and need for the requested accommodation based on his statements and letters.

In a separate ruling, the court refused to grant the member's request for a permanent injunction against the association requiring it to allow him to keep his dog, to establish a nondiscrimination policy, and to require all employees to attend annual fair housing training. The court ruled that the case didn't present the type of flagrant violation that, on its own, justified such a court order. There was no evidence that the association engaged in a pattern or practice of discrimination or bad faith. It took no affirmative action to remove the dog and, several months after the dispute arose, but before the lawsuit was filed, the association specifically informed the member that the dog could stay. The evidence suggested that the association "attempted to comply with the law and sought legal advice—which, in hindsight, was poor."

EDITOR'S NOTE: In July 2013, the court ordered the association to pay more than $127,000 in attorneys' fees. The member originally requested nearly $193,000, but the court found that some of the charges were excessive or duplicative.

- Bhogaita v. Altamonte Heights Condominium Association, Inc., July 2013

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