

Community Association Management *Insider*[®]

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Fannie Mae Adds Fees for Condo Buyers

The Federal National Mortgage Association, or Fannie Mae, has taken steps to make the cost of purchasing or refinancing a condo more expensive, unless the purchaser makes a sizable down payment.

With many lenders already wary of condo loans because of their default rate, Fannie Mae has added a fee of .75 percent of the loan amount of a 30-year fixed mortgage, for borrowers who put down 25 percent of the purchase price or less, effective April 1.

For example, the buyer of a \$300,000 condo, with a mortgage of \$240,000 (after a 20 percent down payment), will be assessed an additional \$1,800 when Fannie Mae purchases the loan from the lender.

FEATURE

What Records to Keep Confidential from Prying Members

Many record inspection requests by members are legitimate and take relatively little office time. Unfortunately, sometimes requests may be driven by unfounded suspicions, with the intent to harass the board or manager. Also, these requests may be attempts to gather confidential information to which members are not entitled so that they may sue the association or other members. Therefore, to protect the interests of the association, it is important for board members to know which requests to grant and which to deny.

Many boards and managers may not know that their bylaws require them to open the association's books and records to members in many situations. Furthermore, they may not know that their state's laws may give association members an almost absolute right to inspect the association's records—though many states limit it to

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MANAGEMENT TIPS

How to Preserve Your Community's Age-Restricted Status

If your community is considered housing for older persons or senior housing, it is entitled to an important exemption under the Fair Housing Act (FHA) that allows your community to discriminate against families with children.

However, to enjoy this exemption, your age-restricted community must first qualify as senior housing under the FHA. While you do not have to apply to the U.S. Department of Housing and Urban Development (HUD) to qualify, you must take certain steps to make sure your community qualifies as senior housing. We will discuss what it takes to qualify as senior housing and the certification steps your community must take to immunize your community from familial discrimination claims.

Senior Housing Qualifications

If you hold out your community to the public as housing for older persons and you fail to meet certain guidelines, you may find yourself in trouble. To qualify, your community must meet the requirements for housing for persons 62 and older, or those for housing for persons 55 and older.

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Records to Keep Confidential (continued from p. 1)

inspections for a “proper purpose.” A demanding request to inspect documents not often asked for may force you to call the association attorney to ask whether the member can look at a particular record.

We will discuss some of the limits of state law and what records an association may keep confidential to prevent an unreasonable denial of a record inspection request and, therefore, exposure to lawsuits and liability.

Abiding by State Law

According to the laws of most states, members who seek access to association records must have a proper purpose for wanting to see them. A proper purpose is one that’s related to the member’s membership interest in the association, and not for commercial use or other personal financial gain, says Missouri attorney Marvin J. Nodiff. Once the member establishes a proper purpose, the association must weigh it against the reasons to keep the records confidential.

However, this balancing act may be directly superseded by your state’s law and your association’s governing documents if they specify which records members have a right to see. Almost all states have a law on the issue, whether in their general corporate law or in their laws specific to community associations, says Nodiff. But the laws vary widely from state to state.

Which Documents to Keep Confidential

Although the records you must share vary from state to state, there are several types of records that nearly all associations are entitled to keep confidential. Some records include information that, if disclosed, would constitute an invasion of privacy. Other records could harm the association if disclosed, such as confidential advice from the association’s legal counsel.

Unless your state law or governing documents say otherwise, do not give your members access to the following association records:

Nonbusiness-related personal information. Documents supplied by individual members containing personal information not directly related to the business of the association should not be disclosed. For emergency purposes, some associations gather members’ medical information, such as any medical conditions they might have. Keep these records confidential, says Maryland attorney Thomas C. Schild. Members’ privacy is very important and should be respected wherever possible, he adds.

Individual employment records. Individual personnel files, including job evaluations and disciplinary actions, should be kept confidential. This specific information should not be shared with anyone except those with supervisory roles, such as board members or the manager.

Privileged attorney-client communications. It is inappropriate to grant a member access to any letters or emails sent by the associa-

tion's attorney to a board member or to the association manager, if that letter or email is subject to attorney-client privilege. The same goes for the attorney's confidential oral advice if it's recorded in meeting minutes, says Nodiff.

If the communication contains legal advice and was prepared in contemplation of actual or possible litigation, it's privileged and shouldn't be shared. For example, if the communication involves the association's enforcement options against a member who's in violation of the rules, it would be privileged. But if it contains merely an explanation of how many votes are necessary to amend the bylaws, that information will not be privileged.

Other records concerning pending or likely lawsuit. The association might have records (other than communications with its attorney) that involve a pending or anticipated lawsuit. For example, the board might have held a closed meeting to discuss possible legal strategies against a member who sued the association. If the association took notes at that meeting or kept formal minutes, the member shouldn't be given access to them. It would put the association at too great a disadvantage in a future lawsuit involving the member.

Contracts still being negotiated. The process of negotiating a contract is a very sensitive one, and often involves confidential information. In addition, part of the process often involves accepting bids from

several vendors. Some members may pursue insider information to help a friend or relative secure a contract. It would undermine the integrity of the bidding process if members were able to access this information, warns Nodiff.

Insider Sources

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Thomas C. Schild, Esq.: Thomas Schild Law Group, LLP, 401 N. Washington St., Ste. 500, Rockville, MD 20850; (301) 251-1414.

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Search Our Web Site by Key Words:
records; attorney-client privilege;
records inspection

Age-Restricted Status

(continued from p. 1)

62 years of age and older. Housing that is intended for, and solely occupied by, persons who are 62 years of age and older is exempt from the prohibition against discrimination based on familial status. All household members must be age-eligible. "Underage" occupants are permitted only if they have occupied the housing since before Sept. 13, 1988, or if they are employed by the housing provider and reside in the unit in order to perform job functions, such as a live-in aide for a person with a disability.

55 years of age and older. To qualify for an exemption from the prohibition against discrimination based on familial status for housing designed and operated for persons who are 55 years of age or older, all three of the following conditions must be met:

➤ *80 percent occupancy by older persons.* At least 80 percent of the occupied units in the community for older persons must be occupied by at least one person who is 55 years of age or older.

➤ *Intended for older persons.* To qualify as a 55-and-older community, a community must show a clear intent through policies and procedures that its community is for older persons. A community need not set aside 20 percent for family housing. The remaining 20 percent is a "safe harbor." But to specifically set aside 20 percent of the homes for non-seniors would not demonstrate the intent to provide housing for seniors.

➤ *Verification of occupancy.* The association must be able to verify the age of the occupants of the building through reliable surveys and affidavits. Verification can be based on a self-certification by an adult member of the

household, or any state, local, or internationally issued document that contains current information about the age or birth of the possessor, such as a birth certificate, driver's license, or passport. Once the proof is obtained, the association need not force a member to produce the same proof thereafter, although incoming members must provide proof. The evidence of members' ages may be kept in confidence, and is required to be produced only when HUD or a qualified fair housing organization undertakes an investigation of alleged discrimination.

After a community has met the requirement that 80 percent of the homes are occupied by at least one person 55 or older, any other age restriction can be set, unless state or local law prohibits it, says David Baade, director of the Fair Housing Continuum in Florida. For example, once a community

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Age-Restricted Status

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qualifies as a 55-and-older community, its rules can also say that residents must be at least 18 years of age to live at the community. Then, even the 20 percent of units that don't have a 55-or-older resident must have residents of at least 18 years of age.

Show Clear Intent

Federal fair housing law requires that your community stick to "policies and procedures" that show its intent to provide housing for seniors. This means that in the governing documents, which includes bylaws, and community rules, your community must include a statement saying that housing in the community is for seniors, says Baade.

Example: A prospective buyer who wasn't qualified to live in a community for seniors was denied the right to buy a condominium there. The association claimed that because the community qualified as senior housing, it could refuse to sell to an underage buyer. However, the prospective buyer sued the condominium association, claiming that the community didn't qualify as senior housing.

In this case, a Missouri appeals court ruled that the community didn't qualify as senior housing. The court said that there was no evidence that the condominium owners association published and followed policies and procedures that demonstrated intent to be housing for seniors. Although the age restriction was made known informally to potential buyers and the association informally wished to abide by the age restriction, the age restriction wasn't included

in the condominium declaration and written bylaws or in any other published policies [Lippman v. Bridgecrest Estates I Unit Owners Assn., Inc., September 1998].

Verifying Compliance

While you do not need HUD's preapproval to be a 55-and-older community, you'll have the burden of showing that you've followed all of HUD's requirements for maintaining 55-and-older status if you are ever sued for discrimination. If you consider your community a 55-and-older community and you don't observe HUD's requirements, you will have a hard time defending yourself if you are ever accused of discriminating against families with children. That's because only communities that follow FHA requirements will be able to qualify for the familial status exemption.

When verifying the members in your community, be sure to count only occupants—persons 55 or older who are actually living in the unit and aren't just a name on the deed. For example, if an elderly couple owns the condominium but allows their young adult son to live there alone, the condominium will not be counted toward the 80 percent of units occupied by at least one person 55 or older.

You should ask qualifying members for written verification of their name and age—for example, a copy of a driver's license, passport, birth certificate, or other reliable identification, says Baade. Sworn statements from occupants verifying their age are also acceptable. Keep a copy of all documentation so that you have confirmation that the 80 percent requirement is being met.

The 80 percent requirement is not a one-time thing. You need to continuously meet this standard to remain qualified as 55-and-older housing. To make sure nothing has changed, such as a 55-or-older member moving out, go through the verification process at least once every two years. To do so, see our Model Form: Use Age Verification Form to Comply with Senior Housing Requirements.

Check for Additional Local and State Requirements

You should check with your attorney to ensure that your community is fulfilling all necessary requirements to qualify as senior housing at the federal, state, and local levels. Some states may impose stricter requirements on senior communities than those of federal law. For example, under federal law, children are not automatically excluded from senior housing, but under California law, each occupant of the senior community must be 55 or older, a permitted health care provider, or be a "permanent qualified resident." A "permanent qualified resident" in California is someone who is 45 or older or a spouse or cohabitant of a senior, or someone providing primary physical or economic support to the senior, and who has an ownership interest or expectation of ownership interest in the residence.

Some states may impose additional registration requirements for senior age-restricted communities. For example, says Florida attorney Ellen Hirsch de Haan, Florida requires a community claiming to be housing for older persons to register with the Florida Commission on Human Relations and to submit a letter to the

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MODEL FORM

Use Age Verification Form to Comply with Senior Housing Requirements

Use the following form every two years to verify the ages of residents in your age-restricted community to fulfill federal law obligations. Be sure to show it to your attorney

for possible additional state and local law considerations before adapting it for use at your community.

AGE VERIFICATION OF ALL OWNERS/RESIDENTS

To: **All Shady Acres Senior Condominium Members**

From: **Board of Directors**

As you know, the Shady Acres Senior Condominiums is made up of housing for older persons. This means that the governing documents restrict occupancy, residency, and the use of homes within the Shady Acres community on the basis of age or familial status.

years of age or older. To meet this requirement, the association performs a survey every two years of residents' ages and related information.

To meet the federal requirements for senior communities, we must maintain information on members living in the community. Federal law requires senior communities to be able to demonstrate that at least 80 percent of the occupied units are occupied by at least one person 55

Please fill out the following form completely, attach proof of age, and return it to the management office in the enclosed envelope. The completed form will be held in confidence, and the information contained thereon will not be disclosed unless required in connection with a challenge to the community's senior status.

OWNER/RESIDENT AGE VERIFICATION

Every owner of, or person residing in, a home in Shady Acres Condominiums must complete an age verification form to certify his or her eligibility to reside in Shady Acres, a senior community. All residents must attach proof of age (copy of driver's license, birth certificate, etc.). Whenever there is a new resident in the home, a new age verification form must be submitted. Shady Acres Condo Association reserves the right to verify any information given below:

- I own and reside in the home identified below.
- I am a renter or lessee of the home identified below.
- I own but do not reside in the home identified below. All residents of the home identified below are listed by name as follows:

- By checking this box and signing under part 2 of this form, I certify that there have been no changes in ownership of and/or residency in the home identified below since the prior Owner/Resident Age Verification form was submitted.

PART 1: RESIDENT INFORMATION

- I am a person 55 years of age or older, so I qualify for residency as a senior citizen.
- I am not a person 55 years of age or older, but I qualify for residency as a permitted health care resident because I provide paid live-in, long-term, or hospice health care to _____, who resides in the home.
- I am not a person 55 years of age or older, but I qualify for residency because I am the spouse or co-habitant of the person residing in the home who is 55 or older, or because I am a disabled person or a person with a disabling illness or injury who is the child or grandchild of the senior citizen or qualifying resident who needs to live with the senior citizen or qualified resident because of the disabling condition.

PART 2: CERTIFICATION & SIGNATURE

If I am currently a resident of Shady Acres Condominiums, I have attached or previously submitted proof of age for myself and my spouse or co-habitant (if applicable) to this form, and I certify that it is (they are) a true and correct copy of the original document(s).

I declare under penalty of perjury that the foregoing statements are true and correct.

Executed this _____ day of _____, 20____, at [insert City and State].

PRINT NAME _____

ADDRESS OF PROPERTY _____ UNIT # _____

SIGNATURE _____ DATE _____

Age-Restricted Status

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commission stating that the facility complies with the statutory requirements to qualify as housing for older persons. The letter must be submitted on association letterhead and be signed by the president of the association. The

registration and documentation must be renewed every two years from the date of the original filing.

Insider Sources

David Baade: Director, Fair Housing Continuum, Inc., 4085 Highway US 1, Ste. 101, Rockledge, FL 32955; (321) 633-4551.

Ellen Hirsch de Haan, Esq.: Partner, Becker & Poliakoff, P.A., 3111 Stirling Rd., Fort Lauderdale, FL 33312; www.becker-poliakoff.com.

For More Information...

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Search Our Web Site by Key Words: senior housing; senior community; housing for older persons; age verification

RECENT COURT RULINGS

► Further Trial Needed for Condo Maintenance Lawsuit

Facts: After a member purchased a terrace-level condominium, he discovered drainage problems on his terrace that eventually caused mold and water damage to his condominium. The terrace-level condominiums in the community are surrounded on three sides by a wrap-around balcony. The initial damage from faulty drainage was further exacerbated by two hurricanes. The member sued the association, and the association asked the court to dismiss the lawsuit because the member's complaint technically failed to state a claim.

Ruling: The Florida district court denied the association's request.

Reasoning: Generally, courts will not dismiss a complaint in which a member has a legal basis for a claim but has made a technical error that makes the complaint invalid. In this case, the court allowed the member to amend the complaint. In the amended complaint, the member claimed that the association breached its duty and that the member suffered damages as a direct result of the association's negligence. The member alleged that the association had a duty to the member to "properly maintain, manage, insure, disburse insurance proceeds, operate, reconstruct, and repair condominium property."

■ Mann v. Island Resorts Dev., Inc., December 2008

► Member Has No Basis for Attorney's Fees

Facts: When a member bought her home, it was next to a basin that was in good condition, free of debris and algae, and full of fish. Over time, as other homes were constructed in the community, the basin filled

with debris, and the fish died. The member was unable to enjoy her property because of the smell and swarms of mosquitoes. The member eventually sued the association for negligence, nuisance, and breach of contract.

A jury determined that the association was liable to the member for \$50,000 in damages plus attorney's fees of \$23,436.57. The association then appealed the award of attorney's fees.

Ruling: An Ohio appeals court ruled for the association.

Reasoning: The appeals court ruled that there was no state law, contract between the member and association, or finding of bad faith to justify an attorney's fees award. Although the association's governing documents expressly provided that the association could recover attorney's fees from a member under certain circumstances, the governing documents did not create the same right for members.

■ Fogel v. Lyonhil Reserve Homeowners' Assn., November 2008

► State Agency Overreached in Pursuing Association Fines

Facts: For years, a Florida condo association received complaints regarding its assessment structure. Equally sized condominiums in the community were required to pay differing assessment amounts. As a result, in 2004, the association decided that all similarly situated members are to be assessed equally for common expenses.

However, at some point after the decision, the board became aware of an amendment in the governing documents that specifically prescribed each condo's share of the common expenses. The amendment resulted in similarly situated members pay-

ing a disproportionate share. When a member filed a complaint with the state's Division of Land Sales, Condominiums and Mobile Homes for failing to assess members for common expenses pursuant to the amended governing documents, the association decided to revert back to the original assessment percentages. It also offered the members a refund if they had overpaid.

The state agency charged the association with violating state law for assessing common expenses that differed from those set out in its governing documents and fined the association \$5,000. The association appealed the fine, and an administrative law judge recommended that because the language in the amendment was ambiguous, the state agency should rescind its violation notice and forgive the association from paying a fine. The agency declined to do so, and the association sued the agency in state court.

Ruling: A Florida appeals court reversed the agency's final decision and instructed the agency to adopt the administrative law judge's recommended order.

Reasoning: The court ruled that the agency did not have the authority to enforce its interpretation of the provisions in the association's governing documents that were ambiguous. Plus, there was no showing of consumer harm made at the administrative law hearing, as no members bothered to show up.

■ Eden Isles Condo. Assn. v. Dept. of Bus. & Prof. Regulations, January 2009

► Insurer Waived Right to Sue Condo Member

Facts: A "right of subrogation" allows an insurer to choose to take action to recover the amount of a claim paid to a covered insured if the loss was caused by a third party. A condo association's governing documents require that all insurance policies contain a provision that "the insurer waives its rights of subrogation as to any claims against Unit Owners, the Association, and their respective employees, servants, agents and guests." Moreover, the governing documents states that each member has the right, but not the obligation, to obtain insurance for personal property and personal liability, but "all such insurance shall contain the same waiver of subrogation" that governs any insurance obtained by the association.

An insured member suffered water damage that was caused by a leak from the shower or bathtub of

the condominium located directly above his own. The member submitted a claim to his insurer, which paid \$118,547.28 to repair the damage. However, the owner of the condominium above the insured member's had no insurance.

The member's insurer, on behalf of the member, sued the uninsured member and the association for negligence. It claimed that the uninsured member's failure to obtain insurance permitted this action. Both the uninsured member and the association asked the court to dismiss the insurer's claim without a trial.

Ruling: A New Jersey appeals court granted a judgment without a trial in the association's favor and dismissed the insurer's claim.

Reasoning: The court concluded that the waiver of subrogation provision in the insurance policy obtained by the member stands. The governing documents contemplated no litigation between members or between members and the association. The court ruled that the optional nature for members of the association's insurance scheme does not change the purpose of a waiver of subrogation provision. In other words, when the insurer issued a policy to the member, it did so with the understanding that it could not sue a negligent member.

■ Skulskie v. Ceponis, January 2009

► Passed Budget Ruled Valid

Facts: A board president sued his association and other board members who voted in favor of a passed budget to have the budget invalidated. The other board members asked the trial court to dismiss the president's complaint without a trial, and the trial court granted the request. The president then appealed.

Ruling: The appeals court upheld the lower court's decision.

Reasoning: The other members of the board showed that the adoption of the budget was properly authorized. They also showed that it was made in good faith and in furtherance of the association's legitimate interest. On the other hand, the board president could not show any evidence of fraud or other misconduct by the other board members, so the judgment was properly granted.

■ Levine v. Greene, December 2008



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*New Orleans lingo for "everybody talking at once"

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