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Portland Edition

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Managing an HOA can be a lonely and frustrating task. Take heart. Help is on the way.



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Falling in the Cracks

When faced with a homeowner association maintenance or repair issue, the starting point is to determine whether the HOA has the duty to maintain or repair. This may not be as simple as it sounds. While the governing documents generally define the common elements and repair responsibilities, sometimes the item in need of repair may fall into a gray area. For example, while the governing documents may state that the HOA has the duty to maintain the floor between unit levels, what happens when a unit owner requests that the HOA fix his squeaky floor? The answer depends: Is the squeak related to a structural problem or the hardwood flooring installed by the unit owner? If it's a defect in the structure, the HOA fixes, if the flooring, it's typically on the unit owner.

To sort this all out, it is helpful to create a matrix that can serve as a quick reference guide for determining the maintenance and repair responsibilities of the HOA versus owner. The matrix should conform to requirements of the governing documents.

When it comes to repair requests, the board should have a standard policy of prompt action prioritized by urgency: a broken pipe is urgent, a squeaky floor much less urgent. Sidewalks that are heaving and creating a tripping hazard require quicker action than scheduling the repainting of signs or buildings. Reaction time should fit the situation. If not urgent, repairing within a few weeks is reasonable.

The importance of prompt response was made clear by a jury verdict in the Los Angeles Superior Court in the case of Mary Jamison Moller v. The Atherton Homeowners Association. The jury found the HOA liable for \$495,000 in water damage to a resident's unit. The resident had made repeated complaints to the board of water damage, mustiness and moistness in her unit. The board failed to act for three years, when an architect was hired to design a drain system to alleviate the problem. By then, the unit condition had grown worse, and the new drain system

was not installed properly. The resident developed health problems, allegedly because mold and mildew began to grow inside the unit's walls. Among other things, the jury found that the board was negligent and had breached its fiduciary duties. The resident was awarded damages for pain and suffering and the trial judge ordered the HOA to raise \$250,000 to pay for repairs to the unit.

How soon should a board take action to make a repair? At least one court has held that an HOA must perform a repair within a "reasonable time". What constitutes a "reasonable time" depends on the circumstances. In *Lemon v. Golf Terrace Owners Association*, the Supreme Court of Alabama found that the HOA acted within a reasonable time when it took over three years for a re-roofing project. The resident in that case had a serious roof leak in his unit and sued the the HOA for failing to fix it within a reasonable time. The roofs in the project were over 16 years old and defectively designed.

More and more roofs began to deteriorate and leak. The board appointed a committee to develop a plan to deal with the roof problem and an architect was hired to prepare a design. The board was constrained in its actions, the Court noted, because it was required by the governing documents to submit the new design for a vote of the owners. Once approval was obtained, the board then had to secure competitive bids from roofing contractors, one of which then had to again be submitted for owner approval.

The Court expressly acknowledged that "the delay in the construction appears to have resulted from the fact that the board governing documents for making extensive repairs had to follow the procedure set out in the structural alterations to the roofs. The record affirmatively shows that "the board took the owner's problem seriously." The Court then went on to document extensive efforts undertaken by the HOA to try to stop the leaks in the owner's unit while awaiting construction of the new roof. So, as long as the board's repair efforts are constrained by

the governing documents, "reasonable time" could be months or even years.

It has long been presumed that the "business judgment rule" would usually insulate a board from liability for a business decision made in good faith, so long as the board members acted on an informed basis, were disinterested and independent, and were reasonably diligent in informing themselves of the facts. However, a dent was placed in this "shield" from liability by a California appellate court in *Lamden v. La Jolla Shores Clubdominium Homeowners Association* (1998). In that case, the complex experienced a major termite problem and an exterminator recommended fumigation to control it. The board decided against fumigation and decided to spot treat the infested areas. A unit owner sued alleging that the HOA should fumigate instead of spot treat. The board defended the lawsuit by stating that its conduct was in conformity with the "business judgment rule", and the trial court agreed, holding that the board had acted in good faith and had a rational basis for the decision to reject fumigation.

On appeal, however, the trial court's decision was reversed. The appellate court essentially held that the "business judgment rule" is not the applicable standard when reviewing maintenance and repair decisions. The court reasoned that the HOA was "for all practical purposes" the complex's landlord, and must, therefore, exercise due care for the "tenant's" property. The court stated that this relationship between the HOA and the unit owner required that the HOA was to exercise due care to protect the co-owner's unit from undue damage. The court held that the board's conduct should be scrutinized under a standard of reasonableness rather than good faith. Accordingly, boards should also consider whether their maintenance and repair decisions are reasonable and prudent, in addition to being made in good faith and represent an informed business judgment.

Like other duties, the board must take its maintenance and repair duties seriously and take prompt action when

possible. Neglecting a needed repair can have deleterious consequences. To avoid a problem with funding repairs, the board should also set aside adequate reserves. If a board acts diligently, does so in good faith, while being well informed, it will significantly reduce any legal claims that it did not live up to its obligations. 🗑️

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Ask the HOA Expert

Q We have a president who solicits co-owner involvement when the board is discussing business at a board meeting. Should co-owners be allowed to participate in board discussions as if they were a board member? Should a board meeting be conducted like a town hall meeting where everyone can speak? It is my contention that a board meeting is for the board to conduct its business without co-owner input.

A Your interpretation is correct. Board meetings are designed for the directors to discuss and make decisions about HOA business. There are occasions when co-owner input is appropriate but not as a general rule. A member forum should be held prior to the start of the board meeting to allow input and questions.

But once the board meeting is called to order, guests are there to listen, not participate. There are a number of articles about meetings and how to run them that can be found at www.RegenesiS.net in the Article Archive>Meetings section.

Q I need information on HOA policies and procedures with regards to fining. Can you help me?

A Generally, the board has the authority to enact reasonable rules and enforcement procedures. They should include:

1. Clear definition of the issue (parking, pets, failure to pay HOA fees)
2. Consequences for failing to obey like fines or curtailing use of amenities
3. Appeal process

Fines need to be reasonable. Any rule or resolution that is contemplated by the board should be reviewed by an attorney that specializes in HOA law in your state for compliance with your governing documents, state and federal law. There are a number of sample rules at www.RegenesiS.net in the Policies section.

Q Our board likes to do a lot of business by email so now revising minutes is being done by email. By the time the minutes get back to me (board secretary) they have been rewritten by various board members to change wording or to add items not discussed. The president is the worst offender. My understanding is that minutes are taken and prepared by the secretary. Then, corrections and additions are to happen at the next board meeting. Is this correct?

A Minutes should be revised only at a board meeting, not by way of an email circuit. Of course, as secretary, you need to make sure you are taking complete and accurate minutes. There are some things that belong and others that don't. Minutes should record board actions,



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not discussions. There are many meeting minutes articles at www.Regensis.net in the Article Archive in the Meeting and Ask the HOA Expert sections.

Q Our board has taken to publishing names of delinquent members in the HOA newsletter and board meeting minutes. Is this advisable?

A There are many reasons why members don't pay their fees and the solution varies: Millie is on disability, Joe's Social Security is inadequate, Mary just lost her job, Bill declared bankruptcy, Gertrude has been trying to sell her condo for two years and Arnold is withholding payment until repairs get done on his unit.

What happens if the collection information the board posts is not correct? This kind of misinformation libels someone who may sue for defamation of character.

Your board is ill advised to pursue this collection tactic. It's totally unnecessary and mean spirited. With a properly designed and enforced Collection Policy, there are effective ways for the HOA to get the job done without humiliation. There is a sample **C o l l e c t i o n P o l i c y** at www.Regensis.net in the Policy Samples section.

Q We recently got a professional reserve study done. Our Budget Committee took the information and plugged it into a spreadsheet that will allow us to postpone the need for a professional study revision. The substitute study changes some of the assumptions, like reducing the recommended reserve contribution and the inflation rate. By doing this, we can lower our annual contributions significantly.

Our reserve study provider has recommended annual updates. What are the pros and cons of updating the reserve study? How would we update our substitute study and how long could we use it and still be confident that it was fairly accurate?

The Regensis Report

A Artificially manipulating the reserve study numbers to reduce contributions for current members is a violation of the fiduciary duty the board has to all members, current and future. When it comes to paying for major repairs and replacements (the main purpose of a reserve study), there is no free lunch. Shorting reserves today will require making up the shortfall later, usually by special assessment. Special assessments are always unfair to some because they are being required to pay for something that should have been paid for by owners that sold and are long gone.

The other mistake frequently made with reserves is failing to fund each component fully. An example of full funding is a \$10,000 component with a 10 year useful life should have \$1000 per year reserved to be fully funded. Reserving less than \$1000 a year will create a shortfall which must be made up later. But since reserves often include money for long life components like roofing, there is an illusion that there is more money than needed to pay for things in the short term. Boards that fall into the trap convince themselves that reducing reserves by a third, or a half, or two thirds is just as good as full funding. New math?

In fairness to all members, current and future, and to eliminate special assessments which are unfair to those that have to pay them, full funding of reserves is the only reasonable approach.

Annual updates are critical to keeping a reserve study accurate. The cost of an annual no site inspection update is usually nominal. A site inspection update is highly recommended at least every three years to verify component condition and useful life.

You should stay out of manipulating the reserve study yourselves. It has obviously been a self-serving exercise so far that is bound to result in a significant short fall. You paid for an objective and professional reserve study and you should follow these recommendations. 🏠

Updating a Reserve Study

A reserve study is a homeowner association's essential long range planning tool. It charts a schedule for the board to follow for major repairs and replacements (paint, roofing, etc.) and forecasts a budget for each event so the board can set aside money (reserves) each year so adequate funds will be available when the various events come due. It's an amazing tool that takes a lot of guess work out of the board's job.

Even though a reserve study makes funding projections up to 30 years away, the premises upon which those projections are founded are ever changing. Each year, the inflation rate changes as does the yield on invested funds and the starting balance in reserves. These three moving parts alone can have a dramatic impact of costs and reserve fund balances years away. But there are other forces at work. The cost of construction labor changes from year to year based on a hot or cold real estate market. Cost of certain building materials changes from year to year. Oil based products are particularly volatile and pricing affects roofing and paint. Wood products fluctuate as well.

The reserve study typically predicts future costs based on current costs adjusted by inflation. Revising the reserve study when actual costs are incurred is essential since those costs are the most accurate available. If painting was predicted eight years ago to cost \$1500/unit and the current year's actual cost is \$1650/unit, the reserve study should be updated to that cost.

The question often comes up "How much money should we put into reserves each year?" The answer varies from HOA to HOA based on the number and age of components. But at each HOA, there is an amount of money which represents "fully funded" each year. Say your reserve study only has one component worth \$10,000 that has a 10 year useful life. To be fully funded, \$1000 should be reserved each year so, for example, in Year 3 there should be \$3000 in reserves. If that

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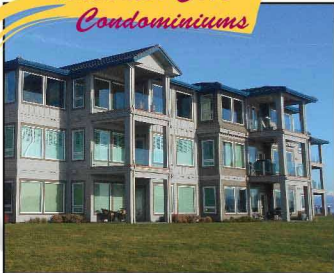
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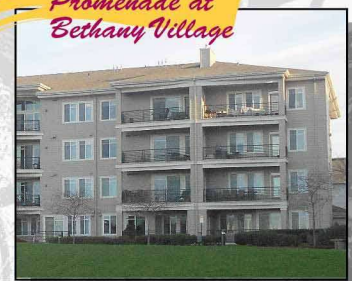
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same principle is used for each component according to its useful life, the HOA will always be fully funded and every member will have contributed a fair share based on time of ownership. If anything less is set aside, some member(s) in the future will be required to make up the shortfall. This is unfair to them and the board has failed in its fiduciary duty to protect the interests of all members current and future.

Whether for practical, banking or legal reasons, having and updating a reserve study each year will keep the board informed, help maintain the most financing options for the members and in compliance with state statutes that apply.

If your homeowner association has had a professional reserve study done, make sure it is updated every year and remember to include the cost of the update in your Operating Budget so it won't be overlooked.

The reserve study is one of the most indispensable planning tools that an HOA can have. Not having one is like steering a ship without a rudder. If your HOA has not had a reserve study done, put it on the Must Do List. For more information on Pacific Northwest reserve studies, call Michael Steward michael@regenesisreserves.com or Phone 503.268.1789. 📞

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Self Management Myth

There is a myth that has survived for decades that the business of a homeowner association (HOA) should be handled entirely by the board without assistance from professional management. That myth is anchored in the belief that money is saved and that there is better control.

Curiously, the myth was hatched by HOA developers who had a clear

conflict of interest and profit motive: If the board does the work for free, monthly fees can be reduced. If the fees are lower, the developer can command higher sales prices. So, developers profited from the myth and there was nothing in the law to stop them from doing it.

The myth of self management is just that...a myth. The reality is that managing an HOA demands a high degree of expertise. Property management is very difficult even under ideal circumstances when there is an iron clad lease with strong enforcement provisions to control the tenants. But HOAs are populated with *owners*, not tenants. Owners can't be evicted for breaking the rules or nonpayment. Owner standards and demands are much higher than the typical tenant's. And an HOA manager needs the diplomacy skills of Henry Kissinger and the skin thickness of a rhino.

Sooner or later, self managing boards discover that they've been bamboozled by the myth and that self management is neither easy or fun. But changing to professional management seems next to impossible as the non-board members chant "We've never done it that way" and "Professional management will cost *money!*" The longer an HOA practices self management, the harder it is to go pro. It's like turning an oil tanker...but turn you should.

Consider that the board is entrusted with most members' biggest asset, their home. To properly maintain this cherished possession requires effective long range planning and broad knowledge of construction and building maintenance. This expertise is rarely found on a volunteer board. Lack of planning inevitably leads to lack of money which leads to lack of maintenance which leads to eroding market value and livability. Yikes!

Consider the two most emotional reasons that even the smallest HOAs should be professionally managed: Money and Rules. No neighbor should have to collect money from or enforce rules on another neighbor since the actions are predictably confrontational. Yet in every HOA, both of those situations will eventually become a reality. What then?

When it comes to professional HOA managers, the list is usually short. So it's important to carefully pre-screen the candidates. The kinds of tasks they perform are numerous so prepare your task list (Request for Proposal) before you interview. The scope of work directly drives the cost.

While professional HOA management clearly costs money, it will reduce internal conflicts and improve maintenance which will be returned in increased market value. Many HOA management companies offer different levels and costs of management to allow all HOAs to participate at some level. Equally important, the HOA board will come closer to that "carefree living" the developers marketed. Look into it and make self management a thing of the past. *There is a sample Request for Proposal available to Gold Subscribers of www.Regenesi.s.net* 📄

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Collection Protocols

Why is it taking so long to collect delinquencies? Can we close the pool to the deadbeat? Why can't we collect on that judgment?

A clearly worded, communicated and enforced Collection Policy is the first step to effective collections. A collection policy simplifies one of the board's most disagreeable tasks: collecting money from neighbors. With a Collection Policy, the course of collection action is predetermined and the board no longer needs to wring its collective hands over each case. Here are some of the essential components of an effective Collection Policy:

- Payment Date: ___ of the month
- Payment Late: ___ of the month
- Late Fee: \$ ___
- Finance Charge: ___ % per month
- Payments applied to oldest balance first
- Type of notices (10 Day Notice to Pay, Notice of Intent to Lien, etc.)
- Who provides the notice (HOA, attorney)

- At what point is the collection referred to an attorney
- All collection costs charged to the debtor
- HOA has right to obtain and execute a personal judgment (garnish wages, attach personal property, etc.)
- Amenities (pool, tennis court, clubhouse) are suspended for delinquencies of a certain dollar amount
- Shut off Utilities (if provided by the HOA) for delinquencies of a certain dollar amount. This only applies where utilities to individual units have shut-off option.

Other important collection techniques include:

Copy Assessment Payment Checks. Photocopy payment checks when received whether delinquent or not. The information will be valuable if collection is necessary and may save a \$100 - \$200 "skip trace" cost later.

Get Work Phone Numbers. Getting a judgment or lien doesn't guarantee payment. In most jurisdictions, a collection can receive up to 25 percent of a debtor's "disposable" wages (after withholding). Ask all owners for work phone numbers for "emergencies" with a pool or car registration form.

Notice All Legal Owners. There may be more than one owner on each unit title. Make sure all applicable names are on the notices. A title company can assist with this information. Co-owners are equally responsible for the entire debt.

Checks Marked "Paid in Full". Cashing checks so marked could be considered binding. Make sure the amount truly is "paid in full" before depositing.

Record Liens. Liens alert lenders, purchasers and title companies of a "cloud on title" that needs to be cleared up. For this reason, long standing delinquencies often get cleared up at refinancing or sale closing. A recorded lien improves the odds of collecting even if an owner files bankruptcy or a lender forecloses. If the lender forecloses, the HOA can collect if there are surplus proceeds. If there is no lien and the property is sold, the HOA has no claim.

Let the Attorney Handle It. After several rounds of written notices and 60 days have passed, turn the matter over to the HOA attorney. Cease communications with the debtor. Don't discuss repayment agreements, collection costs or payoff information. Referring all calls to the attorney will expedite the process. One attorney letter often does the trick.

Take Away Privileges. Many governing documents allow withholding access to amenities like pool and parking. If allowable, do it.

Shut Off HOA Provided Utilities. In some cases, drastic action is called for. Your collection policy can call for shutting off HOA paid utilities like water, if all other measures to collect have been tried and failed. This may require a plumber.

Money is the life blood of every homeowner association. Since most operate on a tight budget, if one owner defaults, the effect is soon felt by all. There's no magic money or lines of credit. If one doesn't pay, the rest have to. If your collections need corrections, get after it! 🗡️

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Where Buffalo Roam

Noise is a very subjective thing. When it comes to music, some forms are considered noise even when barely audible. The problem is not always the volume. It can be the content that offends the ear of the beholder. Such is often the case in poorly sound insulated common wall HOAs. Normal household noise travels through walls, ceilings and floors and can sound like stampeding buffalo. Round'em up and move'em out!

Noise issues inevitably find their way to the board or community manager, usually at 2 a.m. The complainer figures, "If I can't sleep, someone else should join me." If you've made the common mistake of providing your home phone number for "emergencies",

you've probably found out that noise can have the same urgency as a three alarm fire.

There is a common misconception that because excessive noise making is against the rules of every HOA in creation, it's up to the board to do something about it. Wrong. Neighbors making excessive noise is a matter for the police if neighbors can't reach an understanding. In most cases, the neighbors themselves can resolve the noise if they only talk to each other.

Poor sound insulation is common when older apartments are converted to condos or co-ops. But it still happens in new construction. Since the builder usually doesn't plan to live there and buyers rarely get to test drive their units, noise levels can be horrific even in current code construction. The most noticeable noise usually originates from the kitchen due to the hard surfaces, then from the hallway and living room due to higher concentration of traffic. If a unit has hardwood flooring throughout, noise will be like Chinese Water Torture, only worse.

In cases of poor sound design, the board can enact floor finish standards that require sound deadening panels below hard flooring, area carpets over them or restricting hard surfaces altogether. Clearly, it's easier to prevent someone from installing a hardwood floor than demanding they rip it out, so the sooner these standards go into place, the sooner problems can be averted.

For those poor souls living below Buffalo Bill, sound deadening panels attached to the ceiling can offer relief. Attaching resilient metal channels to provide an air gap to which is fastened 5/8"-3/4" sheetrock will considerably reduce sound transmission. It is relatively inexpensive to install over the existing ceiling and only takes 1-1½" of ceiling height away. Adding 1" thick fiberglass insulation in the gap may help further. Even though this will cost money, it will certainly enhance livability and make the unit more saleable. As a token of good will, the upstairs neighbor may be willing to share of the cost. At least they should be asked. Their willingness to be part of the solution will go a long way toward mending fences.



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Buffalo were designed to roam on the plains. When they lose their way and begin foraging overhead, don't get mad, get earplugs! (Just kidding.) First, talk to the neighbor to see if there is an accommodation that can be made. Most neighbors don't want to be a problem. Assume yours doesn't when you talk with them.

If, however, the neighbor turns out to be an unsympathetic jerk or can't avoid making noise without learning to fly, the aggrieved should either take the matter up with the police, if we're talking domestic violence or all night parties, or install sound proofing. If there is an inherent construction design flaw, the board can help further with proactive noise reduction standards. Oh give me a home, where the buffalo don't roam.

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Blessed are the Peacemakers

Homeowner associations can be hotbeds of discontent, turmoil and conflict at times. Out in the big world, combatants can often successfully just avoid each other rather than deal with the problems. But within the HOA, avoidance is much more difficult and being in conflict with a neighbor can make living there very stressful. Unresolved conflicts in HOAs often prompt one or both to move to avoid further unpleasantness.

The Bible teaches that conflict comes from the desires that battle in the human heart: "What causes fights and quarrels among you? Don't they come from your desires that battle within you? You want something but don't get it. You kill and covet, but you cannot have what you want. You quarrel and fight. You do not have, because you do not ask God. When you ask, you do not receive, because you ask with wrong motives, that you may spend what you get on your pleasures." James 4:1-3

Conflict caused by concealing the truth, bending others to your will, or seeking revenge is clearly counter productive. But conflict can also be fueled by good intentions in a desire to be understood, loved, respected, or vindicated.

Conflict can arouse different kinds of responses. One response is to run, hide or deny the problem exists. Another response is to attack either verbally, physically or legally. Neither of these responses diminishes the conflict and usually has quite the opposite effect. The only real long term solutions to conflict are peacemaking responses like:


1. Overlook the Conflict. Just because we get slapped doesn't mean we have to get even. An eye for an eye and a tooth for a tooth leaves only the blind and toothless. "A man's wisdom gives him patience; it is to his glory to overlook an offense." *Proverbs 19:11* "Bear with each other and forgive whatever grievances you may have against one another." *Colossians 3:13*

2. Reconciliation. Making amends is not only the right thing to do, it relieves us of anxiety and hostility. "Therefore, if you are offering your gift at the altar and there remember that your brother has something against you, leave your gift there in front of the altar. First go and be reconciled to your brother; then come and offer your gift." *Matthew 5:23-24*

3. Mediation. Pride is a high mountain to climb. Sometimes, a little help from a friend is needed to build a bridge of reconciliation. "If your brother sins against you, go and show him his fault, just between the two of you. If he listens to you, you have won your brother over. But if he will not listen, take one or two others along, so that every matter may be established by the testimony of two or three witnesses." *Matthew 18:15-17*

4. Accountability. Rather than stand idly by while a neighbor engages in self destructive or harmful behavior, intercede in a caring way. "Brothers, if someone is caught in a sin, you who are spiritual should restore him gently." *Galatians 6:1*

Peacemakers do not avoid conflict but confront it directly with the goal of reconciliation. Reconciliation is not

always easy to achieve because the human heart can be hard. But blessed are the peacemakers who point the way. 

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High Medical Costs


A woman brought a very limp parrot into a veterinary office. As she laid her pet on the examination table, the vet pulled out his stethoscope and listened to the bird's chest. After a moment or two, the vet shook his head sadly and said, "I'm so sorry, Polly has passed away."

The distressed owner wailed, "Are you sure? I mean, you haven't done any testing on him or anything. He might just be in a coma or something."

The vet rolled his eyes and left the room returning a few moments later with a beautiful black Labrador. As the bird's owner looked on amazement, the dog stood on his hind legs, put his front paws on the examination table and sniffed the dead parrot from top to bottom. He then looked at the vet with sad eyes and shook his head.

The vet took the dog out but returned a few moments later with a cat. The cat jumped up and also sniffed delicately at the bird. The cat sat back, shook its head, meowed, and ran out of the room.

The vet looked at the woman and said, "I'm sorry, but like I said, your parrot is most definitely 100% certifiably dead, bereft of life." He then turned to his computer, hit a few keys and produced a bill which he handed to the woman. Still in shock, she took the bill and cried, "\$150? Just to tell me my bird is dead?"

The vet shrugged. "If you'd taken my word for it the bill would only have been \$20. But with the Lab Report and the Cat Scan..." 

Regenesis Service Directory

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