

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

JULY 2009

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## Rising Foreclosures May Lead to Increased Mosquito Hazards

The National Pest Management Association is warning that abandoned homes can become breeding grounds for mosquitoes in the summer months. The NPMA says the increasing numbers of foreclosures in the last 12 months has heightened the potential for mosquito infestations, especially in and around foreclosed homes with backyard pools.

The group says the problem can easily become a health hazard, noting that mosquitoes can also transmit West Nile Virus. "The Centers for Disease Control reported that West Nile Virus resulted in more than 1,300 human cases and 44 fatalities across the U.S. in 2008," says the group's senior scientist, Greg Baumann. The NPMA recommends contacting your local health department if concerned about a foreclosed property with a backyard pool or other area of standing water.

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## FEATURE

## Six Tips to Avoid Carbon Monoxide Poisoning and Liability

If your condominium community uses a fuel-burning appliance such as a gas or oil furnace to heat your building or pool, you need to worry about carbon monoxide (CO), a hazardous material that your members cannot see or smell. Many people die and many more become seriously ill from CO poisoning each year.

In a recent example, a carbon monoxide leak that reportedly originated in the heating system of a pool could land a Maryland condominium association in some hot water. An investigation of a carbon monoxide leak that sent a family of six to the hospital determined that the building did not have the required carbon monoxide detectors in the building, thus potentially putting the building in violation of a town ordinance. According to the report conducted by the fire marshal's office, the leak originated in the basement of the building in the pool room, as the association's gas-fired pool heater was found to be the only carbon monoxide-producing device in the building.

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## IN THE NEWS

## Housing Turmoil Forces Condo Developers, Buyers to Jump Through Regulatory Hoops

As the impact of the housing crisis ripples through the economy, condominium developers are scrambling to seek government approval for their condominium buildings in the hopes that obtaining the appropriate approval will help sell their units. Currently, condominiums represent the weakest segment of the housing market. According to the National Association of Realtors, condo sales in April fell 12.5 percent from a year ago, compared with a 3.6 percent decline in sales for single-family homes. Government approval, from the Federal Housing Administration (FHA), means potential buyers can more easily qualify for a low down payment mortgage backed by the FHA.

In the first quarter of 2009, approximately 1,048 developments have applied for and received FHA approval, up from 881 projects in the fourth quarter of 2008 and 409 projects in the prior-year quarter. The FHA's appeal among developers represents a dramatic turn-

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## Carbon Monoxide (continued from p. 1)

The town's fire department also determined that the heating unit was improperly ventilated.

Even if your condominium building does not have a fuel-burning appliance, you could still find yourself on shaky territory. For example, your building could have a garage beneath it and some of your members, especially those who reside directly above the garage, could be poisoned from CO from car exhaust. Also, if you manage a mixed-use condo building, trucks loading and unloading near a ventilation system could create a CO poisoning risk.

Here are six tips that can help reduce the risk of CO poisoning, or at least help show that you took the right steps so that you can reduce the risk of liability if CO poisoning does occur.

### Tip #1: Inspect Heating Systems Annually

One way to keep your building safe from CO is to properly maintain your community's heating systems. Hire a qualified person to inspect your heating system at least once a year and perform the routine maintenance work needed to keep it running safely.

**What to inspect.** A representative of your oil or gas company should inspect gas and oil furnaces, water heaters, wood stoves, fireplaces, and all fossil-fuel-burning appliances, says fire protection consultant Merton Bunker. The representative should also check the venting system. If your local gas or oil company does not conduct inspections, you should hire an independent company to do so.

**When to inspect.** The best time to inspect the heating system is in the fall, before cold weather sets in, says Bunker. Problems may develop in the spring and summer when the heating system is not in use. For example, birds or rodents may build nests in the venting system.

The Environmental Protection Agency also recommends that you inspect chimneys and vents when you change a vented heating appliance. You may need to make some adjustments due to the change. For example, if you change your heating system from oil to natural gas, the flue gas produced by the gas system could be hot enough to melt any accumulated oil combustion debris in the vent and block it.

### Tip #2: Keep Inspection Records

Keep records of annual inspections you conduct. If you are sued later for negligence, you can later use them to prove that you have maintained the heating systems, says New York attorney Daniel Morrison. Hire a qualified person to conduct the inspection, and insist on getting an inspection report that states what was inspected and any findings or recommendations that were made.

If you do not inspect the heating system and the CO leaks out, your community's failure to inspect can be used in court as evidence that you were negligent. But if your records show that you have inspected your system annually, you will be in a good position to

defeat a possible negligence claim and avoid paying a large damage award.

### **Tip #3: Follow Inspector's Recommendations**

After looking that the community's heating systems, the inspector will point out any problems and recommend corrective actions. The inspector may tell you to make a specific repair or to perform a test to make sure the furnace is working properly.

In one case, two Missouri roommates were hospitalized for CO poisoning. They claimed that a defective venting system in the building's utility room had caused the CO leak. The manager said that he did not know about any defects and had not gotten any complaints about the heating system. However, the court still found him liable because although there had been no prior complaints, an electric company employee who had inspected the system had told him to perform "a match test" once a month. The day after the residents were hospitalized, an electric company representative did a match test and discovered the leak [*Ashley v. R.D. Columbia Assoc.*, May 1995].

### **Tip #4: Reinspect if Members Complain**

Inspecting the heating system once a year is usually enough to detect problems and prevent leaks. But the once-a-year rule does not always work. Problems can develop at any time and for any reason.

Members may complain about heating system problems such as sooty smoke. Or more ominously, they may come down with flu-like symptoms such as headache, nausea, and dizziness that clear

up when they leave their units, According to the National Fire Protection Association (NFPA), these symptoms are a sign of CO poisoning.

Respond to these complaints immediately. Don't wait for the next annual inspection, says Morrison. Ask the gas or oil company or the fire department to check your heating system for CO leaks. If you don't, a court could find that you were negligent, that you knew of a potential problem and did nothing about it.

### **Tip #5: Install and Inspect CO Alarms**

A CO alarm is a device that measures the concentration of CO in the air. It sounds an alarm when the concentration of CO in the air corresponds to a 10 percent level in the blood. The alarm may sound before any members experience any symptoms. While many cities or states require CO alarms in certain buildings, it is a good idea to install them in yours even if your city does not require them.

If your condominium building has a parking garage underneath it, you may want to install CO alarms in the common areas of your building that are located directly above the garage. Parking garages can generate a significant amount of CO, so it is important to check your garage's exhaust system as well as install the alarms in the appropriate places.

To ensure early detection, install CO detectors close to the ground. CO is a heavy gas that does not rise quickly. Therefore, if you install CO detectors in a high place, as you would smoke detectors, a harmful amount of CO can build up in the air before enough of it rises to set off the detector's

alarm. The instruction manual for your CO alarm will give advice on proper placement, how often batteries should be changed, and how long the CO alarm should last before it needs to be replaced.

### **Tip #6: Avoid Pollution Exclusion Clauses**

Many insurance policies have what is called a pollution exclusion clause, says Texas risk management consultant Steven Cataldo. This clause bars coverage for injuries that result from the discharge of gas or fumes into the building. If your policy has this clause and a member or guest sues your community for CO poisoning, the insurer could deny coverage.

For example, Cataldo recounts an incident in a building where faulty heating and ventilation systems released CO, killing three people and seriously injuring five others. In this case, the general liability insurance carrier relied on a pollution exclusion clause in the insurance policy to deny coverage. Some policies contain a "hostile fire" exception to the pollution exclusion. These policies cover injuries from fumes if the fumes were caused by a fire. But at least one court has ruled that this exception does not apply to CO fumes.

In another recent case, the Georgia supreme court ruled that the pollution exclusion clause excluded carbon monoxide claims. The very basis for the lawsuit was the injured woman's claim that the release of carbon monoxide gas inside the house "poisoned" her, causing her to suffer difficulty breathing, dizziness, insomnia, vomiting, nausea, headaches, and decreased appetite. The court found that the plain language of the pollution exclusion clause

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## Carbon Monoxide

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excluded her claim from coverage under the commercial general liability policy [Reed v. Auto-Owners Ins. Co., September 2008].

To be sure that your community is covered for this type of claim, speak with your broker about getting an endorsement on your policy that will cover you if fumes

or gases are accidentally emitted. The extra amount you pay for the endorsement will depend on the insurer and the type and size of your building.

### Insider Sources

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Search Our Web Site by Key Words: carbon monoxide; pollution exclusion; heating systems

## In the News (continued from p. 1)

around from the height of the housing bubble, when condos sold so quickly that few developers bothered with the FHA's application process.

### FHA Requirements

More buildings became eligible for FHA approval after Congress last year boosted loan limits to \$417,000 across the country and as high as \$729,750 in the most expensive markets. About one-third of all first mortgages are now being originated through the FHA, up from about 2 percent in 2006. Much of that share has come in markets that were previously shut out by lower loan limits. Delinquencies on FHA-backed loans rose to 7.5 percent in February, from 6.2 percent a year earlier.

However, for the FHA to approve a mortgage on a condo, the building must meet numerous specifications and follow stringent guidelines. For example, to obtain FHA approval, developers must meet guidelines that are more stringent than what most local governments require, including a 10-year structural warranty and a reserve fund. Condo boards in FHA-approved buildings must

waive the right to refuse potential buyers. In buildings with more than 30 units, no more than 10 percent of units can have FHA financing, while no more than 20 percent of units can have FHA financing in buildings of 30 or fewer units. Also, for a mortgage to be eligible for backing, the FHA requires 51 percent of units in a condominium building to be sold.

### Fannie and Freddie Requirements

Fannie Mae and Freddie Mac, the government-controlled mortgage companies, have put in place even tighter guidelines for making condo mortgages. And without government backing, private lenders that offer mortgages for condos require large down payments of 30 percent or more. But if a building has FHA approval, the borrower can get a mortgage in as little as two weeks. In addition, the buyer can get a down payment as low as 3.5 percent.

The FHA doesn't make loans but insures lenders against losses on those loans. In March, Fannie Mae said it would no longer guarantee mortgages on condos in buildings where fewer than 70 percent of the units have been sold,

up from 51 percent. Fannie Mae also won't purchase mortgages in buildings where 15 percent of owners are delinquent on condo association dues or where one owner has more than 10 percent of units, which the firm sees as signals that a building could run into financial trouble. Freddie Mac will implement similar policies next month.

Some of these requirements may change soon as political pressure mounts against these mortgage giants. Recently, two lawmakers—Reps. Barney Frank (D-Mass.), who is chairman of the House Financial Services Committee, and Anthony Weiner (D-N.Y.)—have sent letters to the chief executives of Fannie and Freddie to request that they relax these recently tightened standards for mortgages on new condominiums. The lawmakers argued they could threaten the viability of some developments and slow the housing-market recovery. The letter warned that the 70 percent sales threshold “may be too onerous” and could lead condo buyers to shun new developments. The legislators asked the companies to “make appropriate adjustments” to their underwriting standards for condos.



Fannie and Freddie have also boosted fees on mortgages for condos. Buyers without a minimum 25 percent down payment have to pay closing-cost fees equal to 0.75 percent of their loan, regardless of their credit score, under new rules that took effect in April. Fannie has said it will drop that fee in August for cooperative apartments and detached condos. The FHA, by contrast, doesn't charge higher rates to borrowers who make smaller down payments.

### Condo Supply Expected to Increase

The condominium industry should expect more regulatory changes and more developers seeking government approval. As bad as conditions are, they are expected to get worse as additional condominium unit supply becomes available. According to Reis Inc., a real-estate research firm, 93,000 new units are scheduled for completion this year, a 28 percent increase from last year. At the end of April,

the U.S. had enough condos to absorb 15 months of demand, according to the National Association of Realtors.

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Fannie Mae; Freddie Mac; mortgage

## CUTTING COSTS

### Improve Member Safety, Reduce Costs with Proper Outdoor Lighting

In the past, communities have tackled the need for better outdoor lighting by installing high-intensity discharge (HID) lighting sources that essentially blast the grounds with light. Unfortunately, high-intensity lighting typically casts hard shadows, produces an unnatural look, and distorts color, while adding significantly to the monthly electric bill.

In other words, the quantity approach to outdoor lighting completely ignores the quality aspect. Light, after all, has a very specific purpose. The security of your members in parking areas, walkways, and outdoor common areas is a primary concern. Light can also affect the aesthetics of your community's common areas, which can make your community more attractive to prospective purchasers of homes in your community.

Your members may want a newer, better product for lighting common areas, but don't know there are options aside from HID lighting. "They don't know it's

available, even though it's just what they want," says Larry Leetzow, president of Magnaray International, a lighting fixture manufacturer based in Sarasota, Fla.

#### Seeing Better Under the Lights

Most HID light comes from a point source and therefore, creates hard shadows. The physiologic consequences can be quite unnerving, as the harshness of this light forces the eyes' irises to contract, which subsequently causes a "disability glare" that can register as discomfort or even pain.

Incandescent light bulbs, and even the up-and-coming LEDs, fare no better, as they also produce light from a single point.

Instead, by taking into account how humans perceive light and applying this information to outdoor lighting designs, visual acuity can be improved through a combination of fluorescent light sources within carefully designed fixtures. In other words, HID lighting

sources are not the best option for communities, according to Leetzow. He says that his company's high-quality fluorescent lighting systems provide visual characteristics that make it a fundamentally superior light source.

Fluorescent light emanates from a tube that disperses light throughout its length. This dispersion helps reduce hotspots and the sharp "fall-off" that creates shadows. This "soft fill" light allows for a uniform visibility and instills a sense of safety, since the eye doesn't have to continually adapt to brighter and darker areas.

"The quality of light is its trueness to the daylight that we see with our eyes," explains Leetzow. "The human eye has three photoreceptors—red, blue, and green—just like computer displays and televisions. When combined, the red, blue, and green light frequencies make white light that enables people to see more normally. Fluorescent light sources can produce

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## Cutting Costs

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that light, which is far more balanced and normal than the yellow light frequencies produced by low- and high-pressure sodium lights, for instance,” he says.

“We undertook one project where there previously was a combination of light technologies used throughout the complex,” says Bob Malone, president of Malone Controls, a firm that designs and installs controls and other energy-related systems. “We subsequently installed fluorescent lights, and now the whole complex, including walkways, parking, and recreational areas, looks much more evenly lit with true color that is consistent throughout the entire site. It is a very dramatic improvement.”

Leetow’s company uses a reflector design that that efficiently magnifies the lamp’s image, reducing “exit luminance,” commonly called “glare.” Because properly designed fluorescent fixtures and lamps require fewer lumens to produce higher quality, whiter light, they also require substantially less energy.

### Better Security Through Better Lighting

Of course, the payoff for all of this optical technology comes in the form of better security. Members and their guests feel more secure when harsh shadows are eliminated.

By using fluorescent lights with powerful reflectors, a community can achieve a much better spread-of-field than with the old pole-mounted HID lights, thus allowing the community to light its buildings, pool areas, walkways, and parking lots with fewer fixtures.

Better lighting also allows security staff to obtain more accurate descriptions of suspicious persons or vehicles—so much so that some military bases are switching from HID lighting to fluorescent. For instance, at the main gate of the Marine Corp Air Station in Miramar, Calif., facilities management swapped out 33,000 watts of metal halide fixtures in favor of 6,000 watts of fluorescent fixtures, and achieved far more effective lighting with no hot and dark spots or high-glare factors.

### Fluorescent Lighting, Color Accuracy

The shortcomings of HID lighting, and even quartz halogen, become even more apparent when color is considered.

The Color Rendering Index (CRI) is used to describe the visual effect of light on colored surfaces. Here are some common ranges of CRI, with 100 being best since it comes closest to reproducing color as the sun does: Low Pressure Sodium, 0; Clear Mercury, 17; High Pressure Sodium, 25; White Deluxe Mercury, 45; Metal Halide, 85; 4100K Fluorescent 86.

Fluorescent lighting sources top this list, making foliage look more naturally green and reproducing all other colors as we remember them in daylight. Provided with a choice, prospective purchasers most likely will opt for a home in a community with the more natural light.

### Reducing Electric Costs

The quality of lighting also exerts a direct effect on cost containment. If fewer fixtures are needed, less initial outlay is required along with lower maintenance expenses.

As a general rule, communities, just like anyone else, do not want to spend without seeing a return on their investment. Leetow echoes that sentiment, commenting that the mind-set is “using what you have is most efficient.” Fluorescent lighting systems eventually pay for themselves, as evidenced by a study showing cost savings between 70 percent and 80 percent.

One final consideration involves lighting controls. HID lights can require as much as 15 minutes to warm up and achieve full light output. Unfortunately, even a momentary loss of power can cause the system to re-strike and have to warm up again, making them inappropriate for use in conjunction with motion detectors. The only alternative is constant illumination, and a backup system is often required for applications where safety and security are required. However, a fluorescent light will turn on quickly, and utilizing a motion sensor in appropriate areas will reduce electric costs further.

With a thorough consideration of all elements pertaining to the quality of light, communities can turn this understanding into dollars and cents via lowered operating costs.

#### Insider Sources

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Search Our Web Site by Key Words: lighting; fluorescent light; high-intensity discharge; safety; cost reduction

## RECENT COURT RULINGS

### ► Insurer Required to Cover Members' Fire-Damaged Homes

**Facts:** A fire that started in one condominium unit spread to adjoining units, causing substantial fire and smoke damage. The insurer made payments to the association that covered damages to certain structural elements of the building, but did not cover individual members' damage to the interior of their units. Both parties argued over the extent of property coverage required by the association's governing documents. A trial court ruled in favor of the members, and the insurer appealed.

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

**Reasoning:** The association's governing documents required the association to purchase insurance coverage for the type of damage incurred by the members. The court noted that the association's lawyer interpreted the governing documents in the same manner in a letter to the insurer's attorneys.

Also, the court stated that it would be an absurd requirement that every member be named individually as an insured, which would require constant revision of the policy as units are purchased and sold. The named insured is the condominium association, and the association is comprised of every person owning even a partial interest in a condominium within the association.

■ Craig v. Sandy Creek Condo. Assn., June 2009

### ► Members Must Comply with Association's Setback Requirements

**Facts:** When a couple decided to construct an addition to their home, they met with a member of the association's architectural review committee. The committee member told them that the adjustments that they wanted to make were not in compliance with the rear setback provision established in the governing documents.

The members submitted an application for a variance with the City of New Orleans zoning board, and their application was granted with the caveat that any decision made by the zoning board does not take away any authority of the association. Afterwards, the members sent their construction application to the board president via certified mail. A delivery notice was left for the president, but she did not claim

the package. The application was returned to the members, and they made no further attempts to deliver it to the association.

The members began construction, and the association sent notices to them to cease construction. They finished the construction project, and the association asked the court to order the members to comply with the restrictive covenants in the governing documents.

**Ruling:** A Louisiana appeals court upheld the trial court's order in favor of the association.

**Reasoning:** The trial court found that the context and wording of the rear setback rules gave the association's members the choice between two setback requirements of 20 and 24 feet. The appeals court found that it would defeat the purpose of having a rear setback requirement if all members had the option of petitioning the city for a rear setback of under 20 feet, as the members wished.

■ Fairway Estates Homeowners Assn. v. Jordan, May 2009

### ► Developer Must Restore Golf Course

**Facts:** A homeowner association sued the developer of the community to require it to restore the community's golf course. The community was marketed to prospective purchasers as a golf course community. The presence of the golf course was essential to the members' decisions to purchase, and the golf course enhanced the value of their property. After a problem with the irrigation system, the grass died, and the golf course was closed.

The developer remained the owner of the golf course and was responsible for it both financially and operationally. Prospective buyers who asked about the ownership of the golf course were assured that they would not be financially responsible for the golf course and that, if it lost money, the losses would not be their problem. The trial court ruled for the association.

**Ruling:** An Oregon appeals court agreed with the lower court's judgment.

**Reasoning:** The values of the properties within the community were negatively affected as a result of the degradation of the golf course. As a result, the appeals court ruled that it was reasonable for the members to rely on the developer's representation in making their decisions to purchase in the golf course community.

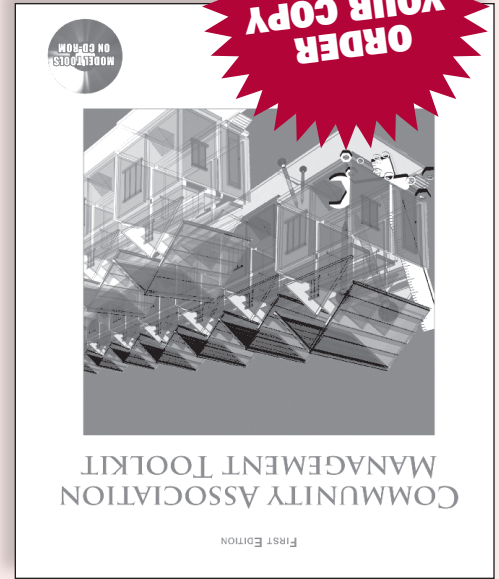
■ Mt. High Homeowners Assn. v. J. L. Ward Constr. Co., May 2009

# Community Association Management Toolkit

**Community Association Management Toolkit** contains 14 chapters filled with Model Agreements, Model Checklists, Model Contract Clauses, Model Forms, Model Letters and Memos, Model Questionnaires, Model Rules, and more that will help you handle today's most pressing community association issues. **Community Association Management Toolkit** contains Model Tools covering the following topics:

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