

Community Association Management *Insider*[®]

MARCH 2009

INSIDE THIS ISSUE

Model Letter: Recruit Members for Community Volunteer Service 3

Court Watch: Allowing Smoking in Common Areas May Invite Nuisance Claims 5

Recent Court Rulings 6

- ▶ President of Alternate Association Can't Sue
- ▶ Association Not Required to Give Member Insurance Proceeds
- ▶ Management Company's President Not Served Properly
- ▶ Member Liable for Balcony Repairs

Colorado Association and Parents at Odds Over Flag Display

When their son was deployed to Iraq, members installed a flagpole outside their home to fly the American flag.

Both federal and Colorado law guarantee residents the right to display the American flag, but allow restrictions on the method and size. Federal law says nothing about flagpoles, while state law allows homeowners associations to regulate the pole's size and location.

The association wants the members to remove the flagpole, but they are refusing until their son is home. Admittedly, the members knew the flagpole violated the community covenants when they installed it. But the couple didn't expect any trouble. They asked their immediate neighbors before installing the pole and received no objections.

PRODUCED IN CONSULTATION WITH



FEATURE

Use Community Volunteers to Boost Spirit and Trim Costs

As the number of foreclosures and communities experiencing budget constraints rises across the country, many associations are taking a close look at how they can manage their community in an efficient and cost-effective manner. Some have been forced to increase assessments and cut back on services provided.

Already limited by budget constraints, some communities are facing increased costs associated with the rising number of abandoned and foreclosed homes left in disrepair. They may be faced with the task of maintaining the abandoned properties at their own expense, tracking down the lenders that are failing to keep the properties up, or allowing the properties to become both unsightly and, in some instances, dangerous.

For example, a growing concern that has sprouted in many neighborhoods since last summer is the number of unattended swimming pools. These pools are becoming an important health concern

(continued on p. 2)

BEST PRACTICES

Follow 8 Guidelines for Using Reserve Account Funds

A well-funded reserve account clearly signifies that a community association is equipped to deal with its long-range needs. A reserve account is an account specifically designed to pay for common elements for which a useful life can be estimated—for example, the replacement of an existing swimming pool, tennis court, or clubhouse roof. It's not intended to fund everyday needs that are covered by the community's general operating account.

Without a well-funded reserve account, an association's only option to pay for repair needs that arise may be to impose a special assessment. And these special assessments are unfair because they penalize those members who happen to live in the community when these predictable expenses become due.

Reserve account funds are part of any association's long-term financial plan, which helps to strengthen the community's fiscal health

(continued on p. 4)

BOARD OF ADVISORS

David J. Byrne, Esq.
Stark & Stark, PC
Princeton, NJ

Kathryn C. Danella, PCAM
Boca Pointe Community
Assn., Inc.
Boca Raton, FL

Richard S. Ekimoto, Esq.
Ekimoto & Morris, LLLC
Honolulu, HI

Robert M. Diamond
Reed Smith LLP
Falls Church, VA

V. Douglas Errico, Esq.
Marcus, Errico, Emmer
& Brooks, PC
Braintree, MA

Thomas J. Hindman, Esq.
HindmanSanchez PC
Arvada, CO

Ellen Hirsch de Haan, Esq.
Becker & Poliakoff, PA
Largo, FL

Benny L. Kass, Esq.
Kass, Mitek & Kass, PLLC
Washington, DC

Tammy McAdory,
CMCA, AMS
Kiawah Island
Community Assn.
Kiawah Island, SC

P. Michael Nagle, Esq.
Nagle & Zaller, PC
Columbia, MD

J. David Ramsey, Esq.
Greenbaum, Rowe, Smith
& Davis, LLP
Woodbridge, NJ

Gary B. Rosen, CPA, CFE
Wilkin & Guttenplan, PC
East Brunswick, NJ

Tom Skiba
Community Assns.
Institute
Alexandria, VA

Clifford J. Treese
Association Information
Services, Inc.
Honolulu, HI

Jeffrey Van Grack, Esq.
Lerch, Early &
Brewer, Chtd.
Bethesda, MD

Editor: **Eric Yoo**

Executive Editor: **Heather Ogilvie**

Director of Production: **Kathryn Homenick**

Director of Operations: **Michael Koplin**

VP & Managing Director: **Mark Fried**

Editorial Director: **Anita Rosepka**

Community Association Management Insider (ISSN 1537-1093) is published by Vendome Group, LLC, 149 Fifth Avenue, New York, NY 10010-6823.

Volume 8, Issue 11

Subscriptions/Customer Service: To subscribe or for assistance with your subscription, call 1-800-519-3692 or go to our Web site, www.vendomegrp.com. Subscription rate: \$337 for 12 issues (plus \$17 shipping/handling). **To Contact the Editor:** email eyoo@vendomegrp.com. Call: Eric Yoo at (212) 812-8435. Fax: (212) 228-1308.

To Place an Advertisement, Please email Joyce Lembo, jlembo@vendomegrp.com, or call (212) 812-8971.

Disclaimer: This publication provides general coverage of its subject area. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional advice or services. If legal advice or other expert assistance is required, the services of a competent professional should be sought. The publisher shall not be responsible for any damages resulting from any error, inaccuracy, or omission contained in this publication.

© 2009 by Vendome Group, LLC. All rights reserved. No part of *Community Association Management Insider* may be reproduced, distributed, transmitted, displayed, published, or broadcast in any form, or in any media without prior written permission of the publisher. To request permission to reuse this content in any form, including distribution in educational, professional, or promotional contexts, or to reproduce material in new works, please contact the Copyright Clearance Center at info@copyright.com or (978) 750-8400. To order high-quality custom reprints of *Insider* articles, please contact PARS International Corp. at Reprints@parsintl.com or (212) 221-9595 ext. 430.

Community Volunteers (continued from p. 1)

because of the presence of mosquitoes carrying the West Nile Virus and other diseases. In the Las Vegas Valley, over a thousand complaints were logged with the regional health department concerning stagnant swimming pools in the first five months of 2008, nearly the same number of complaints in all of 2006.

To save money, your association may be considering using volunteers within the community to address issues such as these. Increasing an association's number of community volunteers is a great way to build the community and trim costs from the association's budget. Here are some things to consider when increasing your reliance on community volunteers to save money.

Scope of Volunteer Duties

The board of directors should discuss which useful tasks offer minimal risk of injury to community volunteers and other members while reducing costs. If labor costs are a significant portion of your expenses, your community might want to consider volunteers for flowers and landscaping maintenance such as hedge, tree, and grass trimming. However, the board should consider the risk of injury for each task. For example, permitting member volunteers to trim mature trees may expose the volunteer and other members to too much risk.

More examples of proper uses of volunteers may be minor touch-up painting at the club house; removing trash and waste from the common areas; and light snow removal activities from short walkways. Using a volunteer to plow snow or shovel major walkways is not a good idea, because the risk of injury is much greater for the volunteer and to property.

Insurance Issues

You may be concerned about your association's insurance coverage in the event a volunteer is injured while performing voluntary duties. According to Clifford J. Treese of Association Information Services, an injured volunteer should be covered under an association's workers' compensation and employer's liability insurance or the association's commercial general liability (CGL) policy.

A CGL policy will contain an exclusion for bodily injury that would be covered under your state's applicable workers' compensation laws. And workers' compensation is governed by each state's own classifications. Therefore, a member volunteer may qualify for workers' compensation if injured while performing duties for the association. Typically, a salary or a contract indicates whether or not someone works for the association, but ultimately, it is the state administrative body that determines whether someone is an employee, says Treese.

Absent issues as to whether an injured volunteer is an employee, the bodily injury part of the CGL or the Medical Payments part of the CGL should provide coverage. And all associations should

carry Workers Compensation & Employers liability insurance. This not only covers the volunteer situation; it is primarily for the contractor who, for any reason, does not have workers' compensation coverage at the time of the injury.

Should Volunteers Sign Waiver?

If your community is increasing its reliance on volunteers to help save money, your association may be considering having the volunteers sign a waiver as an additional safeguard against liability. Before going this route, associations need to consider the value of the volunteer waiver, says Hawaii attorney Richard Ekimoto of Ekimoto & Morris, LLLC. In Hawaii, for example, waivers are going to be narrowly read, meaning that they probably won't apply in all the situations one might think they would.

Also, the association has to take into account whether people would be willing to volunteer if they had to sign a particularly broad waiver or any waiver at all. Not only can a waiver be seen as a deterrent, at the same time, an association can make a reasonable judgment that it is inappropriate to penalize volunteers by making them waive their potential claims in advance, particularly if most of them are covered by insurance. Ekimoto has had volunteers ask why they have to sign waivers when the members don't ask directors or committee members to sign waivers before they serve.

Insider Sources

Richard S. Ekimoto, Esq.: Principal, Ekimoto & Morris, LLLC; 1001 Bishop St., Ste. 780, Honolulu, HI 96813; www.hawaiicondolaw.com.

Clifford J. Treese, CPCU, ARM, CIRMS: President, Association Information Services, Inc., 7724 Creekside Dr., Pleasanton, CA 94588; www.associationis.com.

MODEL LETTER

Recruit Members for Community Volunteer Service

Here is a letter you can adapt and send to all members, informing them of volunteer opportunities in your community. It explains the scope of a volunteer's duties and how volunteering can help maintain community property values and keep association fees low.

[Insert date]

Dear Member:

The Shady Acres Community Association invites you to get involved in your community! Our productive group of dedicated volunteers generously donates its time and talents to assure the continued success of our community association, and in turn, keeps our association fees as low as possible and our property values as high as possible, especially in these tough economic times.

As a volunteer, you will help to support and promote an appreciation of your neighborhood. Each area of volunteer assistance is a vital part of the continuing operation of the association. Volunteer opportunities exist throughout the year. Whether you can donate your time on a regular basis or only occasionally, we invite you to put your own interests, special skills, and talents to work for the Community.

We currently have an immediate need for routine maintenance and landscape volunteers.

There is no major work involved with routine maintenance and landscape volunteer positions. You will be a part of a small group of other volunteers. As a landscape volunteer, your duties will be to plant flowers and trim hedges, small trees, and grass. As a maintenance volunteer, your duties mainly will be to repair or replace very small items, which could include:

- ◆ Light bulbs in the clubhouse and pool;
- ◆ Minor electrical work, such as switch replacement at the clubhouse;
- ◆ Minor plumbing, such as replacing toilet flappers at the clubhouse or pool;
- ◆ Minor touch-up painting at the clubhouse; and
- ◆ Minor damage repair, such as replacement of toilet paper holders at the clubhouse or pool cabanas.

In some cases, we will schedule outside help when such help is needed, such as replacing the lights or pumps. As a volunteer, you would bring to the attention of the Board any major repair issues that would require hiring professionals. And you would bring to the Board's attention any and all items that are not repaired within 30 days, so that a professional can be hired.

To be added to the volunteer list, please contact the manager or any officer of the Board. We appreciate all the volunteers who help maintain the value of our community and keep our homeowners' association fees as low as possible!

Sincerely,
Shady Acres Community Association

For More Information...Visit Us Online:

www.communityassociationinsider.com

Search Our Web Site by Key Words: volunteers; insurance; maintenance costs

Best Practices

(continued from p. 1)

and increase the homes' market values, and allows boards to fulfill their fiduciary responsibilities.

Proper Uses of Reserve Account Funds

With the proper establishment of a reserve account, income taxes can be reduced and an association can assure that every present and future member pays a fair share of required future capital expenditures. To determine how much to fund a reserve account, the board should hire an engineer to prepare a replacement study that will project the repair and replacement needs and costs of the association's common elements.

Once funded, the reserve account should generally be tapped only to pay for items listed in the replacement study—with certain exceptions. To help board members use the reserve account appropriately, share with them these eight guidelines:

1. Charge capital items from most recent replacement study to reserve account. If an item's actual cost is significantly greater, or the useful life is shorter, than estimated, then the engineer should be consulted to update the replacement study as quickly as possible to reflect this transaction's impact. The updated study should be integrated into the coming year's budget.

2. Charge capital items excluded from replacement study to reserve account. Since engineering studies only estimate the common elements' replacement costs, certain items may have been missed during the preparation of the engi-

neer's report, or the costs and conditions of an item's replacement may have changed over time. An association should recoup both the element's replacement cost and the deficit created by the unexpected expenditure through an increased replacement contribution level.

3. Don't charge minor repairs to reserve account. These should be funded through the operating budget. Associations should define thresholds for "minor" and "major" repairs with their managing agent and accountant.

4. Don't charge maintenance costs to reserve account; establish separate fund. A deferred maintenance fund should provide for the periodic maintenance of items, such as painting, caulking, and power washing. It would be inappropriate to use the reserve account for these types of maintenance expenditures. Boards should establish a deferred maintenance fund for the maintenance of items that do not recur annually.

5. Charge developer transition-related items to reserve account. During the initial years of an association's existence there may be situations in which a developer is responsible for various replacements to the common elements. However, due to transition litigation, the developer may refuse to perform the necessary repairs or replacements. These types of expenditures can be charged to the reserve account, and any money subsequently received should reimburse the account. If there is no settlement, the engineer should be consulted to determine the impact on the association's reserve account, and the association's future funding policy.

6. Charge income taxes to reserve account. Many associations choose to allocate any interest or investment income earned by the reserve account back to the fund. Such income may be contributed net of the federal income taxes, because associations must pay tax on such income.

7. Charge interest expense to reserve account. If applicable, interest expense may be charged to the fund. Many associations have authorized major capital replacement projects only to discover that they are unable to fund all of the planned replacements. Absent a special assessment, many associations seek assistance from lending institutions to close these funding gaps. Proper practice is to include the expenditure, debt service, and the future assessments required for debt repayment in the reserve account budget.

8. Don't borrow from reserve account. Borrowing could create negative tax implications and may ultimately lead the association down the road to financial ruin. To avoid this, an association should regularly monitor its operating budget to ensure that each year's deficit, if any, is addressed in the subsequent year.

Insider Source

Gary B. Rosen, CPA, CFE: Shareholder, Wilkin & Guttenplan, PC, 1200 Tices Ln., East Brunswick, NJ 08816; www.wgcpas.com.

For More Information...

VISIT US ONLINE:

www.communityassociationinsider.com

Search Our Web Site by Key Words: reserve account; capital expenditures; common element replacement

COURT WATCH

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 even-

tual 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 [*Birke v. Oakwood Worldwide*, January 2009].

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.

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

(continued on p. 6)

Best Practices

(continued from p. 5)

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.

For More Information...

VISIT US ONLINE:

www.communityassociationinsider.com

Search Our Web Site by Key Words: smoking; nuisance; common area

RECENT COURT RULINGS

► President of Alternate Association Can't Sue

Facts: A property owner wanted to profit from his land by establishing a common interest development. He subdivided his land into 16 lots and a large common area. He built homes on six of the lots, sold five of them, and kept one house for himself. The community was governed by an association in name only. There were no formal meetings from 1980 through 1997, and the original property owner acted informally on the association's behalf.

In 2003, a fire destroyed the homes of the original property owner and a member. After the fire, the owner asked the member to act as president of the association to pursue the fire insurance claim and to rebuild the two homes. The rebuilding process did not go smoothly, and because of increasing tensions, two factions in the community emerged. One faction consisted of the original property owner and his daughter. He sent letters to the rest of the members notifying them of two meetings. At the meetings, the owner and daughter were the only ones present and they cast 11 votes to impose assessments. The cast votes included votes for 10 vacant lots that they owned.

The other faction consisted of the rest of the members in the community. At their meeting, they executed and recorded an amendment to the original governing documents that modified their voting rights.

The original property owner sued the other members to collect the assessments that had been imposed on them. The trial court ruled in favor of the other members, declaring that according to the association's governing documents, only lots that had been improved with a home were entitled to vote. Therefore, the imposed assessments are invalid.

Ruling: A California appeals court upheld the lower court's ruling.

Reasoning: The appeals court ruled that the original property owner had no legal status to file a lawsuit on behalf of the association against the other members. Although the owner designated himself as president, the association he presides over is not a legal entity that is capable of bringing a lawsuit.

■ Irish Beach Clusterhomes Assn. Bd. of Governors v. Farrell, January 2009

► Association Not Required to Give Member Insurance Proceeds

Facts: A water leak developed directly above a member's condominium. The member permitted a restoration company into his condo to dry the carpet and an environmental inspection group to inspect the premises. The inspection results showed that the member's condo contained visible microbial growth on the closet and bathroom walls. The association then asked the member to move from his condo so the remediation could be performed. The member denied that his condo had any mold and refused to vacate unless the association paid his relocation expenses. He also denied the association access to fix any damage done to the property.

The association then sued the member for refusing to provide access to his condo, thereby causing harm to the association and its members. The member countersued, claiming that the association was wrongfully withholding insurance proceeds. The trial court granted the member's request to dismiss this issue, because the member had shown that no toxic mold existed. The environmental inspection company inspected the condo again and affirmed this. The trial court also ruled in favor of the association on the issue of the insurance proceeds, because the governing documents state that insurance proceeds are to be used by the association for repair or replacement. The member appealed.

Ruling: A California appeals court upheld the lower court's decisions.

Reasoning: The appeals court ruled that the trial court interpreted the governing documents correctly. The governing documents state that the association shall use insurance proceeds for repair or replacement of the insured property, and make no mention of payment of such proceeds to members. Also, the court noted that once the need for remediation was removed, the association had no right to a declaration from the court requiring access, because there was no present controversy.

■ Montecito Condo. Homeowner's Assn. v. Rahmanizad, January 2009

► Management Company's President Not Served Properly

Facts: A member sued her condo association and the president of its management company for imposing an allegedly invalid assessment on its members. According to the member, this assessment violated the governing documents and led to the illegal attempted foreclosure on her home.

The member claimed that the governing documents require that the assessment imposed in this case be based on member voting. Also, the member alleged that the assessment was unequally enforced on her and was done in retaliation for her request to the association for financial accountability.

The management company's president asked the court to dismiss the lawsuit because he was not properly served with a summons and complaint.

Ruling: The Nevada district court did not dismiss the case, but required the member to properly serve the manager.

Reasoning: An individual may be served by following state law for serving a summons for a court action, by delivering a copy of the summons and complaint to the individual personally, or by leaving a copy of each at the individual's dwelling or usual place of abode.

The member conceded that she did not personally serve the manager, but she alleged that she complied with California law by serving the manager at his place of business because of the huge financial burden of attempting to determine which piece of real estate owned by the manager was his personal residence. However, the court stated that California law

does not provide a financial burden exception; therefore, her attempt to serve the company's president at his place of business was improper.

Since a dismissal would lead to the member reinstating the lawsuit, the court required the member to serve the management company's president in compliance with the rules.

■ Moulton v. Eugene Burger Mgmt. Corp., January 2009

► Member Liable for Balcony Repairs

Facts: In response to observations of water damage to a condominium building's balconies, an association hired consultants to inspect the building's water-proofing systems as well as the decks and balconies.

Based on the association's reading of the governing documents, the association determined that individual members would assume the cost for any damage to the underlying structures due to water seepage. The association informed members of the necessary repairs, that the association had retained a contractor to repair the balconies at the owners' expense, and that the owners could hire a private contractor if they wished.

A member disagreed that these suggested repairs to his balcony were his sole responsibility. He eventually sent a letter to the association stating that he had retained a separate contractor. When no work had been done after two months, the association resurfaced the member's balcony and sent the member an assessment for the work. The member refused to pay, and the association sued. The trial court granted a judgment without a trial in the association's favor, and the member appealed.

Ruling: A California appeals court upheld the lower court's decision.

Reasoning: The court stated that the member misinterpreted the governing documents. They do not designate the balconies as a common area, but rather they are classified as exclusive-use areas of the common area. As such, nothing in the bylaws negates the member's duty to maintain and repair his exclusive-use area or balcony. Also, the governing documents allow the association to assess individual members for work done to repair exclusive-use areas of the common area.

■ Gabriel v. Canyon Haven Homeowners Assn., January 2009

Visit CommunityAssociationInsider.com Today!

FREE 14-Day Trial Subscription

CommunityAssociationInsider.com is designed to answer tough community association management questions — and provide real-world, tested solutions for day-to-day problems. It contains model tools such as collection policies, rules and regulations, contracts and clauses, bylaw amendments, and notices, as well as employee recruiting aids and risk management checklists to help you put solutions into action.



CommunityAssociationInsider.com

**Community Association Management Insider
IS NOW ONLINE!**



VENDOME GROUP LLC 149 FIFTH AVE NY NY 10010

Presorted Standard
U.S. Postage
PAID
Permit No. 1906
Southern, MD

Open to Read Your Latest Issue