

Community Association Management *Insider*[®]

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2010 Outlook Grim for Florida Community Associations

Results of the most recent survey of Florida's community association members show no immediate end in sight to mounting foreclosure-related financial pressures that have resulted in increasing budgetary restraints and falling property values in community associations across that state.

In a report titled "Community Associations Face a Perfect Storm: Foreclosures, Budget Shortfalls and State Mandates," nearly nine in 10 respondents to the Fall 2009 Survey on Community Association Financial Stability, conducted by the Community Association Leadership Lobby, said they expect foreclosures, delinquencies, and revenue shortfall problems to either increase or remain unchanged in 2010.

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FEATURE

Three Ways to Minimize Dangerous Speeding in the Community

Speeding drivers in your community can ruin your neighborhood's tranquility and, more importantly, threaten the safety of anyone on foot, especially playing children. According to the *American Journal of Public Health*, two-thirds of children who are hurt or killed in traffic accidents are struck and injured within several blocks of their homes.

Your association most likely has speed limits set for the private streets within your community. Unfortunately, many drivers lack awareness of the deadly impact that driving five or 10 miles per hour over the limit can have on the people outside their vehicles.

There is no single cure for speeders within a community. However, with a carefully thought-out plan and some community outreach, speeding members may realize that the association is serious about preventing speeders and eventually reduce the incidences of speeding in your community. We'll highlight the most effective traffic calming methods and give an example of what one association did to curb its speeding problem.

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NEW REGULATIONS

FHA Spot Approval for Condos Expires After Feb. 1

Meeting Federal Housing Administration (FHA) requirements is important for your condominium association because doing so dramatically increases your condominiums' marketability. An increasing number of first-time homebuyers are pursuing FHA-insured mortgages for purchasing condominium units. And for communities that meet FHA requirements and obtain approval, these potential buyers can get loans that require down payments of only 3.5 percent and qualify for loans under less burdensome terms.

Under the temporary guidance issued by the Department of Housing and Urban Development (HUD), the FHA Spot Approval process expired on Feb. 1, 2010, rather than ending on Nov. 2, 2009, as originally proposed. A Spot Approval was the lender's ability to approve and fund a loan on a specific unit in any condo building that met certain conditions.

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Minimize Speeding (continued from p. 1)

Private vs. Public

Before we delve into the different methods, it is important to realize the differences between private and public streets in a community. Private streets are considered part of the common area or common elements of an association. These streets are maintained by the association.

Public streets, on the other hand, are dedicated to and maintained by a city or county. The distinction between public and private streets is important because an association may not have authority to adopt and enforce rules with respect to public streets. In the event the streets running through your community are public, your association may have to overcome bureaucratic obstacles with your city or county's department of transportation to implement some of the following methods.

Limit Opposition with Communication

You can limit objections to implementing any of the following methods by involving members in the decision-making process. For example, homeowner meetings may be held for the purpose of discussing residents' views and opinions of speeders in the neighborhood and to obtain recommendations from the community.

Also, a committee may be formed that will attempt to contact homeowners and discuss traffic issues. Educated homeowners are more likely to voluntarily comply with the rules and regulations of the association. Therefore, by openly discussing the speeding problems in your community, you may help to promote voluntary compliance with the speed limit.

Method 1: Installation of Speed Bumps

Traffic calming devices come in all shapes and sizes. The most recognized are speed humps and speed bumps, raised mounds of pavement placed across roadways that compel drivers to slow down. Installation of these speed bumps in the streets forces drivers to slow down or experience an unpleasant jolt and possibly minor car damage.

Bumps are steeper, while humps have a gradual rise. Speed tables are flat-topped speed humps. In a study of 179 sites by Fehr & Peers Transportation Consultants, speed humps have been shown to reduce speeds by 22 percent and reduce traffic accidents by 11 percent.

According to Steve Robinson, general manager for Quickstripe, a Southern California-based paving company that installs traffic calming devices in private community associations, speed humps are quite effective in slowing cars down.

One criticism of these traffic calming devices is that they slow emergency vehicles down. Robinson works around this by recommending rubber speed cushions to his clients. These cushions are designed as a series of small speed humps installed across the roadway. Cars must

drive by with one or both wheels on the rubber products, while the wider berth of emergency vehicles allows them to straddle the cushions, thereby driving over them without slowing down.

Another potential source of liability with these traffic calming devices occurs when a driver damages his car by going too fast over speed bumps. To help reduce the probability of liability, it is important to place bumps at distances recommended by professionals. You should also place warning signs at entrances to the community and warn members in writing of the installation of the speed bumps in advance.

The association should additionally be aware that some municipalities enact ordinances prohibiting the placement of speed bumps or other similar speed control devices on private streets. Therefore, before installing any speed bumps in your community, review local ordinances to ensure there are no prohibitions against such speed control devices.

Method 2: Placement of Stop Signs, Increasing Enforcement

Stop signs will require drivers to come to a stop at designated points in the community. Strategic placement of stop signs can prevent drivers from speeding up between signs and, in turn, reduce speeding.

One association in Encinitas, Calif., with public streets hired a professional traffic engineer to conduct a thorough assessment of the entire community. The engineer recommended adding numerous stop signs at various intersections in the community. The board went to the city's traffic

commission with the recommendations, but the city council rejected the request for the placement of a four-way stop sign because it did not meet a score based on state standards. However, through the association's efforts, the city installed additional signage on all intersecting streets.

Despite their benefits, stop signs have the practical problem of enforcement. Many drivers fail to come to a complete stop at the stop signs or, even worse, fail to slow down entirely. One option for the association is to contact its local city council or police department for assistance. The city may be willing to temporarily increase the number of patrol units sent to the community. Once the community has the reputation of being a high "ticket" area, drivers may be more likely to obey both the speed limits and stop signs.

The association from the example above hires a patrol company to perform parking and speed enforcement as well as provide increased safety and crime prevention patrols. The company has meticulous records that detail every individual incident where someone was caught speeding. Habitual offenders may incur a fine, but they first have the opportunity to provide their viewpoint at a due process hearing. The association has found that the general use of the patrol has reduced the speeding problem—and that the major offenders were people who live within the community.

Method 3: Radar Systems

A third alternative is for an association to purchase or borrow a radar device of some type. Many police departments can lend portable trailers, which show the

approaching driver's speed. The trailers display—for all to see—a speeding driver's violation while reminding him to obey the limit. Some units keep an electronic log of the traffic count and speeds detected.

Radar trailers work mainly by drawing drivers' attention to their speed in the hopes of discouraging speeding. If radar trailers are too difficult to procure, you might consider purchasing a radar speed board. These are similar to radar trailers yet much smaller. They can be mounted to poles in your community and can be solar-powered. If a vehicle's speed is at or below the limit, it shows that speed in a steady green. If the speed exceeds the legal limit, it flashes the speed in red.

Another possibility is a radar gun, which is used to record a car's speed and then issue a fine. The use of a radar gun would require monitoring. This means someone would have to physically monitor the cars as they go through the radar and record license plate information.

Any of these systems can be utilized by an association to monitor speeders and issue warnings and fines to those violating the association's speed limit, if desired. A list of community vehicles and license plate numbers will need to be maintained by the association so warnings and fines may be mailed to those observed speeding. Therefore, it may be necessary for the association to amend its governing documents or adopt a resolution requiring owners within the community to provide vehicle information to the association. In the event a speeder is not a resident of the community, the associ-

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Minimize Speeding

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ation will not be able to issue such warnings. However, the mere presence of visible speed-monitoring devices in the community may be enough of a deterrent for drivers to slow down in the community.

Another benefit with the use of radar systems is the ability

to record data including traffic count, average speed, number of violations, and highest speed. This is valuable information for either informing local police, getting support for more speed deterrents from the city, or helping the board make better and more informed decisions on speeding issues in the community.

Insider Source

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For more information, visit:

www.communityassociationinsider.com

Search Our Web Site by Key Words: speeding; traffic calmers; car accidents; fines

New Regulations (continued from p. 1)

FHA Spot Loans

FHA spot loans were a way to make FHA loans available to homebuyers in well-run condo projects even if they had not gone through the full approval process. The difference here was that these loans were for the individual unit, not the whole building. This was a huge advantage because a good portion of the condos that are eligible for conventional financing also met FHA Spot Approval guidelines. FHA spot loans did not work for all situations. They were an option only for condominiums that had already sold out or were nearly there, and had shown that they had the financial resources to continue to perform well in the future.

Here were some of the major requirements for a spot loan approval:

- The condominium project must be complete, including all common areas and facilities;
- The owners association must provide evidence that the project has the appropriate hazard, liability, and flood insurance;
- Individual units in the project must be owned fee simple. The project's legal documents must

provide for undivided ownership of common areas by unit owners;

- The governing documents should not place any legal restrictions on conveyance; provisions that seek to limit the free transferability of title are unacceptable, such as rights of first refusal and restrictive covenants;
- At least 90 percent of the units in the project must have been sold;
- At least 51 percent of the units in the project must be owner occupied; and
- Condominium projects consisting of 30 units or fewer can have up to 20 percent of the units encumbered by FHA-insured mortgages under the spot loan rule.

Current Approval Process

A major concern is that the new approval process may add a significant amount of time to approving a condo project compared to the prior Spot Approval process. And many associations may be shocked to find out that their condominiums no longer qualify for FHA financing when the spot loan approval process expires.

Under the regulations found in the Mortgage Letter 2000-46,

after February 1, all condominium approval projects need to be approved through either a "HUD Review and Approval Process" (HRAP), where HUD approves the project, or the "Direct Endorsement Lender Review and Approval Process" (DELRAP), where a lender with direct endorsement authority approves the project.

With either process, the approving entity needs to gather the documentation and examine whether the condominium meets FHA guidelines. The lender achieves this by reviewing the condo questionnaire, the property appraisal, and the condominium association's governing documents.

Attorney Stephen Marcus predicts that the elimination of the Spot Approval process will result in condominium associations paying to get their buildings FHA approved since it would be an unfair burden on the first person seeking to sell in a condominium association after February 1 to pay to get the entire building approved.

In anticipation of future requests from members to obtain approval for FHA financing under either the HRAP or DELRAP

process, Marcus provides the following list of documents your association may want to prepare in advance in order to ensure a smooth approval process:

- Articles of Incorporation of the Condominium Association filed with the state, if applicable;
- Association's Federal Tax Identification Number;
- Fully completed and executed Recorded Condominium Documents—Master Deed, Bylaws, and Declaration of Trust;
- Recorded Plat Maps/Site Plans indicating legal description;
- Plan or Evidence of Transfer of Control of Homeowner Association;
- Proposed or Actual Budget: Budget must include a provision for replacement reserves equal to 10 percent of annual budget including insurance premiums and deductibles if not budgeted for separately. If not adequate, a reserve study will be required to support budget allocations;
- Management Agreement, if applicable;
- FEMA Flood Map;
- Outstanding or Pending Litigation Analysis;
- Pending Special Assessment Analysis;
- Attorney-written certification of condominium in accordance with FHA requirements;
- Fully executed condominium questionnaire completed by developer, homeowner association, or management company;
- Photos of subject project/site for evidence of the stage of construction (an appraisal would satisfy this requirement);
- Phase 1 environmental assessment study—New Construction, if applicable;
- Copies of building permits and Certificates of Occupancy—New Construction;
- Evidence of percentage of FHA-insured loans;
- Estimated construction completion date—New Construction;
- HUD Form 92451, Builder's Certification of Plans, Specifications & Site, Section 1, Site Analysis Information. Form must be executed at #10 at bottom of page 1 and #13b on page 2—New Construction;
- HUD Form 92544, Warranty of Completion of Construction—New Construction;
- HUD Form 92010, Equal Opportunity Certificate—Proposed or New Construction only. Not required if property is 100 percent complete at time of review;
- Developer/Builder Certification to Condominium Requirements—New Construction only; and
- Developer/Builder Certification to pre-sales—New Construction only.

Insider Source

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For more information, visit:

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Search Our Web Site by Key Words: FHA; Spot Approval; spot loans; HRAP; DELRAP; loan approval

DOS & DON'TS

✓ Survey Members, Investigate Options Before Acting on Secondhand Smoke Complaints

Many condo associations face an increased number of complaints from nonsmokers about their smoking neighbors and are being asked to take action. Oftentimes, associations are put in the awkward position of resolving the conflict between smoking and nonsmoking members. The emotions involved are heightened due to the fact that smokers believe that they have a right to smoke in their own homes, while nonsmokers believe that they have a right not to be exposed to harmful secondhand smoke.

There is no legal requirement that an association must adopt smoking restrictions, but there is legal support permitting associations to implement a smoking ban, or limitations, in common areas and even within units in some instances. Associations contemplating a no-smoking policy should

survey owners for feedback, in addition to examining the structure of the building, ventilation systems, weather-stripping of doors and windows, and related building components to determine how effective and desired a smoking ban may be in the community.

Requiring smokeless ashtrays, the installation of an air filtration system or other measures to effectively diffuse the smoke may offer workable solutions in communities with smokers without making smoking members feel as though their rights are being impinged. Other considerations for a no-smoking policy may include a “grandfathering” provision to protect existing owners who smoke, or designating certain locations and/or times for smoking.

For more information, visit:

www.communityassociationinsider.com

Search Our Web Site by Key Words: smoking ban; secondhand smoke

RECENT COURT RULINGS

► Member's Architectural Improvements May Be Allowed

Facts: A member obtained association approval for an addition to his home and for substantial outdoor improvements to his property. The approval specified that an outdoor structure could not exceed 10 feet 6 inches in height. However, over the course of construction, the member concluded that he had to increase the height of the structure. He increased it by a foot and a half without first obtaining a variance from the association.

A neighbor complained, arguing that the structure constituted an unreasonable view obstruction. The association was reluctant to grant the variance and was concerned about the attorney fees it was incurring in addressing the compliance matter. Additional issues arose about the other improvements the member made and whether the improvements were in line with the association's architectural guidelines. The association ultimately levied a \$23,732.48 reimbursement assessment in connection with the disputed matters.

The member filed a suit against the association, alleging breach of contract and fair dealing. The association asked the court to dismiss the case on the basis that the lawsuit arose out of a dispute over communications from the association pertaining to purported noncompliance with the architectural guidelines. The association argued that this was therefore a free speech issue, so the member had the burden to present evidence establishing a probability that he would prevail on his claims. The trial court dismissed the member's claim, and the member appealed.

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

Reasoning: The appeals court ruled that not every mundane communication between a homeowners association and a member gives rise to a freedom of speech issue. Here, the act of putting demands concerning architectural guidelines compliance in writing did not raise free speech concerns. The issues in this case revolved around the association's unwillingness to grant a variance and demand that disputed improvements be removed. The court stated that

these were breach of contract matters and not free speech concerns.

■ Turner v. Vista Pointe Ridge Homeowners Assoc., December 2009

► Association Reasonably Denied Member's Accommodation Request

Facts: A condo association's governing documents prohibits members from keeping pets on the premises. The association sued a member and sought a court order preventing him from keeping a pet in violation of the governing documents. During the course of the trial, the member raised numerous counterclaims, but stated that he was not requesting an accommodation under the Fair Housing Act (FHA). However, he stated that he will claim the need for an accommodation under the FHA in the event a court holds valid the restrictive covenant prohibiting pet ownership.

The court upheld the association's rule and stated that the association need not honor a future request by the member for an accommodation under the FHA unless there is a significant change in the member's health or disability status.

Subsequent to the court order, the member requested an accommodation four times using a medical opinion that predated the court's ruling. The association denied the request three times on the basis that the member did not demonstrate a significant change in his disability status. For the fourth request, the association asked for more information regarding a change in his disability status. The member never replied and initiated this lawsuit. The association asked the court for a ruling in its favor without a trial, and the district court granted the association's request. The member appealed.

Ruling: The North Dakota Supreme Court agreed with the lower court's decision.

Reasoning: The member failed to show that his disability status had changed in regard to his first three requests for accommodation or that the association's conduct had caused him emotional distress. With regard to the fourth request, the member failed to show that the association unreasonably denied him a reasonable accommodation. The fourth request was submitted with forms containing identical statements,

and the association was justified in seeking additional information because the statements of the medical professionals were ambiguous.

- Lucas v. Riverside Park Condos. Unit Owners Assn., December 2009

► Association Not Liable for Accidentally Discarding Member's Personal Property

Facts: A member of a cooperative sued her association and its officers for the removal and destruction of the contents of a storage bin located in the basement of the co-op. As a cooperative housing corporation, each member or shareholder is issued a proprietary lease through which he or she pays maintenance fees to the association.

Under the terms of the lease, storage space was provided by the association to each resident. The lease instructs each resident to refrain from using the space for valuable and perishable items. The lease also authorizes the association to enter the designated storage space “at any reasonable hour of the day upon notice, or at any time and without notice in case of emergency.” If a member is not present to open the storage space or has not provided a duplicate key to the association, the lease allows the association to “forcibly enter the apartment or storage space without liability for damages...”

One day, employees of the association broke the padlock on the suing member's storage bin and discarded most of the bin's contents. The association said this occurred accidentally as part of a general cleanup effort and that its workers were under the mistaken impression that the property in the storage bin had been abandoned. The board of directors then sent a memo to all members notifying them of the occurrence and that policies were being explored to prevent such a thing from happening again. The trial court dismissed the member's claims since the association offered her “full restitution” for the lost items and because the board members were protected by the business judgment rule. The member appealed.

Ruling: A New Jersey appeals court agreed with the lower court's decision.

Reasoning: The association had a legal right under the lease to go into the storage area and maintain the storage space. Although the association should have given the member notice that workers intended to enter her storage bin, the absence of such notice does

not equate with fraud or the sort of misconduct that could overcome the business judgment rule, a principle that shields board members from liability so long as their decisions were made in good faith.

After discovering their error, the board took appropriate steps to inform the members, apologized for the harm, and promised to take steps to prevent the situation from repeating in the future. Also, they promptly offered to compensate the member for her loss.

- Davis v. Howell Management Co, Inc., November 2009

► Members Not Liable for Assessments Relating to Common Facilities

Facts: Two members claimed that they did not know a homeowners association existed when they purchased their respective homes. The property deeds make no mention of the association, and the deeds contain no restrictions that require the owners to become members.

In addition, the association's governing documents state that any owner within the community “may become a member” of the association “upon submitting a letter of application and being accepted by a majority vote of the membership.”

The members paid for a number of years and then they terminated their membership in writing. The association sued for unpaid assessment fees and asked the court to declare that the members were liable for any future assessments relating to common facilities in the community.

Ruling: A Rhode Island trial court denied the association's request for a judgment without a trial.

Reasoning: The assessment includes maintenance costs for docks, tennis courts, social and recreational activities, and other various facilities. The members submitted a photograph showing a “No Trespassing” sign posted on a dock that restricted access to members and guests only. This showed the court that mere ownership of a home in the community may not grant owners access to the common facilities maintained by the association. If the former members cannot access these facilities, the association cannot prove that the former members were unjustly enriched by the association upkeep of these facilities.

- Arnolda Improvement Corp. v. Bartlett and Co. Antiques Inc, January 2010

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