

# Community Association Management *Insider*<sup>®</sup>

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## **VA Governor Signs Community Association Pay Bill**

Virginia Governor Tim Kaine recently signed a revision of the Property Owners' Association Act (POAA) that allows community association members to get salary information for the top six employees earning over \$75,000. The revision takes effect July 1. Currently, only aggregate salary information is available. The bill also specifies that all books and records of the association, including individual salary information for all employees and payments to independent contractors, be made available to members of the association's board of directors.

The POAA change was made possible when three board members of an association partnered with Majority Leader Morgan Griffith (R-Roanoke/Salem). As board members, they complained that they were prohibited from knowing individual salaries even though they vote on the association's annual budget of over \$2 million.

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## FEATURE

## **How to Screen Out Risky Employees, Limit Crime and Liability**

When you hire a bad apple to work in your community, you run some serious risks. The individual may perpetrate some sort of crime due to easy access to your members. If news of the crime gets out, your community's reputation may plummet and you may fall into a costly legal trap called "negligent hiring." The association or your management office may be liable because you exposed members or visitors to dangerous employees through poor hiring practices.

When it comes to hiring, associations and management companies must be more careful than most other employers. That is because condominium building or community employees might have access to homes and have the trust of members. An unscrupulous employee could easily take advantage of his insider role to steal from or attack members. We'll offer you four safeguards to ensure careful hiring to help you protect yourself from liability and your members from harm.

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## CUTTING COSTS

## **Balance Heat to Conserve Energy, Minimize Complaints**

This past winter, you may have received calls from members complaining about inadequate heat in their condo units. Often, these complaints are unfounded or result from easily correctable problems. Provide too much heat, however, and you are just wasting fuel and money. The best bet is to address heating complaints right away, while also controlling your heating costs.

Many condominiums or co-operatives utilize a central steam or hot water heating system to heat their buildings during winter months. Such buildings usually have high oil or gas costs. However, this season, your association may have witnessed a dip in heating costs because the price of crude oil has fallen over \$100 a barrel since last summer.

Unfortunately, there is no guarantee that the costs of heating your building will stay down. In the current depressed marketplace for oil, the issue has been volatility. Between July 2008 and January 2009,

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**Risky Employees** (continued from p. 1)**Was the Crime Preventable?**

When deciding negligent hiring claims against employers, a court will first consider whether the association or management company could have done more to prevent the crime. In particular, was enough information gathered about the job applicant's past to make a reasonable hiring decision? Or was a vital piece of information missed, such as a criminal conviction that would have warned the association that the prospective employee was likely to commit a crime?

In one case, a Georgia court ordered an apartment complex, its property manager, and its leasing manager to pay a large judgment to the estate of a woman who was strangled to death in her own apartment by a maintenance worker hired by the complex. The court found that: (1) the leasing manager recommended the employee even though he knew about his prior trouble with the law but kept silent; (2) the complex did not follow its hiring procedures by making a criminal background check that would have revealed the employee's violent crimes; and (3) the complex allowed its employees unfettered access to keys despite reports of unforced entries and robberies by tenants. The crime committed was, therefore, foreseeable by the complex [*TGM Ashley Lakes, Inc. v. Jennings*, December 2003].

**"Reasonable Care" Basics**

Not all employee crimes are the employer's fault. An association does not have to be hyper-vigilant regarding crime, but it must be careful about the kinds of people who are hired. In legal terms, you must exercise "reasonable care" when making hiring decisions, says New York labor attorney Peter D. Stergios. The employer's job is to prevent "foreseeable" risks. A risk is foreseeable when a person of average common sense would recognize the danger.

In general, whether it is foreseeable that a job applicant will commit a crime depends on the nature of the job and the applicant's background.

**Nature of the job.** Some jobs are riskier than others, and courts expect associations and management companies to be more careful when they are filling high-risk positions.

Some positions that are high risk include: (1) custodial positions, including maintenance operators, property managers, garage attendants, and on-site repairmen; (2) positions designed to assist and protect members, including security guards, courtesy patrols, and doormen; and (3) positions that involve contact with members.

**Applicant's background.** Past criminal convictions, a history of illegal drug use, or a violent mental disorder are all good indicators that a candidate is high risk. Suppose, for example, that a maintenance worker strikes a member. No one would reasonably expect someone with a spotless record to do this, but if the worker was a convicted

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## MODEL AGREEMENT

### Use Pre-Employment Statement to Certify Accuracy of Application

Before starting your pre-employment screening process, get the job applicant to sign this pre-employment statement that should be a part of, or attached to, your employment application forms. This statement was written with the help of pre-employment background specialist Steven E. Gall and New York labor attorney Peter D. Stergios.

#### PRE-EMPLOYMENT STATEMENT

##### PLEASE READ AND SIGN THE STATEMENT BELOW

1. I hereby certify that the information I have provided on this application is true and complete to the best of my knowledge. I agree that any misrepresentation or omission of any fact in my application, resume, or any other materials, or during any interviews, is good reason to refuse to hire me or, if I am employed, to end my employment.
2. I understand that any offer of employment I may receive from *[insert name of association or management company]* is contingent on my successful completion of *[insert name of association or management company]*'s total pre-employment screening process, including receipt of references that it considers satisfactory.
3. I have been notified that, in processing my application, *[insert name of association or management company]* may take steps to verify all the information I provide or may hire a pre-employment screening company to conduct a background check. For this purpose, *[insert name of association or management company]* may get information about my prior employment, military record, education, character, general reputation, personal characteristics, criminal record, and mode of living. I authorize *[insert name of association or management company]* to verify all the information I am providing and to hire a pre-employment screening company to conduct a background check. I understand that if I request in writing that *[insert name of association or management company]* tells me that it requested a background check, *[insert name of association or management company]* will do so and will give me full information as to the nature and scope of this investigation.
4. I authorize *[insert name of association or management company]* to obtain, verify, and exchange information and reports about me, including, but not limited to, reports and information from city, county, state, or federal law enforcement agencies, educational institutions, and present and/or past employers.
5. I authorize and request all of my present and former employers and those individuals whom I have listed as personal references to furnish information about my employment record, including a statement of the reason for the termination of my employment and information about my work performance, abilities, and other qualities pertinent to my qualifications for employment. I hereby release my present and former employers and those individuals whom I have listed as personal references from any and all liability for damages arising from furnishing the requested information.
6. I authorize and request city, county, state, and federal law enforcement agencies and educational institutions to provide information and records about me to *[insert name of association or management company]*. I release and hold harmless these institutions and agencies from and against any and all such claims, demands, suits, or expenses from or related to the accuracy or handling of said information and reports.

SIGNATURE OF APPLICANT \_\_\_\_\_ DATE \_\_\_\_\_

## ***Risky Employees***

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felon with a history of job and disciplinary problems, most people would expect you to have foreseen that he might commit a crime, and they might question your judgment in hiring a felon for a position with member contact.

### **Ask for Critical Information on Application Form**

Your first line of defense is to get applicants to give you critical information on your employment application form. You need to get this information from all applicants, so make sure all applicants fill out application forms, even if they have already submitted resumes.

#### **History of criminal convictions.**

Ask whether the applicant has ever been convicted of a crime, and if so, what crime. Some states, such as New York, have human rights laws that bar you from asking applicants about arrests or criminal accusations that did not result in convictions. But these state laws may let you ask about charges currently pending against applicants. You should speak to your attorney to find out what your state allows.

**Previous employment information.** Find out where the applicant has worked and get the name and telephone number of a reference at each place of employment so that you can contact the references.

**Required licenses.** If you're hiring the applicant for a position that requires a license, ask whether the applicant's license has ever been revoked. For example, if your state requires security guards to be licensed, get license numbers for all applicants for security guard positions.

**Personal references.** Have the applicant provide the names and contact information of three personal references.

**Applicant's certification that information is accurate.** This is an important step because it puts pressure on the applicant to be honest. To do this, attach to the application a pre-employment statement in which the applicant swears that the information is true. For an example, see our Model Agreement: Use Pre-Employment Statement to Certify Accuracy of Application.

### **Check Application for Common Red Flags**

You do not have to reject an applicant just because you uncover something suspicious. But you do have to get an explanation.

Check for gaps in employment history. More often than not, any compromising information in the applicant's past is somewhere in these gaps, says hiring consultant and president of a national pre-employment background screening firm, Steven E. Gall.

Another red flag is suspiciously short terms of employment. This is a clue that the applicant might be hiding something. Also, be wary if the applicant fails to answer any questions on the application form. This is another indication that the applicant might be trying to hide something.

### **Conduct Background Check**

Relying on the information an applicant provides is not enough. You should conduct a thorough background check on all applicants. This involves double-checking the facts stated in the application, con-

tacting references, and getting copies of certain records.

You can do some of this checking on your own, but you will probably have to use a pre-employment screening company to get certain critical records. Hire a reputable screening firm to check applicants' criminal records, driving records, credit reports, military records, and possible name changes before you hire them.

### **Screen Again Before Reassignment**

Finally, rescreen employees before you reassign them from low-risk positions with little member contact to high-risk positions with member contact. For example, do not assign an outdoor maintenance worker to work inside a condominium unit without first doing a criminal background check.

According to Stergios, it does not matter that you have known and trusted the employee for a long time. What matters in court is whether you made a reasonable investigation. And what was a reasonable investigation for the employee's original position may not be appropriate for the newer higher risk position.

#### **Insider Sources**

**Steven E. Gall:** President, Gall & Gall Company, Inc., 8555 N. Dixie Dr., Dayton, OH 45414; [www.gallgall.com](http://www.gallgall.com).

**Peter D. Stergios, Esq.:** Partner, McCarter & English LLP; 245 Park Ave. 27th fl., New York, NY 10167; [www.mccarter.com](http://www.mccarter.com).

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## Cutting Costs

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daily oil prices rose or dropped by 5 percent more than 39 times, versus just four times over the previous two years, and analysts foresee oil prices staying volatile for much of 2009. Regardless of the price swings in the marketplace, the tried and true way of saving money for your community has been to focus on adopting energy efficiency measures.

“One successful measure for condominium buildings has been to use technology to balance out the heat in a building and address member complaints regarding inadequate heat,” says Jerry Pindus, CEO and founder of US Energy Group.

## Energy Management Systems

Heat balancing systems basically work by installing wireless sensors in some units in the building that can read the building’s inside temperature. In a traditional building, a boiler will start cycling at a set outside temperature and keep supplying heat, even if the inside temperature is within a comfortable range.

The different wireless sensors placed throughout the building also allow the building to operate more effectively for members’ comforts. Various sides of a building may be cooler due to greater wind gusts or other natural elements. With these systems, the equipment can be programmed to send more heat in that part of the building.

A centrally heated building cannot ever provide a comfortable 72 degrees on one floor and yet provide greater heat for a single member in a particular unit. The building’s board and management must decide the “right” temperature level for the building

as a whole, weighing individual demands against collective comfort and peace of mind. But using technology that tracks indoor and outdoor temperatures provide the means of making your entire building more comfortable for members, while identifying and alleviating most problem areas. This reduces fuel costs and increases efficiency, conservation, and sustainability.

According to Pindus, US Energy’s system typically provides a minimum of 15 percent fuel consumption savings, sometimes up to 40 percent, and most customers achieve between 20–30 percent savings. The firm’s technology has been installed in condo buildings as small as six units and as large as 32 stories and hundreds of units.

## Addressing Members’ Heating Complaints

When members complain about inadequate heat, it is best to have a record of the building’s indoor temperature to refer to. “Our heat control system takes temperature readings every hour and the system records and keeps the data for over three years,” says David Unger, chief technology officer for US Energy Group. If you don’t have an energy management system, you can still establish a record of temperatures to determine if there’s a problem or if the member’s complaints are unfounded.

**Take temperature, record results.** Give your staff an electronic infrared noncontact thermometer to carry around at all times. If a member complains, the staff person should go to his condominium unit and take the temperature with the thermometer. Readings are taken by pointing the thermometer at an indoor wall or surface. This method is accurate within a quarter of a degree, says Unger.

**Share results with elderly or sensitive members.** Frequently, members, especially elderly members, feel cold even when their condominium unit is warm. But if you show members that the temperature in the unit is actually at or above a reasonable temperature, they’ll usually back down from their complaint. Remember that before you take the temperature of the unit, check for any open windows and ask the member if he has recently left any windows open. Sometimes members will acknowledge that they’ve left the windows open a crack to let in fresh air. If so, take the temperature after all the windows have been closed. Also, explain to the member that leaving the windows open causes the unit temperature to go down, counteracting the heat the building is providing.

**Take multiple overnight readings.** If the member isn’t satisfied by one temperature reading (for example, she claims that the unit gets cold during the night), you can temporarily install a special device, called a temperature data logger, that measures and records the temperature in the unit at predetermined intervals. This device stores the information in its memory, and you can connect it to a computer to access the information. For example, you can set the device to take the temperature at 15-minute intervals over a 24- to 48-hour period.

**Check radiator valves, window seals.** If a unit’s temperature isn’t at or above the level decided upon by the association board, check for two common, easy-to-fix problems:

- Radiator valve not turned on. You would be surprised at how often a heat problem is due to the simple fact that the radiator valve

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## Cutting Costs

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is in the off position. So check to make sure the valve is turned on.

### ■ Window seals not tight.

The window seals may be letting in drafts and may be in need of resealing.

## Conserve Fuel, Minimize Open Window Effects

One rough way to check if your building is overheated is to see how many windows are open. This

is a common problem. When you overheat units, members will open windows in their units or in stairwells. This wastes fuel and money.

Because the cost of supplying fuel for heat and hot water for a multiple dwelling can be the biggest expense an association faces, it is worth it to have your staff periodically check during the winter months how well the radiators are working, how hot the units are, and whether windows are being left open for hours at a time while the heat is on.

### Insider Sources

**Jerry Pindus:** Chief Executive Officer, US Energy Group, 78-40 164th St., Fresh Meadows, NY 11366; [www.use-group.com](http://www.use-group.com).

**David Unger:** Chief Technology Officer, US Energy Group, 78-40 164th St., Fresh Meadows, NY 11366; [www.use-group.com](http://www.use-group.com).

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## RECENT COURT RULINGS

### ► Association Not Liable for Member's Water Intrusion

**Facts:** A member sued his condominium association to compel the association to make repairs to the common area to prevent water intrusion and flooding into the lower level of the member's condominium. During a period of heavy rainfall, there was standing water in the member's condominium.

The community has had a history of water intrusion and repairs. Shortly after the completion of construction, the association won a construction defect lawsuit against the developer and used the money to hire a flooring company to repair and waterproof the affected areas in the community. However, these repairs were also defective, and the association sued and, ultimately, settled with the repair company. The association then hired another repair firm to fix the water intrusion. After the firm completed the repairs, it wrote to confirm that it could take no responsibility nor give any guarantees that the water penetration issues will be controlled or corrected.

When the water intrusions began again, the association board sent a memo to all members. It outlined the history of the community's water intrusion problem and discussed the extent and the cost of the work that would be required to fix the problem. It noted that such work could not guarantee there would be no further water intrusion in times of heavy rain and that the work would have to be paid through a special assessment levied against all members. The memo noted that it had determined that it was in the best interest of the association to assert that it is not and will not be responsible for any water intrusion into

the below-grade portions of the condominium units and that mitigation against further water damage is the responsibility of individual members.

The trial court said that it would defer to the association's judgment and ruled that the association had made a reasonable and good-faith decision regarding the water intrusion repairs.

**Ruling:** A California appeals court agreed with the lower court's decision.

**Reasoning:** The association had carefully considered the high cost of the repair work, the inconvenience to all members created by construction adjacent to their units, and that the water intrusion problem had been greatly minimized by previous repairs. The evidence showed that the board reasonably and in good faith exercised its discretion to determine that further repairs were not in the best interest of the community.

■ *Calemine v. Jared Court Homeowners Assn.*, February 2009

### ► Association's Parking Rule Deemed Valid

**Facts:** A member sued to have a court declare whether a parking rule approved by the association's board of directors was valid and enforceable. The board passed a rule prohibiting members from parking anything but a single motorized vehicle in a member's assigned parking space. The member testified that he was using his assigned parking space to park a motor vehicle and a motorcycle, and he claimed that the rule was passed solely to eliminate his parking arrangement.

**Ruling:** The trial court ruled for the association.

**Reasoning:** The court found that the rule did not terminate the rights to park or contradict the parking provisions in the governing documents. The rule was the result of a valid amendment to the rules and regulations and was not arbitrary. It was necessary to maintain an aesthetic appearance and for safety purposes. There had been complaints made to other owners to provide full access to and through passage-way adjacent to the assigned parking areas.

■ Fishman v. Vantage Point Assn., February 2009

### ► **Bylaw Amendment Restricting Rentals Is Enforceable**

**Facts:** A condominium association's declaration that established the association contained no restriction regarding rental of the units. Many years later, the association amended the bylaws to prohibit rentals of condominium units. One of the owners leased her condominium unit over the association's objection, claiming that the rental prohibition was ineffective because it had not been added to the association declaration. The association then filed a lawsuit asking the court to declare that the bylaw amendment was enforceable. The trial court granted a judgment without a trial in the association's favor. The appeals court upheld the lower court's decision, and the member appealed to the Wisconsin Supreme Court.

**Ruling:** The Supreme Court of Wisconsin upheld the lower courts' decision.

**Reasoning:** The court ruled that state law allows associations to enact rental restrictions through bylaws. Under Wisconsin state law, a declaration must contain a "statement of the purposes for which the building and each of the units are intended and restricted as to use." The use restrictions mentioned here are general in nature and nothing in this provision requires that all restrictions on use be identified in the declaration.

■ Apple Valley Gardens Assn. v. MacHutta, March 2009

### ► **Board Decision Regarding Construction Project Ruled Valid**

**Facts:** A group of members filed a lawsuit to challenge the association board's authority to enter into a contract for construction work on its building without a vote pursuant to its governing documents. The governing documents require a vote if the construction project is "alterations" or "improvements" costing more than 25 percent of the estimated annual budget. Here, the association classified the work as "repairs" and "maintenance."

The building had suffered leaks over the course of

many years and testing revealed that one-third of the units had toxic mold. The board hired architectural and engineering firms to conduct inspections, and the firms reported that the roof had incurred moisture damage and had nearly exceeded its life expectancy. The trial court granted a judgment without a trial in favor of the board.

**Ruling:** A New York court upheld the lower court's decision.

**Reasoning:** The court applies the "business judgment rule" when members challenge a board's action. Under the rule, the court's inquiry is limited to whether the board acted within the scope of its authority under the bylaws and whether the action was taken in good faith to further a legitimate interest of the association. In classifying the construction work as repairs and maintenance, the board relied upon a determination by the city's chief building and zoning inspector that the project did not need a building permit.

■ Helmer v. Comito, April 2009

### ► **Association Didn't Discriminate Against Members**

**Facts:** An African-American couple filed a discrimination lawsuit against their association. The members asked the court for a judgment without a trial in their favor.

The members posted a "No Trespassing" sign on their property on the advice of the association, association's attorney, and local police after an employee of the association's contractor had damaged the members' property and subjected them to racial slurs. The complaint alleged that after the signs were posted, the association fined the members for posting the signs and threatened to fine them for having a flower border even though the association did not require similarly situated white families to remove their flower borders.

**Ruling:** A Pennsylvania district court granted a judgment without a trial in favor of the association.

**Reasoning:** The members' evidence of harassment consisted of three letters from the association that provided notices of asserted violations of association regulations. The court ruled that these letters were merely notices, with appropriate descriptions, and references to regulations. There was no evidence of differences in treatment by the association of the members as African-American homeowners as compared to Caucasian homeowners.

■ Farrell v. Ashcombe Dover Homeowners Assn., March 2009

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