Community Association Management Insider®

Helping You Run Your Condo or Homeowners Association Legally and Efficiently

SPECIAL ISSUE

FEATURE

Put a plan in place to deal with problems stemming from the needs of aging members.

IN THIS ISSUE

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Include Four Steps in Age-Restricted Community Resolution

Age-restricted communities have become a real force in the housing market, providing a great alternative for elderly people who want to stay active and remain in their homes rather than move into nursing homes or assisted living facilities as past generations often did. But they've also presented challenges for their associations—members who are "aging in place" at such communities are more likely to develop medical problems or issues that are an inevitable part of getting older. And that could mean liability for an association that hasn't properly handled incidents arising from the declining health of members. Some members may start to suffer from dementia or other neurologic conditions that can lead to sometimes violent or otherwise dangerous behavior, while others might become at risk for accidents because of physical limitations.

So be aware that if you manage an age-restricted community, you'll face some special management concerns, and you must know how to deal with these issues when they become apparent or when there's an actual emergency. Here's how you can put a plan in place to deal with problems stemming from the needs of aging members.

Serve Needs of Community

First, you should understand what you're up against, and know what your obligation is 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 hoarding);
- Hygiene issues that offend other members;
- Members wandering, starving themselves, or closing themselves away from the community; and
- Banging on walls, name calling, and threats.

Violent behavior can escalate into a very dangerous situation for the member, other members, and you. But this danger isn't limited to

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Age-Restricted Resolution

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just the people involved in an altercation; associations have faced an unpleasant surprise when an incident results in a lawsuit for them. In fact, more cases of fatal criminal conduct at age-restricted communities are ending up in litigation for the associations.

The issue of negligence pops up particularly when victims of violence at an age-restricted community 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 that behavior. While such cases are state- and fact-specific, managers generally do have some obligation to get involved, so it's crucial to check with your association's attorney about requirements in your state.

For example, in New Jersey, if there is a foreseeable risk of criminal harm, a landlord has an obligation to take "reasonable action." In age-restricted communities there, the association steps into the shoes of a landlord, and is required to carry out that obligation. 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—and that's the point when a lawsuit comes into the picture. Other states, such as Arizona and California, require associations to take reasonable action when there's a foreseeable risk of criminal harm, as well. But this standard is vague and so, in these cases, the concern is what is reasonable?

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Guidelines on Paper Establish Responsibility in Action

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. One way to do this is to create a formal resolution to be passed by the board. 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, though. 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. Keep it succinct and limit it to actions that you realistically could take. After all, you don't want your resolution to work against you.

Draft Language to Avoid Liability

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. This includes:

- The member's phone numbers and email address;
- A person to contact in case of emergency;
- Special needs the member may have; and
- Relatives' names and their contact information (contacting a family member is the first and best step you can take).

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

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.

There are personal freedom issues in these situations. You can't tell a person that he can't live the way he does if it's not dangerous, so tread lightly. A prime example of a common problem among elderly residents is clutter or hoarding. 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.

Likewise, 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.

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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. 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 yourself and your staff.

> **PRACTICAL POINTER:** Beware of using your security personnel to handle these cases. If one of your staff members intervenes when he had no basis to do so and causes damage, the association could be held liable.

Step #4: Keep records to support court action. If these steps don't work, and you continue to experience problems with a member, consider asking a court to 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 the member created a problem. Create 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 be retaliated against if their identities are exposed to the problem resident or anyone associated with him. Ask your attorney to what extent you can 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

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dangerous, in which case the information about the people who complained may be disclosed to only the judge.

Constantly keep in mind that detail is the key when it comes to record keeping for this kind of matter. Boards 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.

> **PRACTICAL POINTER:** Maintain a professional tone in all communications. 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. 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. Let concerned members know simply that:

- The association is working with the resident to try to resolve the problem at issue;
- The appropriate authority has been notified; but
- In the meantime, there are concerns about the potential for violence so members should do all *reasonable* things to protect themselves.

However, never use specifics and avoid editorializing.

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, 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.

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. The National Council On Aging (NCOA) is an additional helpful resource. Information from NCOA is available *here.* ♦

IN THE NEWS

Florida HOA Members Will Have to Wait for Landscaping Legal Precedent

A secret settlement between an Orange County homeowner and an association that insisted on traditional lawns in her community has disappointed Sunshine State HOA members who want a legal precedent they can follow. So-called Florida Friendly landscaping, which uses less irrigation and fertilizer than traditional green lawns, has been at the center of legal fights—despite a 2009 state law crafted to protect Floridan aquifer, river, and lake waters from overuse and pollution. The law has been called "weak" by association experts and attorneys. The law declares that residents who pursue environmentally friendly yards will be shielded from homeowner association demands for more conventional lawns. But homeowners and associations have had sharply different interpretations of the law and have been waiting for a court's decision to clarify their rights and obligations for landscaping.

The homeowner in this case was sued by her association in 2012 for planting drought-tolerant landscaping. Many anticipated that the outcome of the case would cement an interpretation of state law, but health issues resulting from the stress of litigation forced the homeowner to settle with the HOA instead of continuing the legal battle.

The homeowner's lawn is currently landscaped with traditional grass, but she has stated that she is selling the property.

At the local government level, the incorrect application of fertilizer and pesticides has been criticized by officials. Some types of fertilizer are banned from being sold by garden supply stores during a certain time of the year when the water supply is more susceptible to being contaminated by those chemicals. For now, residential landscaping will continue to be a critical issue for the state's environmental health. ♦

Q&A

Determining Whether Condo Resident Is Protected by Debt Collection Law

Q A resident in one of the units in the condominium building I manage denies that she caused damage to the hallway outside of her unit. A family member of the resident is the actual owner of the unit, but she has been permitted by the association to live there. Under the governing documents, the unit's owner is obligated to pay for this type of damage. I sent the owner several letters notifying him that he must pay for repairs. The resident has continued to argue that the damage isn't hers and that she's the proper party the association

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Q&A

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should be dealing with. Eventually, the association had a debt collection agency attempt to collect the past due amount. Now the resident is suing the association, claiming that we violated the Fair Debt Collection Practices Act (FDCPA). Does the resident have any power to bring this claim?

A No, according to a recent case with similar facts. There, an Indiana court determined that the FDCPA's protection doesn't extend to residents in an HOA; it is intended to protect members as they are the "consumers" in such a situation.

That lawsuit was filed by a woman who resided in a condo unit that was owned by her father. The association sent a series of notices and letters regarding the damage that the resident allegedly caused with a barbecue grill. The resident vehemently denied causing the damage and explained several times to the association that she hadn't lived in the unit at the time the damage took place. The association paid for the cost of repairing the damage and retained a debt collection agency to recoup the cost it had incurred in doing so.

Ultimately, the member paid the assessment, but the resident subsequently sued the association and the collection agency. She asserted that both parties violated provisions of the FDCPA. Specifically, the resident alleged that they misrepresented the debt at issue because she had never agreed that it was valid, and that no basis was given to support the association's decision that despite her denials the damage had been done by her. She said that the covenants do not support the association's "random decision that they can assess the cost to the unit owner regardless of whether he or his resident caused the damage."

But an Indiana court agreed with the association that the resident lacked standing to pursue such a claim. It emphasized that it was the unit owner's obligation to satisfy the debt at issue, not the resident's, and that the FDCPA does not provide relief for parties that are not obligated to pay the amount that is due. The court noted that all fees and charges were billed to the owner's account and that although the resident made some payments on the owner's behalf, she had no obligation to do so and her brother actually has power of attorney over the unit owner. Because the unit owner was not a part of the lawsuit, and the resident couldn't pursue an FDCPA claim on his behalf without his power of attorney, the association and collection agency asked the court to dismiss the FDCPA claim.

The court also noted that while there was some precedent from a past case that held that people other than those owing the debt at issue may pursue FDCPA claims, the resident is not a "consumer" as defined by the FDCPA for that purpose. "The FDCPA does not extend its protection beyond the consumer; there is no reference to anyone else in the process who may have a consequential, let alone extremely consequential role in the debt-collection process," such as the resident here, said that court. It dismissed the claims against the association and debt collection agency [Hill v. Woods, October 2016]. ♦

RISK MANAGEMENT

Carefully Consider Warning Signs for Wild Animals in Community

A recent tragic accident at a Florida theme park has raised questions about the use of warning signs in communities where alligators are a known threat. The state's gated communities often have golf courses, lakes, and ponds that attract alligators. Florida is one of many states that face dangerous wild animals as threats to residents, as other areas around the country are home to poisonous snakes, among other wildlife. Since the widely reported alligator attack, associations, including yours, might be asking whether they should post warning signs about dangerous animals. Here's what you should take into consideration before doing so.

Ask About Association's Liability

Consulting with the association's attorney about your association's obligations for posting warning signs—and the liability it can create if not done properly—is crucial. As with many association problems, expectations and liability for sign posting regarding dangerous animals might be state specific, so make sure that your sign posting plan complies with applicable law for your association.

For example, in Florida, an association, as the owner of property, can be held liable if someone is injured on the property due to the association's negligence, notes Fort Myers and Naples community association attorney Joseph Adams. There, negligence includes allowing licensees or invitees to enter an area of the owner's property where risk of injury by a dangerous condition is foreseeable, but not readily apparent, and not warning the licensees or invitees of the danger, he adds. He points out that the property owner has a duty to maintain the property in a reasonably safe condition and a duty to prevent injury through the issuance of adequate warnings of known, but hidden, dangers.

Three Cases on Point

Adams explains that in 1996, Florida's Second District Court of Appeal found that, generally speaking, the law does not require the owner or possessor of land to anticipate the presence of or guard an invitee against harm from animals ferae naturae (natural wild animals) unless such owner or possessor has reduced the animals to possession, harbors such animals, or has introduced onto his premises wild animals not indigenous to the locality. In the absence of reasonable foreseeability of the danger, the court found in this case that there was no duty on the part of a city to guard an invitee against a shark attack, or to warn of the possibility of such an occurrence.

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Risk Management

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And in a 2004 decision, the Second District ruled that a landowner owes two duties to a business invitee: (1) to use reasonable care in maintaining its premises in a reasonably safe condition; and (2) to give the invitee warning of concealed perils that are or should be known to the landowner and that are unknown to the invitee and cannot be discovered through the exercise of due care. The court found that a hospital did not violate its duty of ordinary care to maintain the hospital in a reasonably safe condition, even though a patient was bitten by a black widow spider in the emergency room. The evidence showed that the hospital had maintained the facility in a reasonable manner, did not know that a black widow spider was on its premises, and had no previous incidents with black widow spiders.

Adams emphasizes the precedent that's most directly on point. A 1986 decision from Florida's First District Court of Appeal dealt with a case that involved a University of Florida student bitten by an alligator while swimming in Lake Wauberg, a recreational facility operated by the university. In a split decision, the court found that the injured swimmer disregarded clear warning signs on the premises that warned of the dangers of alligators. The court also emphasized that the student ignored a "No Swimming" sign where the attack occurred. Thus, the university was found not to be liable for the injuries.

Take Reasonable Precautions

If your association knows of alligators or other dangerous wild animals on the premises, reasonable precautions should be taken. Reasonable precautions might include the posting of signs warning of the possible presence of alligators or potentially dangerous animals that inhabit the property, such as poisonous snakes, Adams suggests. In addition to taking the association's attorney's advice, managers and boards should remember to address the issue with their association's insurers.

Many states have helpful resources. In Florida, associations can utilize the Florida Fish & Wildlife Conservation Commission's nuisance alligator program, which helps with the removal of alligators that might constitute a nuisance or pose a threat. Investigate your state's animal control agency and make sure that contact information for it is kept handy in the management office or where employees can easily find it. ♦

Insider Source

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