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Managing Smoking, Pets, and Other Nuisances

An Exclusive Special Report from
Community Association Management Insider

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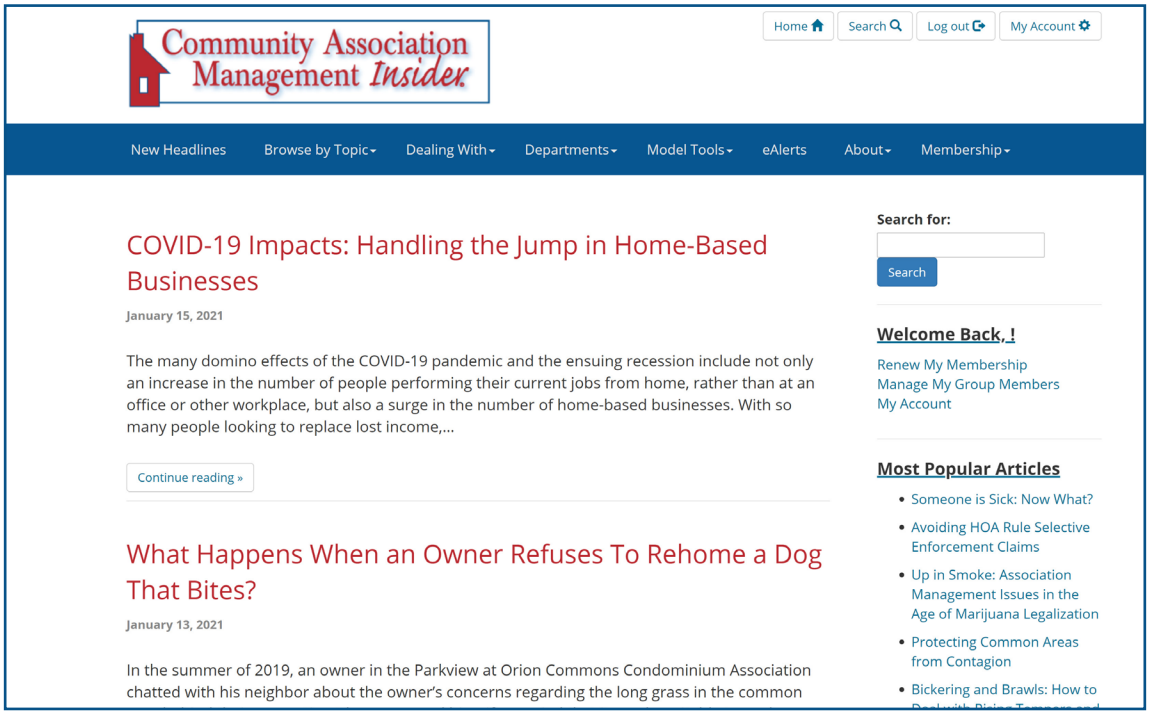
Community Association Management Insider helps community association managers keep their co-ops, condominiums, and homeowner's associations running effectively and within budget — and all in the bounds of state, local, and federal law, as well as their governing documents.



A Message from the President

Regardless of where you're located, or how long you've been in the business, the same types of problems tend to crop up over and over, don't they?

It's not the big emergencies that make you pull your hair out, but the everyday hassles that start to grate when you get lots of people living together in the same community. Things like pet issues. And smoking. And the other chronic niggling nuisances that, over time, become a real pain in the neck.

Which is why we've pulled together this Special Report specifically about managing these sorts of challenges. You'll learn:

- How to manage smoking in common areas
- Your obligations relating to service dog special requests
- How to handle "nightmare neighbors"
- How to manage wild animals that come into your community (and, ideally, how to keep them out!)
- Keys to managing a homeless presence in your area
- And more

So sit back, grab a soothing cup of tea, and read on to find out how to manage—and mitigate—those "small" nuisances that become a big headache over time.

Best regards,

Matt Humphrey
President
Plain-English Media
Publisher of *Community Association Management Insider*

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Smoking

Pass Anti-Smoking Bylaw to Extinguish Related Risks in Community

As time goes on, even more information emerges about how dangerous smoking is not only for smokers, but also for those exposed to secondhand smoke. Secondhand tobacco smoke — Environmental Tobacco Smoke or ETS — has been classified by the Environmental Protection Agency (EPA) as a "Group A" carcinogen, a known cause of cancer. Smoking is also a fire hazard, leading to possible property damage; cigarettes or cigars that haven't been completely extinguished can spark flames. And tobacco smoke also annoys nonsmoking members and their guests, resulting in more complaints that you have to address.

It's common for prospective homeowners who are considering buying in the community to ask about whether it's a nonsmoking property. This is especially important in smaller properties like condominium buildings, where smokers might linger outside the building or in limited common areas. So another positive reason for a ban is increased property values.

"If it's within your association board's power to ban smoking, you should seriously consider proposing a ban in either part or, depending on what type of community you have, all of the community."

If it's within your association board's power to ban smoking, you should seriously consider proposing a ban in either part or, depending on what type of community you have, all of the community. Here's how you can accomplish this.

Take Proper Steps in Line with Governing Documents

Because of the risks involved with smoking, many community association boards feel that it's their responsibility to ban smoking in their communities. Some boards feel that putting an end to smoking in common areas is enough, while others try to prohibit smoking in members' units as well. If you decide to do one or both, you should write an effective bylaw so that you can enforce a no-smoking policy.

Although you could probably ban smoking in common areas just by passing a rule, a bylaw is better because it requires a vote of the members. This will give you a stronger mandate to enforce the smoking policy, and members will appreciate being included in the decision. To extend your smoking ban to members' units, on the other hand, you probably don't have a choice, and will have to hold a member vote and pass a bylaw. That's because you probably don't otherwise have the authority in the governing documents to regulate this type of member behavior within their units.

Pick Smoke-Free Locations

A good anti-smoking bylaw will help you implement a ban on smoking at your community, but what you put in the bylaw will be determined by where you want to ban smoking there. In the past, communities banned smoking only in the common areas, but in recent years banning smoking anywhere in the community has become more prevalent — including within members' units. This is more likely to happen where smoking, even within the confines of a unit, affects other units, such as in single, high-rise buildings.

Think about what's most likely to work in your community. For example, you'll have to consider your community's physical layout. If it's comprised of single-family homes on fairly large lots, you probably don't have a valid reason to ban smoking that's confined to a member's unit. In that case, you can ban smoking in all common areas, but shouldn't try to ban it within units. However, if your community is comprised of units that share a common ventilation or HVAC system, or a common wall that's not a cinderblock firewall, it's reasonable to extend the ban to smoking within members' units.

Draft Your Bylaw Effectively

To be effective, the smoking ban bylaw, like our Model Bylaw: Take Proper Steps to Ban Smoking in Community, should base the ban on the nuisance provisions in your governing documents. Virtually all governing documents ban members from doing anything that would be a nuisance or annoyance to others in the community. Since secondhand smoke is a known carcinogen, smoking in common areas, where members congregate, is certainly an annoyance to members who don't smoke and is likely to fall within the legal definition of "nuisance." And in communities where members' units share common walls or ventilation systems, smoking is a nuisance even when confined to a member's private unit, because smoke often seeps through the walls. In both situations, the association has not only the right to ban smoking — it has the responsibility.

The bylaw should also state exactly where smoking is banned. Cigarettes probably come to mind when discussing smoking, but you should also specify that members may not smoke cigarettes, cigars, or pipes in banned areas. And, depending on where your association is located, you might want to include marijuana as being part of the smoking ban. Your location will determine whether this is an issue; marijuana might not be legal in your area anyway.

To make your new policy effective, the bylaw should ban smoking by members and their guests. Sometimes, it's a guest, not a member, who is smoking.

In communities that ban smoking within members' units, this means that the members must not allow anyone they've invited into their unit to smoke. Make members responsible for the behavior of their guests, whether that guest is smoking within the member's unit or in a common area. By having the authority to fine a member for her guest's behavior, you'll give the member an incentive to take the initiative and control that behavior.

"It's important to give the association the authority to fine members for violating the policy. Any policy will be more effective if the association has a way of enforcing it."

Put Teeth in Your Policy

It's important to give the association the authority to fine members for violating the policy. Any policy will be more effective if the association has a way of enforcing it. Despite your best efforts to explain your policy in advance to your members, and despite your authority to fine members, some members might still violate the policy. So say in your bylaw that, if the association must sue to enforce its policy, or if it must defend itself in court against a member who has challenged it, the loser of the lawsuit must pay for the winner's costs and legal fees.

Facing Member Opposition to Smoking Ban

Sometimes when associations try to implement a smoking ban, they face opposition from members. If this is an issue at your community, don't drop the idea of a smoking ban. Instead, realize that you can overcome this by proposing a remedy or remedies acceptable to all parties.

Surveying members before proposing the ban can help you gauge the level of support and opposition to the plan. The more smokers residing in the community, the less likely the ban will be approved.

If you believe that the majority of members would oppose a smoking ban, you can otherwise limit smoking in common areas. You can come up with creative solutions to potential stalemates. For example, you can exempt existing smoking members from the ban — that is, "grandfather" them — and suggest establishing designated areas within the general common areas where they can smoke without bothering nonsmokers and new members to whom the ban applies.

Practical Pointer: Remember that in all circumstances, prohibiting smoking within a certain distance from units or near children's play areas should be a top priority.

Allowing Smoking in Common Areas May Invite Nuisance Claims

As nonsmokers become more assertive about their right not to breathe secondhand smoke, there has been increasing litigation over the issue of smoking in condominiums.

A recent California case is an example of this, and it may push boards to consider eliminating smoking in the common areas of condominium communities. Although the case involves an apartment complex, there are similarities with how smoking in condominiums has been litigated — and will continue to be litigated.

Common Area, Public Nuisance

In this case, the apartment complex owner banned smoking in all indoor units and indoor common areas, but permitted it in the outdoor common areas, such as near swimming pools, playgrounds, and outdoor dining areas, in order to accommodate residents and guests who smoke. Furthermore, the apartment complex owner encouraged smoking in the outdoor common areas by providing ashtrays for smokers and by permitting its employees to smoke in outdoor areas.

However, one of the residents was a 5-year-old girl who had allergies and asthma. The secondary smoke in the outdoor common areas exacerbated her symptoms and caused her to suffer through three bouts of pneumonia. Although the girl's father requested that the management ban smoking in the outdoor common areas, the management denied these requests. The eventual lawsuit claimed that the management's failure to ban outdoor common area smoking constituted a public nuisance and a violation of the Americans with Disabilities Act (ADA). The owner asked the court to dismiss the case.

The court ruled that the resident could continue with her nuisance claim, but her ADA claim must be dismissed. The court said that the ADA does not apply to apartments and condominiums. The court allowed the nuisance claim because the management "plainly has a duty to maintain its premises in a reasonably safe condition" and her complaint properly stated the elements of a public nuisance claim under California law. The management's decision to allow smoking in the outdoor common areas created a condition that was harmful to health. It allowed smoking in the outdoor common areas that affected a substantial number of people at the same time. The seriousness of the harm caused by secondhand smoke outweighed the social utility of allowing smoking in the outdoor common areas. The girl suffered harm that was different from the type of harm suffered by the general public, and the management's conduct was a substantial factor in causing the harm, the court said.

Limiting Liability to Nuisance Claims

Litigation over smoking disputes is not going away. There is plenty of medical evidence that secondhand smoke poses a health risk for nonsmokers, underscored by the adoption of laws in many states banning or restricting smoking in public places.

Boards should take complaints about secondhand smoke seriously and try to propose a remedy, or remedies, acceptable to all parties. If an association's board is considering a ban on smoking in common areas, it should first survey members before proposing a ban. This way, a board can gauge the level of support and opposition to the plan. The more smokers residing in the community, the less likely a ban will be approved.

"Boards should take complaints about secondhand smoke seriously and try to propose a remedy, or remedies, acceptable to all parties."

Since the issue of smoking in condominiums usually arises with member complaints, if there is strong opposition to the plan, a board may be able to come up with creative solutions to these potential stalemates — for example, by exempting existing smoking members and establishing designated areas within the general common area where they can smoke without bothering nonsmokers.

Also, if your association chooses to ban smoking in common areas, be sure to amend the governing documents and not enact a community rule to do so. A court is more likely to uphold a bylaw amendment because it is more difficult to enact than a community rule. A bylaw amendment typically requires the approval of at least 75 percent of unit owners and sometimes more, while a board can adopt a rule by majority vote.

A bylaw amendment is also easier to defend in court from members challenging it. A member must prove that that an amendment is arbitrary and capricious to overturn it, while members challenging a rule must demonstrate only that it is "unreasonable," which is a much lower legal threshold to clear.

Association Tolerance for Cigarettes Is Going Up in Smoke

Despite widespread warnings about the dangers of cigarettes, you'll no doubt have at least some smokers in the community you manage. This is especially problematic in condominium buildings, where smoke from one unit can permeate other units and common areas — leading to bitter complaints or damage that you'll have to deal with. Some cigarette smoke complaints might even purport that the smoke is causing health issues for other members. And, in an increasingly smoke-intolerant society, courts have been ruling in favor of plaintiffs, forcing associations to try to implement smoking bans.

In New York City, a judge ruled that secondhand smoke is a "breach of the warrant of habitability." That case helped set the stage for the ruling in a groundbreaking court case in Manhattan that is extinguishing the idea that associations, including co-ops, can ignore secondhand smoke complaints or shirk responsibility to help unit owners who are being affected by smokers in the building. A state Supreme Court judge has awarded more than $120,000 in back maintenance, interest, and attorney fees to a co-op shareholder who claimed that smoke from other apartments had permeated her unit and rendered it uninhabitable. The decision put forth the idea that if associations want to be in charge of residences, they must assume the obligation to ensure that the occupants are protected from hazards such as the carcinogenic toxins found in cigarettes, which can be inhaled as secondhand smoke.

The plaintiff in the case never lived in the Manhattan apartment she purchased, because it smelled of cigarette smoke. During her ongoing dispute with the co-op board, the unit owner was advised by maintenance personnel to re-caulk areas of the apartment, and was told by the managing agent that the situation "wasn't the building's problem." But now the co-op actually is on the hook for the problem. The court's ruling puts increasing pressure on landlords, including co-op boards, to ensure that smoke doesn't pass from one unit to another.

"If you don't have a smoking ban, now is a good time to talk with the board of directors about implementing one to head off trouble."

So if you don't have a smoking ban, now is a good time to talk with the board of directors about implementing one to head off trouble, or if your current ban isn't comprehensive enough you should go back to the drawing board to come up with a policy that protects the health of your members — and keeps the association out of court.

Dogs

How to Handle Owners' Barking about Dogs

Even the most ardent dog lovers can get fed up with their neighbors' pooches, and no one knows that better than the boards of directors and managers who must field the resulting complaints. With so many dog owners thinking of Fido as a member of the family, the proper response calls for a sensitive touch.

Common Complaints

How do dogs get the neighbors' dander up? "The handling of dog waste is probably the number-one issue," says Kelly Richardson, principal in Richardson Ober PC, a California law firm known for community association expertise. Owners let their dogs urinate or defecate in common areas and then fail to clean up after.

Ellen Hirsch de Haan, a partner in the Tampa, Fla., law firm Wetherington Hamilton, PA, agrees that dog waste is the top complaint. "The number-two complaint is dogs off the leash, which leads to dogs pooping in neighbors' yards."

De Haan says barking also ranks high: "A dog left barking all day, left on a patio or under a tree, or a dog that barks any time anyone walks anywhere near the unit."

Turning to the Rules

When dog-related issues arise, the first step is to review the rules to determine which apply.

"You don't want them to unreasonably annoy other owners' quiet enjoyment of their homes."

Kelly Richardson, principal in Richardson Ober PC

Some associations may rely on the catch-all nuisance provision. "I think that applies to pets," Richardson says. "You don't want them to unreasonably annoy other owners' quiet enjoyment of their homes."

De Haan says the nuisance rule can work in the absence of dog-specific rules, but it's better to have those specific rules. Associations without such rules should consider adopting some through the usual process.

But don't go overboard. "One mistake that boards sometimes make is trying to regulate every conceivable way a dog might be a nuisance, and that's not productive," Richardson says. "I don't want to see four pages of dog rules."

He advises sticking to the basics: "Having rules on the handling of waste, leashing of dogs outside the residence, and unreasonable noise will cover 90% of the problems."

It's important that any dog rules are clear and unambiguous. If a rule prohibits "excessive barking," it should define the term "excessive," perhaps by referring to the local ordinance. For example, the municipal code might bar allowing an animal to bark, yell, or cry for more than five minutes in any one-hour period.

Richardson also tells his clients to include a general statement in the rules about the owners' responsibility for their animals: "You're responsible for what your dog does, and, if it damages association property, it's your responsibility. We don't have to prove negligence; you're just liable."

Remember, too, the critical role education can play. De Haan suggests creating a booklet of all of the association's (and perhaps the municipality's, too) pet-related guidelines and distributing it to all residents.

Enforcing the Rules

When the board receives a specific complaint about a dog, it should trigger at least some level of investigation. "The board has to do enough investigation to determine if this is a neighbor-to-neighbor dispute or an actual situation where others also are aware of it," de Haan says.

"You need to make sure it's not that the complainer has animosity toward the dog owner or kicked the dog the first time they met so that's why it's aggressive." She says boards particularly need to see if anyone else has a complaint when an owner has an aggressive dog that lunges and frightens people.

As with all rules violations, the board should assemble some documentation before approaching the offending owner — photos, recordings, noise logs, written complaints from neighbors.

It's wise not to come down to hard on the offender right off the bat in these situations, though. Dog owners can be oblivious to their loved one's behavior or how it might affect others. They may be happy to do what they can to mitigate the problem once it's brought to their attention.

Start by making a compliance request in person or through a letter. Explain the issue and how the owner can correct it, but don't threaten fines or other punitive action yet. If the owner fails to remedy the situation, send a letter noting that the problem persists, outlining the applicable rules and penalties, and setting a reasonable deadline for compliance.

"The biggest problem with dog restrictions is the practicality of enforcement."

Dan Artaev, senior attorney at Fausone Bohn, LLP

But then what? "The biggest problem with dog restrictions is the practicality of enforcement," says Dan Artaev, senior attorney at Fausone Bohn, LLP, in Northville, Mich. "Are you going to go to court to get an injunction? I don't know if a court is going to grant that or that it's worth the expense."

Artaev, in fact, endorses an entirely different approach to enforcement — turning to the local municipality. "I don't recommend that associations deal with these things themselves," he says. "It's something the municipality should be handling.

"I recommend the board refer the complaining owner to the local ordinances. It's very common for those to include leash laws and other rules regarding dogs, and there should be a code enforcement officer, who is better equipped to deal with this situation," he says. "A lot of times, the officer doesn't even need to issue a citation; it's enough to come out."

Associations that handle enforcement themselves, though, can expect to run into dog owners who claim they need reasonable accommodation related to their dogs because of a disability. Associations must proceed with caution when considering whether a reasonable accommodation is required and, if so, whether it includes overlooking violations.

Association Can Refuse Fence for Service Dogs

Owner requests for accommodations of their service or emotional support animals can lead to ugly, costly disputes, but associations shouldn't assume they can't win the legal battle. A state court of appeals in Michigan recently came down on the side of the association after an owner erected a fence for her dogs without first seeking approval. The case provides a good example of how to handle similar situations.

Disabled Owner Builds Unauthorized Fence

Janis Creswell owns a unit in a subdivision governed by the Fox Bay Civic Association. The deed restrictions for the community prohibit owners from constructing fences unless they submit detailed specifications to the association, along with a $25 review fee, and the association approves the project in writing.

According to the deed, the restriction is intended to ensure an aesthetically pleasing and "harmonious" subdivision. The association had previously approved only fences surrounding swimming pools, which are required by state law.

Creswell suffers from several illnesses and was prescribed an emotional support dog; she also owns a registered service dog. After buying her home, she built a fence around her backyard to keep the dogs in, without submitting an application.

The association notified her that she had violated the deed restrictions. It requested removal of the fence and informed her of reasonable alternatives that wouldn't violate the restrictions, including a dog run or invisible fence. Either would allow her dogs to use the yard without her present, but she refused both.

In an attempt to avoid litigation, the association offered retroactive approval for the fence if she obtained consent from all her neighbors. She couldn't secure the necessary consent.

In an unusual twist in these types of cases, it was the association — not the owner — that turned to litigation. It filed a lawsuit alleging Creswell was in violation of the deed restrictions and asked the court to issue an order that she take down the fence. She argued that the association violated the federal Fair Housing Act and its state law counterparts because her request to keep the fence was a reasonable accommodation.

The trial court ruled in favor of the association, finding no discrimination occurred because reasonable alternatives to the fence were available. Creswell appealed.

The Court Knocks It Down

Like the trial court, the court of appeals focused on how Creswell simply ignored the restriction, says Dan Artaev, senior attorney at Fausone Bohn, LLP, in Northville, Mich., who represented the association.

"If anyone else goes out and tries to build something in the community, they have to pay the fee and submit plans to the association," he says. "This woman did none of that. She just took the position that 'I have a service animal, I can do whatever I want.'"

The court of appeals highlighted the fact that the association suggested reasonable alternatives that would provide for Creswell's disability while complying with the restrictions. These, it said, would better balance the need to let a dog outside unsupervised with the need to control the character of the community.

Notably, the court stated that, when considering requests for emotional support and service animals, associations don't have to grant *every* request but should examine the reasonableness of each request based on the unique facts.

Kevin Hirzel, managing member of Hirzel Law, PLC, a Michigan-based firm that works with community associations, says this observation in particular makes the case important. "Associations get a little nervous because so many cases and administrative hearings go the other way on animals.

"A lot of owners who make a request think they're entitled to an absolute accommodation, but this says associations can exercise judgment."

Kevin Hirzel, managing member of Hirzel Law, PLC

"A lot of owners who make a request think they're entitled to an absolute accommodation, but this says associations can exercise judgment. If the board can come up with some kind of alternative that accommodates a disability and doesn't violate the deed restrictions, the courts probably are going to find that okay and not go for some more intrusive accommodation that would violate the restrictions."

Artaev emphasizes the association's soft touch when initially dealing with Creswell. "We never contested the fact that she was disabled or needed an animal because we were trying to be sensitive to her disability," he says. "We just took her word that she needed these pit bulls."

While the association was reasonable, it also drew a hard line to protect the interests of its other owners by going to court. "If an association is too accommodating and doesn't enforce deed restrictions, it's open to 'waiver,'" Artaev cautions. "The next time someone builds something without approval, the owner could just point to this fence and say the association waived the right to enforce the deed restrictions."

The Downside for the Association

Although the association prevailed, it's worth noting that its governing documents didn't include a provision allowing it to collect its attorneys' fees.

"Nobody wins in this sort of litigation," Artaev says. "The homeowner doesn't win because she has to take down her fence and lost the chance to work something out with her association, and the neighbors aren't happy because the association has to pay the legal fee."

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 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.

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."

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. 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 summer, 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. 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 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 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."

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 https://www.cdc.gov/features/dog-bite-prevention/ and https://www.cci.org/about/resources/for-the-community.html.

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*.

Disputes

"Nightmare" Neighbor's Conviction Gives Condo Owners Relief

Dealing with disruptive residents ranks high on the list of thorny problems community associations — and their management companies — can encounter. You've probably heard your fair share of complaints about people violating parking rules or failing to clean up after their pets, but you've hopefully never dealt with anything close to the multi-year reign of terror conducted by a condo owner in Orlando, Fla.

If you ever do, we have some advice on how to handle the situation.

Tales of Torment

Marianna Seachrist was a member of the Phillips Bay Condominium Association. In June 2016, the association filed a petition against her with a state arbitrator, alleging that she violated the association's governing documents in numerous ways and was a nuisance in her condo.

Several witnesses testified on behalf of the association, sharing what the arbitrator dubbed "shocking stories of … torment."

For example, after a new neighbor moved in below her unit, Seachrist began loudly playing the movie "The Nightmare Before Christmas" on a continuous loop over the bedroom of the neighbor's daughter (something the arbitrator, a self-described fan of the movie, labeled "the epitome of a nuisance and malicious behavior"). She also played language lessons very loudly over the neighbor's bedroom. Seachrist would turn these on and then leave home.

The community association manager testified that she constantly sent him and his company emails accusing them of extorting money from her, engaging in fraudulent activity, and harassing her. Her emails often addressed bushes on common elements that she believed needed to be trimmed. Eventually, she cut these bushes all the way to the ground, requiring removal by the association at its expense.

Seachrist also accused board members of being corrupt, abusing their power, and engaging in vandalism. She threatened to hire someone to kill the association vice president.

The association manager testified as well about the complaints he received from other residents about Seachrist, many of them related to noise coming from her unit. An elderly neighbor wept at an association meeting as she told of the constant pounding noises coming from Seachrist's unit at all hours. She eventually moved to a hotel and sold her unit because of the noise — and she wasn't the only resident to leave the community for this reason.

How bad did the noise get? Let's put it this way: Noise complaints led to multiple arrests of Seachrist. According to news reports, in fact, police visited her condo at least eight times.

On one such visit, they found three low-frequency, "Butt-Kicker" speakers in her unit, connected to an amplifier and held face-down on the floor by dumb-

bell weights and cinder blocks. The amplifier was attached to a tablet computer playing a "workout mp3" on a loop, and she could turn the tablet on remotely. (Seachrist claimed that she installed the system to fend off insects.)

But wait — there's more. The cops found video footage of Seachrist stomping around her unit in high-heel shoes and intentionally throwing dumbbells on her floor.

We could go on, with more details of her harassment of other residents (like the one who testified she lived in "constant fear") and vendors such as landscapers and roofers, but you get the gist.

A Welcome Resolution

Although the arbitrator came down on the association's side, it didn't seem to have much effect on Seachrist's behavior. Nor did the temporary injunction her downstairs neighbor obtained against her in 2015 for stalking protection; indeed, the police were called to her unit about noise for three consecutive days after the injunction was issued. She was arrested, but the charges apparently were dismissed at that time.

At long last, though, the Phillips Bay neighborhood can breathe a sigh of relief. This past February, Seachrist was convicted on charges of stalking and aggravated stalking after an injunction charges, and news reports say she faces foreclosure on her condo.

Tips for Handling Obstreperous Owners

You wouldn't wish this long, noisy, and stressful process on anyone, but the association generally took the right route to deal with its troublesome (and no doubt troubled) member. Rather than letting their emotions and her provocative activities get the best of them, they consulted legal counsel and filed police reports, pursuing both civil and criminal remedies.

It's discouraging — but, unfortunately, not unusual — that it took so long to get relief. "One of the difficulties that associations face is that you don't typically have all these incidents happening at one time," says Richard Ekimoto, a nationally recognized community association lawyer with the Honolulu firm Ekimoto & Morris, LLC.

"You don't just start with legal action, but first try a warning, then fines, and finally legal action."

Richard Ekimoto, community association lawyer with the Honolulu firm Ekimoto & Morris, LLC.

Worse, associations can run into arbitrators or judges who feel that board members and management companies should expect a certain amount of harassment by residents. "The law also tends to encourage increasing levels of penalties," Ekimoto says.

"You don't just start with legal action, but first try a warning, then fines, and finally legal action." Even though it may seem obvious that some of the more mild initial steps won't make any difference, you need to take them, especially if they're spelled out in the governing documents.

"Sending a letter to a person who is violating the documents, and otherwise engaging in anti-social and nuisance behavior, and expecting a rational response and compliance is unreasonable and unproductive," acknowledges

Ellen Hirsch de Haan of the Tampa, Fla., law firm Wetherington Hamilton. "However, notice and due process must be observed before taking advantage of any of the other remedies available."

Often, though, the docs lack clear processes for dealing with violations. "If this is the first time a community board is dealing with a significant problem, they may realize their hearing procedures or fine schedule are inadequate or nonexistent," says Marlyn Hawkins, a partner with the Seattle law firm Barker Martin, P.S.

"Residents should call the police if they feel threatened, or if they are being harassed or stalked, or otherwise feel their safety is in jeopardy."

Ellen Hirsch de Haan, of the Tampa, Fla., law firm Wetherington Hamilton

"It may seem absurd that it took *years* for Seachrist's community to get justice, but months can easily fly by if a community feels uncomfortable making an enforcement decision, or if it needs to create or refine procedures for enforcement, or update a fine schedule," she says. "The best possible way to deal with an enforcement issue is to be proactive by addressing the procedural issues *before* you need them."

And when criminal or threatening behavior occurs? "Residents should call the police if they feel threatened, or if they are being harassed or stalked, or otherwise feel their safety is in jeopardy," de Haan says.

Hawkins agrees. "Ultimately, it's healthy to acknowledge that your HOA is not the vehicle for solving all of the world's problems."

Are Community Associations Liable for Harassment between Owners?

Community associations often prefer, understandably, to take a hands-off approach to disputes between owners. Under a federal regulation issued by the Department of Housing and Urban Development (HUD), though, that approach could backfire.

Association Liability for Owner-on-Owner Harassment

Abuse and harassment among owners is on the rise, says Sandra Gottlieb, a founding partner of California homeowner association law firm SwedelsonGottlieb. That's why it's critical that managers and association boards understand the implications of the HUD regulation.

The 2016 regulation makes associations liable in certain circumstances for harassment committed by third parties, including owners, when the harassment was based on a protected characteristic — meaning race, color, religion, sex, familial status, national origin, or disability.

Specifically, it imposes liability on community associations that:

1. knew or should have known of harassment by a third party,
2. had the power to correct and end it, and
3. failed to take prompt action to do so.

Notably, an association could be liable even if the alleged victim doesn't report the conduct if the association *should have known* about it (for example, when a manager or board member heard rumors about the harassment).

Prohibited harassment includes both "quid pro quo" harassment and hostile environment harassment. Quid pro quo — or "this for that" — harassment generally arises in the context of the sale or leasing of a unit or the granting of access to services or facilities. For example, if a board member conditions approval of an owner's variance request on the granting of sexual favors, it would constitute quid pro quo harassment.

"A community association generally has the power to respond to third-party harassment by imposing conditions authorized by the association's CC&Rs or by other legal authority."

Department of Housing and Urban Development (HUD)

Harassment between owners who aren't board members is more likely to be hostile environment harassment. This type of harassment involves unwelcome conduct that's severe or pervasive enough to interfere with an owner's use or enjoyment of his or her home. "An owner yelling racial slurs at another owner would be an example," says attorney Sara Wilson of Becker & Poliakoff in Florida.

Your clients might think they don't have the power to do anything in such circumstances so they don't need to worry about potential liability. HUD disagrees.

According to it, "a community association generally has the power to respond to third-party harassment by imposing conditions authorized by the association's CC&Rs or by other legal authority." What if, however, the governing documents don't expressly prohibit the actual conduct at issue?

"The association may wish to amend the governing documents to include an anti-discrimination restriction applying to residents," Wilson says. "If the association does not choose to, or is unable to, amend the documents in this manner, it would have to rely upon existing restrictions, such as nuisance or noise or possibly a restriction that prohibits unlawful conduct."

The Association's Duty

The regulation requires community associations to take whatever actions they legally can to end harassing conduct. That's why Gottlieb says "neighbor-to-neighbor" disputes don't exist anymore — because the board *must* investigate if they get a harassment complaint. They can no longer leave it to the neighbors to resolve.

"Without an investigation, they don't have enough information to make a decision, even if the decision is to do nothing," she says. "Deciding to do nothing is different than just doing nothing."

Noting that the HUD rule requires prompt action, Wilson recommends an association that receives a complaint gather relevant facts, make a written report, and discuss the matter with an attorney who can assist in the analysis of whether a protected class is involved and whether the conduct might fall under the HUD rule.

Associations may be reluctant to incur the legal fees, but they rarely are equipped to determine if a perpetrator's conduct is motivated by discrimination. "This is just not something associations are trained to do," Wilson says, "and this is why they should seek legal counsel if a potentially discriminatory issue arises."

Gottlieb cautions associations to avoid stumbling into potentially discriminatory conduct themselves: "They have to deal with similar matters in a similar way" She suggests boards develop a detailed roadmap that lays out how they will handle alleged harassment between owners. A board might, for example, escalate as necessary from a cease-and-desist letter to a hearing to a fine and so on — with every action (or decision not to act) documented in the minutes.

Take Four Steps to Put an End to Member-on-Member Harassment

Living in close proximity in a condo building or sharing amenities year after year in more spread out planned communities can throw together members with different points of view — some of them controversial. The past year has created divisiveness in political conversations and discussions about recent exposes regarding sexual harassment. But some states had reported a rise in hostility and aggressive behavior among community association members even before national events brought up these issues to argue over.

Part of your job is to make sure that the community is safe and that all members can live there and enjoy their units or homes peacefully. But when members don't get along, sooner or later, at least one member is going to expect you to get involved. To keep disputes between members from escalating into costly lawsuits or bad publicity, community association managers should know how to handle heated arguments between neighbors, or worse, an ongoing battle that involves harassing behavior, intimidation, or, in the worst case, violence — which has, sadly, not been uncommon.

Zero Tolerance Clause Nips Unpleasantness in Bud

"The best way to prevent reports of or complaints about harassment or intimidation is to ban this behavior in your governing documents."

The best way to prevent reports of or complaints about harassment or intimidation is to ban this behavior in your governing documents. This should include "abusive, harassing, and threatening behavior." Most likely, your declaration gives each community member the right to "quiet enjoyment" of her unit — that is, the right to live in and enjoy her unit without being disturbed, harassed, or threatened by the manager, an employee, or other members or residents.

Most declarations ban members and other residents from making excessive noise or engaging in any other behavior that disrupts the quiet enjoyment of others. But it helps to have a "zero tolerance" clause that specifically deals with abusive behavior to fall back on. Your clause should make it clear that no one may engage in any harassing or abusive behavior or any intimidation or aggression — either verbal or physical — directed at any member or other resident. This Model Clause sets out such a policy. Work with your attorney to tailor it for your particular community's declaration and/or association bylaws.

Model Clause

> Members and other Residents shall not engage in any abusive or harassing behavior, either verbal or physical, or any form of intimidation or aggression directed at other members, residents, guests, occupants, invitees, or directed at management, its agents, its employees, or vendors.

Practical Pointer: It's also smart to ban abusive behavior directed toward guests, occupants, management, employees, and vendors. Bad behavior or outbursts wouldn't necessarily be limited to just members.

What You Should Do to Handle Abuse Complaints

Because of the right your declaration gives each community resident to quiet enjoyment of her unit, it's important for you to look into and try to stop the harassment when it occurs. If you don't, you could face a lawsuit. But, to a degree, how you intervene will depend on the specific facts of the situation. For example, is the member harassing one neighbor or the community at large? Is the member's behavior merely impolite, or is it vulgar? Be aware that if the member's harassing behavior is based on others' race, color, religion, sex, familial status, physical or mental handicap, or national origin, you could be accused of violating fair housing laws and end up having to pay damages.

Here are four general steps that you can take when a member tells you that another member is harassing her and additional steps you can take for unusual circumstances.

Step #1: Verify complaint. When you first learn of a harassment complaint, verify it before acting. It's important to make sure the complaint is credible. You can do this by having your staff try to observe the behavior. For example, if a member complains that another member yells at her each night, have a staff member be on call to hear it. Also, talk to other members who live nearby to see if they've heard or seen anything. And bring a witness along. Document all conversations, and keep a copy of the reports in the abusive member's file. Once the complaint is verified, take the next three steps.

However, if the situation is more a matter of two neighbors failing to get along, each to blame in his or her own way, limit your involvement to an offer of informal mediation of the dispute, continue to monitor the situation, and take additional action if it's necessary.

Step #2: Meet with abusive member. In most situations, you should meet with the abusive member and speak to him about his behavior. An exception is when the abusive member has threatened violence or engaged in violence already, in which case you should call the police. But in most cases, you can discuss the incidents with the abusive member.

Tell him you've received complaints and give him the specifics about those complaints, such as the dates and times they occurred. Also, point out that your declaration and/or bylaws ban abusive, threatening behavior. Remember to write down the date and time of your meeting with the abusive member.

"But be on high alert: You should always be concerned about protecting the identity of the complaining member."

But be on high alert: You should always be concerned about protecting the identity of the complaining member. While in some cases, mediating the hostility in a neutral environment by scheduling a meeting with the abusive member and complaining member might be productive, consider very carefully whether this is safe for the complaining member. And if there's serious animosity between the parties, never set up, or allow a director to set up, a meeting with both sides in attendance.

Step #3: Write warning letter. If the informal approach doesn't work, send the abusive member a strongly worded letter. Your letter, like our Model Letter: Directly Address Abusive Member, should: (1) mention the specific incidents; (2) tell the abusive member that his conduct violates the declaration and bylaws; and (3) say that you may take legal action against him, which

could include the imposition of fines and sanctions, suspension of privileges, and pursuit of the matter in court if the conduct continues. In your letter, be sure to tell the abusive member what he must do to comply. It's important to check with your attorney before including these actions in any letter because the ability to fine and/or suspend privileges varies from state to state. It could also be regulated by your governing documents.

Step #4: Base further action on resident type. You'll need to take further action against the abusive individual if your efforts fail to stop the harassment. As your warning letter should indicate, that further action may include fines, sanctions, suspension of privileges, and pursuing the matter in court. However, the exact steps you take will depend on the specific circumstances and should be taken only after you consult your attorney.

Base your action on the type of resident who's causing the problem — that is, a renter or a member. If the abusive individual is renting his unit, contact the unit's owner and demand that he evict his tenant. Provide the unit's owner with written records of complaints and violations. Also, be sure the other association members and witnesses are willing to testify in eviction proceedings, and be ready to testify yourself, if necessary.

The situation is trickier when the abusive individual is a member, because you can't evict a member and foreclosure isn't likely either. Consider talking to the local police about the problem. If the abusive behavior rises to the level of criminal behavior, the complaining member can press charges; if the abusive behavior falls short of criminal behavior, a visit by the police still might sober all parties involved.

When to Take More Drastic Action

These four steps generally should handle member-on-member harassment, but there are two circumstances that call for additional action on your part. And a failure to take action could lead to lawsuits against the association.

Community-wide harassment. When the harassment isn't directed at one individual, but many, or the abusive behavior affects more than just one neighbor, you have an additional responsibility. If a member is, for example, throwing items off his balcony at anyone who passes underneath, or is verbally abusive and confronts neighbors in a common area, then he's violating the nuisance provisions of your declaration and/or bylaws. But because he's now being abusive toward the community at large, you're no longer a neutral third party; you're involved.

In that case, in addition to involving the police, seek an injunction from a court of law. An injunction is a legal order by a judge, prohibiting certain behaviors. When a member has become a nuisance to everyone in the community, it's the association's obligation to put a stop to it. (You can also consider community-centered punishment, such as fines, sanctions, and suspension of privileges.)

Discriminatory harassment. If a member is harassing or being abusive to others on the basis of any of the prohibited categories set out in federal fair housing law — race, color, religion, sex, familial status, physical or mental handicap, or national origin — the association's obligation to put a stop to it is urgent. If the association does nothing, the harassed member could sue the association for

violating fair housing laws. This means that you should take any or all of the steps listed above, as well as any other legal means available to you, to stop the harassment. Additionally, make sure to document everything you do regarding the matter and involve the association's attorney.

Be careful about labeling this type of disagreement as a neighbor-to-neighbor dispute and taking a relatively passive role in trying to help resolve it. This can be a very costly mistake, particularly where protected classes of citizens are involved.

How to Avoid Court by Using Alternative Dispute Resolution

Inevitably, in any homeowners association or condominium, there will be community-related conflicts. The bad news for associations when a dispute arises is that going to court can be extremely expensive, and the association might end up paying for litigation costs in the end. The good news when a homeowners association is asked to resolve conflicts is that there are ways to avoid costly legal battles: Alternative dispute resolution (ADR) can address issues that don't truly require a trip to court.

"It's important for an association to consider the appropriate ADR techniques — which include, but aren't limited to, conciliation, mediation, and non-binding or binding arbitration — for each situation."

But ADR isn't as simple as it may sound. There are multiple ADR techniques, and whether you choose the right one for your circumstances will affect the outcome, whether positive or negative. So it's important for an association to consider the appropriate ADR techniques — which include, but aren't limited to, conciliation, mediation, and non-binding or binding arbitration — for each situation. Here's what you need to know about ADR and how to make it work for the association you manage.

Technique #1: Use Conciliation for Assessment Collection Disputes

Associations shouldn't automatically jump to the two widely known ADR methods of mediation and arbitration when facing a dispute with an owner over whether he owes association assessments or other fees. There are ADR techniques beyond mediation and arbitration that can be used in community associations. Conciliation, which is one of the least formal methods of ADR, really just involves a more formalized consultation — a meeting — in an attempt to resolve a dispute.

To use arbitration or mediation to collect assessments would be overly and unduly burdensome and would affect one of the most important things for an association — assessments. So make sure that your association offers ADR in the form of conciliation for assessment disputes, such as those over whether an assessment is owed or the payment was late. (Note, though, that conciliation isn't useful in cases where the amount is undisputed but an owner asserts that the assessment is illegal.)

During the conciliation process, a homeowner makes an appointment with a member of the management company's bookkeeping staff and brings with him all of the documentation showing proper payment. The bookkeeping staff member has the association records at hand and is able to compare, on the spot, cancelled checks with the association's bookkeeping entries.

Conciliation is a productive, but much overlooked, ADR technique in the community association world. It works well because it creates a "meeting of the minds" — the owner and the association's manager must have all of their data readily available during this conference; if all of the necessary data is together it should be clear exactly what's owed, if anything, whether late charges were properly assessed, or whether the payment was on time. These issues can all be worked out efficiently using conciliation, rather than the unproductive sce-

nario where a homeowner calls the management company to argue about an alleged discrepancy.

While as the day-to-day manager of the community, you will play a role in some aspects of ADR situations, you should familiarize yourself with what will be expected of you in specific circumstances. For example, should you attend the meeting for conciliation? Not necessarily. Whether you need to attend the meeting will largely depend on how much access to or control over the association's financial records and other relevant information you have. The person representing the association in conciliation is generally a member of the management company's accounting or bookkeeping staff, not the site manager, and needs to be familiar with the accounting aspect of things. If a site manager who doesn't have familiarity with the association's account records has to check with other parties about necessary information during the meeting, it undermines the whole purpose — to quickly and efficiently settle the matter at once.

The ideal system is one where the management company designates a knowledgeable person who has full access to the records, knows them, can do the necessary research on the spot if possible, and can actually come to some resolution with the owner. If you have a person with control over the financial records, that person can resolve that kind of thing or at least agree where the difference is, in which case it's not settled but at least the issue has been narrowed.

> **Practical Pointer:** A conciliation meeting can also be conducted by phone, but if the management company is local, it should be done at the management company's office where both parties have access to a computer in case it becomes necessary to access information that way. Statewide management companies can't send managing agents all over the state for conciliations, so it's reasonable to give the option of doing this by phone or going to the management company.

Technique #2: Use Internal Process for Neighbor Conflicts, Rules Violations

In many states, neighbor-to-neighbor disputes, such as conflicts over things like noise and parking, fall under "housing-related disputes," which can be resolved less formally. (Ask your association's attorney for state-specific information that would affect which ADR techniques you're able to use.)

Typically, association rules and covenant enforcement issues also fall in this category. When the association becomes aware of an alleged violation, it puts the owner on notice, and she may dispute whether it's really a violation. An internal process can resolve arguments over whether an owner's actions have truly conflicted with the association's rules. It could be used, for example, when an owner, by law, can't be stopped by an association from making an environmentally beneficial modification to his unit, but the association argues that the aesthetics of the equipment or the manner in which it was installed doesn't comply with its regulations governing the installation or use of that equipment.

There should be an internal process that allows an owner to contest an alleged violation and state the reasons why he thinks his actions conformed to the as-

sociation's regulations, and also allows the association's representative (in the example above, the architectural control committee) to say why it thinks the owner has been noncompliant with regulations.

Usually, this process involves a separate covenants committee comprised of other unit owners — but not board members — who have volunteered making a determination one way or another. Alleged rules or covenant violations are areas where this type of ADR is widely used.

Techniques #3 and #4: Use Mediation, Arbitration for Developer Claims

Mediation and arbitration can be used for many kinds of association disputes, including those with contractors, builders, and developers. ADR should be available for everything from contractor disputes to developer construction defect lawsuits. In a somewhat controversial move, some builders are actually including mandatory ADR in their governing documents and sales contracts. A process for dealing with transition-related disputes — that is, alleged construction defects or alleged monetary claims — between associations and builders that arise from the development process is often put right in the master deeds or declarations.

Cases where the association has had to arbitrate its transition claims because of provisions in the unit sales contracts have become more prevalent. That's because under certain circumstances, these provisions may be held to affect not only the owner who's purchasing the unit, but also the association of the community where it's located. When a developer signs a sales contract with a purchaser, it can put in the sales contract that any dispute arising from the contract involving construction or other claims must be arbitrated. And courts have sometimes held that if all or most of the owners' sales contracts contain such an arbitration provision, where the association is merely acting as the representative of the owners, even claims brought by the association, not an owner, have to be arbitrated.

Many declarations now contain not only a requirement for ADR, but also a specific process the association has to go through. (This is state-specific, however, so consult with the association's attorney about these issues before taking any action.)

For example, some states have "right to cure" legislation. Under this legislation, the documents contain a process for dispute resolution that's outside the court system and is mandatory before an association can go to a court system there. Once the developer relinquishes control and the project is completed, the association is required to hire a professional engineer, architect, or licensed inspector to do an inspection of the property and make any and all claims that result from that inspection during a specific time period (usually much shorter than the statute of limitations). The builder must respond during a certain time period and based on that response, there must be some kind of ADR process that attempts to resolve any conflicts or outstanding disputes. But legislation isn't necessary; builders can build that process into a declaration, and owners, by accepting title to that unit, may be deemed to have agreed to that process.

Be Aware You Can Include ADR in Service Contracts

Associations, which are in essence like businesses, can't afford to be in court frequently. In service contract disputes, arbitration and mediation are two ADR techniques that can be used to settle matters to the association's and the service provider's satisfaction without costly litigation. Arbitration and mediation provisions encourage the parties. Although mediation is voluntary in the sense that the parties don't have to accept the outcome, it's a good option to offer.

There is rarely a disadvantage to mediation — if you can sit down across the table with a facilitator and try to work something out, it's a no-lose situation because all you've invested is a relatively small amount of money: your lawyer's fees and half the mediator's cost. This is certainly worth it if you can resolve a case, and the mediation alternative is a great way of attempting to do this.

If your association chooses to use mediation to try to settle certain types of disputes, ask your attorney about how to adapt our Model Clause: Try Mediation Before Jumping to Arbitration for Disputes, to use in your contracts to require that the matter be mediated before using arbitration or litigation to settle it.

While mediation is very low risk, keep in mind that "binding" arbitration has some disadvantages as compared to litigation. For example, the right to appeal is limited. There has to virtually be fraud or a gross misapplication of the law by the arbitrator to be eligible for an appeal. But it can stop a party with deeper pockets from using the strategy of dragging out a case to exhaust the other side's resources.

While successful appeals from binding arbitration are exceedingly rare because the grounds for which a court can overturn an arbitration award are extremely limited, that's also a good thing — there is finality. You get to an arbitrator, you get a resolution, and it gets done. And without an appeal, you can file the arbitration award as a judgment in court, and it's enforceable as if it had been tried through the judicial system, which is an added bonus.

If the parties are leery about committing to binding arbitration, another option is non-binding arbitration. There, the arbitrator hears the evidence and renders a decision, but either party is free to reject it and move on to another form of ADR or to court. The advantage of non-binding arbitration, though, is that it informs the parties of how at least one neutral person views their case and so may convince them to accept the arbitrator's non-binding decision or otherwise settle the matter.

It's important to understand that if the association makes ADR an option — or mandatory — for all contractors, it will probably apply to association disputes with you or your management company, because a management company is a contractor. So check your contract with the association to see if ADR is mentioned.

You should also weigh the pros and cons of arbitration. Arbitration has many advantages, but it's not always faster or less expensive than other resolution options. A significant case can drag on for years and wind up being more ex-

pensive than litigation, especially with a three-arbitrator panel, because arbitrators typically charge high hourly rates. And if you use a dispute resolution organization to oversee and conduct your arbitration, you'll probably pay filing and administrative fees. It's a costly process and sometimes takes longer.

Coordinating the schedules of lawyers and arbitrators can also be tricky. And while pretrial discovery isn't as extensive as in the court system, it's still allowed at the discretion of the arbitrator or arbitrators. (Note that in a complicated case it's usually allowed.)

So associations need to be careful if they are going to write arbitration provisions into their agreements. First, consider whether, in light of the advantages and disadvantages, arbitration is an appropriate alternative for your organization's needs. Then write the actual provisions carefully and make sure that if they're needed, the performance is actually what you anticipate it'll be. You can do that by controlling how the arbitrators are selected and who can serve as an arbitrator. For example, in smaller contracts write a provision that provides for mediation and, if the parties can't settle the matter that way, then arbitration.

For smaller types of disputes, a single arbitrator mutually agreed upon by the parties may be acceptable. However, in larger disputes it's common to use a three-arbitrator panel. When a three-arbitrator panel is desired, make sure that the arbitrators are selected in the following way: Each party to the dispute selects a qualified arbitrator, and these two arbitrators pick a third arbitrator to serve with them. If a third arbitrator can't be agreed upon, an assignment judge of the county where the association exists will assign an arbitrator.

The process is designed to make it simple, efficient, and cost effective. Associations should consider where the process worked or didn't work in the past. For instance, if your association has dealt with cases moving slowly, setting timelines within which certain aspects of the process must be completed, such as scheduling the arbitration hearing within so many days and requiring a decision to be issued within so many days thereafter, helps keep the process on track.

You should also customize contracts. Associations can be creative when deciding which ADR methods to choose. It's a mistake to take an arbitration provision off the shelf and just use it in every contract. Instead, think about what the nature of the contract is, who the parties to the contract are, what services will be performed, and what kinds of disputes could arise.

For example, put short time frames into smaller contracts, such as landscaping contracts. If there's a dispute with a landscaping contract, the hearing gets scheduled within 30 days and the decision is issued within 15 days thereafter. On the other hand, those time frames won't work for a complicated construction defect case. Really think about what the contract is that you're inserting the provision into, which will help you customize it.

Other Disruptions And Disturbances

Minimize Risks Associated with Homeless Presence at Community

More and more community association managers, especially those of HOAs or condo buildings in urban areas, are having to deal with the issue of how to handle homeless individuals on or near their properties. The homeless can pose concerns for residents and staff, ranging from creating a nuisance to criminal activity.

As association managers are reporting homelessness on the rise in their areas, Seattle communities have experienced a particularly noticeable uptick. So we enlisted Washington state community association expert and educator Paul D. Grucza to help explain the importance of addressing homelessness affecting your community and how you can do so effectively.

Understand Nature of Problem

The non-profit National Alliance to End Homelessness reports that the January 2017 Point-in-Time count showed that 20 states have experienced a rise in homelessness, while the overall number of people experiencing homelessness increased nationally by 0.7 percent between 2016 and 2017.

At the time this estimate was calculated, the vast majority of the homeless population lived in some form of shelter or in transitional housing. But approximately 34 percent lived in a place not meant for human habitation, such as the street or an abandoned building. So it shouldn't be surprising that your property could be an ideal place for homeless individuals to find shelter.

In some cities, such as Seattle, there are sanctioned camps — that is, locations set aside by cities where the homeless can go for relative safety. But some unsanctioned camps for the homeless have been established close to associations — for example, in Virginia. These so-called "tent cities" have also popped up in North Seattle, adjacent to some of the properties that Grucza's company manages.

"A tent city's close proximity to a residential building creates issues that impact the immediate area, not just the association's building or property."

Paul D. Grucza, Washington state community association expert and educator

"A tent city's close proximity to a residential building creates issues that impact the immediate area, not just the association's building or property," Grucza points out. "Trash, human waste, needles, debris, crimes such as robbery or assault, and fire hazards are some major concerns that start within these camps and spread out into the adjoining neighborhood," he explains.

Use Procedure When Dealing with Homeless

When it comes to the homeless, two scenarios are troublesome for associations: tent cities and individual homeless trespassers on the property. Managers should know how to deal with both.

Grucza has always been a proponent of meticulously preparing community managers for all potential risks they could face in their professions, but he notes the particular importance of training staff regarding the safe handling of homeless situations. Having heard of assaults and other crimes at communities, Grucza has developed tools for his managers to avoid these dangers.

"With the increase in the homeless population across the country and especially in larger urban areas, many community associations have had a corresponding increase in issues that come with such a population."

Paul D. Grucza, Washington state community association expert and educator

"With the increase in the homeless population across the country and especially in larger urban areas, many community associations have had a corresponding increase in issues that come with such a population," says Gruza. The main concern stemming from building penetration by those seeking warmth or protection from the elements, or for nefarious actions as well, is security, he says.

Especially in inclement weather, homeless individuals might look for protection, using buildings as a safe harbor. "There have been occasions where the homeless person watches the traffic patterns for the building, and tries to penetrate those patterns, allowing him to get into parking garages or other private spaces," says Grucza. "There is the possibility of danger in this situation, which creates fear for residents," he says.

That's why it's important for managers who find someone on the property, typically sleeping for the night in a tuck-in cover space, to approach the person carefully, let him know he's on private property, and ask him in an appropriate fashion to pick up any belongings and leave, Grucza explains. In his experience, and that of the managers his company trains, 99 percent of the time, if a homeless individual is asked to move on, he or she will.

But, in the less likely scenario where that doesn't happen, or the homeless person repeatedly comes back to the same building location, managers should know that they can call 911 to ask for neighborhood assistance. In Seattle, for example, law enforcement or a response team will physically remove the person from the property.

As for issues stemming from tent cities nearby, Grucza recommends that managers check what the formal process is for dealing with homeless issues in the area where your property is located. In Seattle, an association must register the complaint through the office of homeless management, which then assigns caseworkers to that particular issue. The caseworker or group will come with police in tow to first talk to the people about moving on and problems that are occurring because of the proximity.

Take Preemptive Steps

"In our industry, there's very little training provided to managers on how to deal with people on an interpersonal level, so there is a resulting challenge in dealing with the homeless problem, which affects the aesthetic, cleanliness, and safety of the association," Grucza says. "Human nature takes us immediately to a reactive mode, where the first thing we do is make it someone else's problem by calling the authorities. But managers need to step back and take the human element into consideration," he says.

Managers should think about the fact that there are reasons that brought the person to the area or building in the first place. A homeless individual didn't just pick this building because it was the first building on the block. So, if possible, use a softer approach when asking him to move on and find out why he came here. The information you get can help you take some practical steps at your community to make the property less appealing as a place for a transient person to spend time.

For instance, in some cases, a homeless person is looking for an outlet to charge a phone or use portable heaters. Managers can close off outlets by locking them down in such a way that only building staff can access them. Another attraction to certain communities is whether residents or staff will offer handouts, food, or other help. So make sure that you advise them to not make transient individuals comfortable there. Grucza instructs managers to send alerts to residents as a safety advisory. Like our Model Letter: Keep Community Residents in Loop After Homeless Incident, your letter to residents should emphasize that residents shouldn't engage with homeless individuals at the property and should call 911 if they feel they are in danger, plus provide other helpful information.

Follow Protocol When Situation Arises

There are steps that community managers should take to ensure their safety and the safety of residents when dealing with a homeless individual at the property. The first step is to do a visual analysis before engaging with a homeless individual in the community, says Grucza. He notes that managers should listen to their instincts. If it seems like making contact isn't safe, ask for assistance from the safety of the manager's office. Facility managers should take these actions, says Grucza:

- Be vigilant when walking the grounds to inspect for potential intruders who may be camped out nearby;
- Determine the location of the person at or near your building;
- Carefully approach that person and advise him of the need to leave, or contact 911 for assistance before approaching if there is suspicious behavior;
- Always be courteous, but be firm in your commands to vacate the area;
- Work with the community manager to develop a building communication advising residents and staff of the situation; and
- Advise residents *not* to engage with or provide anything to the person(s) at or near the building.

Follow Up After Area Is Clear

Your role as the manager in a situation dealing with a homeless individual doesn't end after the person has left the property, Grucza stresses. "Debris, waste, needles, and other items left behind by homeless individuals in buildings, in garages, or elsewhere on the grounds can be hazardous to residents and staff," he says. Training managers and staff in the safe handling of hazardous materials is key to avoid infection or other risks.

Additionally, Grucza trains facility managers to sanitize the area — for example, a stairwell or plaza — that has been used for shelter, getting rid of debris and cleaning surfaces. It's important to let staff know that there are procedures to follow. For instance, staff should have the phone number for a needle task force and should be instructed not to throw needles into building waste. "No association building is equipped for the proper disposal of medical waste, but

managers can make sure that the information for appropriate services is available," he says.

For more information about homelessness across the nation and helpful resources, see www.endhomelessness.org and talk with local law enforcement for advice on how to handle homeless individuals in your community.

Insider Source

Paul D. Grucza, CMCA, AMS, PCAM: Director of Education & Client Engagement, CWD Group, Inc., 2800 Thorndyke Ave. West, Seattle, Washington 98199; *www.cwdgroup.com*.

Minimize Liability for Increased Use of High-Risk Areas in Community

Although in many parts of the country, planned community and condominium residents are battling snow and freezing temperatures, spring and summer — with warm weather and opportunities to get active — will be here soon enough. And some communities experience soaring heat year round, like those in association-prevalent states such as Florida. Many members invite guests into the community and host seasonal parties or activities in warm weather. You may even provide association-sponsored summer fun.

But it's important during this time to keep the community operating smoothly by avoiding accidents and liability for the association during the months where there is extra usage of amenities. Here's how you can avoid risks and association liability by making sure that summer safety rules adequately address risks, and members comply with them.

Keep Three Areas Under Control

Setting objective rules about the way members and their guests must act while in the community helps to avoid a gray area where they can argue that things like throwing parties in dangerous areas, roughhousing in the pool or sports courts, or not cleaning up after entertaining in common areas aren't specifically prohibited. Set expectations by passing and enforcing rules barring dangerous behavior in the following areas.

High-risk area #1: Sports courts, swimming pool. Sports courts, such as basketball, volleyball, and tennis courts, and a swimming pool, are great amenities for a community. But they can also lead to problems — for example, members arguing over how much time should be allotted on a court — or serious injuries or drownings. Creating a set of rules that govern the use of sports courts and the pool is a smart way to avoid liability for injuries and to head off member disputes. Cover the following items in your rules, which you can tailor to your association, and post them at the entrance to amenities:

- Use by children, such as a minimum age to use the amenities;
- Use by members, residents, and guests only;
- Proper attire, such as shirts on sports courts and bathing suits in the pool;
- Hours;
- No food or drinks, except for water in plastic bottles that may be consumed courtside or poolside;
- Aggressive or rowdy behavior or foul language;
- Banned sports equipment, such as skateboards; and
- No pets (if this is applicable to your community)

Remember to say in the rules that all members, residents, and their guests using sports courts or the pool do so "at their own risk," and that "neither the association nor its manager shall be responsible for injuries or accidents."

Specify that if a member violates any of these rules, the association and/or manager reserves the right to bar her from using these amenities.

High-risk area #2: Common areas. Generally, as long as members and their guests aren't disturbing other members, it's all right to allow them to do some limited entertaining in common areas. You may even have equipment in a common area that's actually likely to draw parties, such as barbeque grills or kids' playground equipment.

But parties, no matter how small, can still leave a mess that your maintenance staff will have to pick up, and that can prevent other members from using the areas later. A rule that members must clean up after themselves after using a common area can head off this type of nuisance.

High-risk area #3: Rooftops. A common problem is entertaining on condo roofs — and because a fall from a roof can be deadly it's of utmost importance to address this. As summer begins and temperatures rise, members and their guests may be tempted to go up on the roof and sunbathe, barbecue, or just cool off from their hot units. Unfortunately, allowing people on the roof of your condominium building can create problems for you and the association. For example, if a member or guest gets seriously injured or causes costly property damage, a court may rule that you're liable for the injuries or damage because you let members and guests use the roof.

Letting members and guests use their roof also adds unnecessary wear and tear to the roof, which could shorten its life and create defects. As a result, your insurance premiums could increase. And if, say, a roof defect leads to a leak that damages members' property in the units below the roof, the association could be held liable for that damage.

So how can you avoid this risk? Encourage the board to pass a rule barring members and their guests from using your building's roof. The rule you set should bar members and their guests from using the roof for any reason except an emergency. Adapt and use the following Model Language after talking with your association's attorney.

Model Language

Members and their guests are strictly prohibited from accessing, storing personal belongings on, or using the roof for any purpose, except in an emergency.

Enforce Rules Fairly, Effectively

"Setting rules is fruitless if members don't follow them."

Setting rules is fruitless if members don't follow them. Here are the two steps you should take to enforce summer safety rules when a member doesn't take them seriously.

Speak with member first. As soon as you find out about a member's infraction — for example, leaving a mess in a common area after entertaining — talk to the member about her actions. Remind the member about the rule that specifically requires members to leave a common area the way they found it. And point out that violating this rule could lead to serious consequences.

Send "get-tough" letter for continued violations. If, after speaking with the member, you learn that she has continued to use the common area without cleaning up messes afterwards, send her a get-tough action letter. This letter should be stern and:

- Remind the member about your prior conversation with her about her unauthorized use of the roof in which you reminded her that your bylaws specifically bar such activity;
- Note that despite this conversation, it has come to your attention that the member has continued to use the common area without cleaning it afterwards, citing examples of when she did so; and
- Warn the member that her continued use of the area is both a serious disregard for other members' enjoyment of the community and an extra maintenance issue, and also a material violation of the association's governing documents.

Also, cite the specific portion the member is violating, refer to the specific rule she's violating, and attach a copy of that rule to the letter. And say that if the member continues to use the common areas without cleaning up afterwards, you'll pursue whatever legal remedies are available to the association.

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."

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 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.

And in another 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 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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Someone is Sick: Now What?

The calls related to the coronavirus started coming earlier and earlier, says Sandra Gottlieb, a founding partner of California homeowner association law firm SwedelsonGottlieb. “As the death counts climbed in the United States, people were panicking. It was ratcheting up every single day, and I heard the terror.” In the midst of a public health...

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If the community you manage is considering setting an "acceleration" policy to cut down on the number of delinquent monthly assessments, make sure you know how it works.

Preserve Common Areas from Wheelchair Damage

Q: Several community members, and, occasionally some guests, use wheelchairs. Because of the size and design of some of the common areas, the walls have been dented, paint has been scratched on the walls and doors, and corners and doorways have been nicked. There has also been damage to carpets and wood floors from wheelchairs. It has been expensive to repair wall and floor damage caused by those wheelchairs to the common areas. What can I do to prevent this damage?

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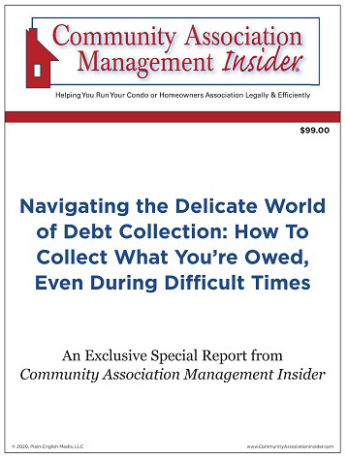

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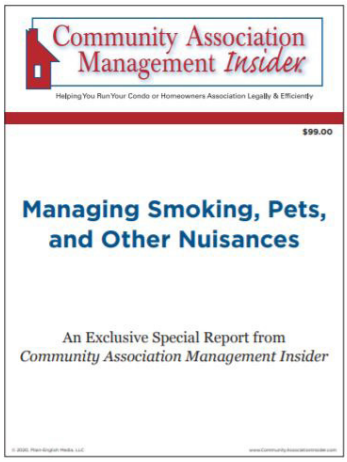
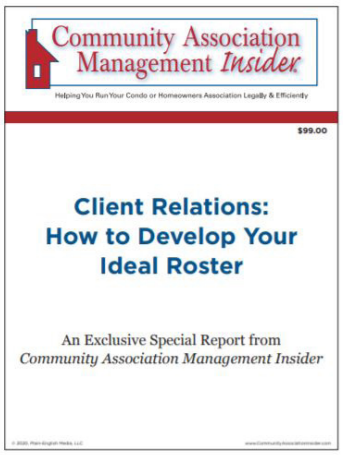


Managing Smoking, Pets, and Other Nuisances

Regardless of where you're located, or how long you've been in the business, the same types of problems tend to crop up over and over, don't they? It's not the big emergencies that make you pull your hair out, but the everyday hassles that start to grate when you get lots of people living together in the same community. Things like pet issues. And smoking. And the other chronic niggling nuisances that, over time, become a real pain in the neck. Which is why we've pulled together this Special Report specifically about managing these sorts of challenges. **Download now »**



Client Relations: How to Develop Your Ideal Roster

Strong relationships with your community association clients are always important — but not always easy — to maintain. As a manager, you don't have to settle for rocky treatment from clients that are overly demanding, unappreciative, or even abusive. Concessions can be made for exceptionally trying times, of course, but wouldn't you rather develop solid, productive, and mutually satisfying relationships with your clients? This exclusive Special Report aims to help you do just that. It provides valuable guidance on how to identify and land the right clients, establish and enforce boundaries, manage poor conduct, and leverage happy clients. **Download now »**

Up in Smoke: Association Management Issues in the Age of Marijuana Legalization

Those states with legal marijuana have seen it rapidly commoditized, with new businesses such as delivery services cropping up and becoming a part of homeowners' daily lives. Not surprisingly, the proliferation of pot has begun to have repercussions for community association managers, both as property managers and employers. Whether you live in a state where marijuana is fully legal, partially legal, or on the cusp of some degree of legalization, you need to know what that means on the ground.

This Special Report takes an in-depth look at some of the most pressing marijuana-related issues for community association managers and their clients and provides expert guidance on how to mitigate the associated risks. **Download now »**

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