

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

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### Condo Project Manager to Plead Guilty in Asbestos Case

The project manager for a condo conversion project in Florida has agreed to plead guilty to a federal crime for helping cover up asbestos violations.

After asbestos was found in the popcorn texture in the ceilings of the units, the property owner and the builders decided it was too expensive to remove the asbestos, and chose instead to cover it with drywall. The technique used to cover the ceilings actually disturbed the asbestos. After rain caused ceiling damage, the owner wrongly told the manager that the ceilings were "under threshold" for asbestos and that the ceilings should be removed quickly to keep the project on schedule. The manager relayed the instructions, leading workers to remove the ceilings without observing the precautionary measures required by law. The manager admitted to falsely claiming that employees had properly handled the asbestos.

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## FEATURE

### Ensure Social Club, Association Distinctions to Minimize Liability

It comes as no surprise that in larger community associations there is an increased likelihood that social clubs exist. A group of members can form clubs for any number of reasons, from recreation to promoting philanthropic goals. These clubs can create a sense of community and greatly add to the quality of life of your members.

Oftentimes, these clubs exist as organizations independent from the association. They collect their own fees, organize their own events, and may even have strict membership criteria. However, private clubs and associations often have a more intertwined relationship. These social clubs may freely use your association's name, they may rent your clubhouse facility to host events, and association staff may lend a hand in setting up club activities.

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## BEST PRACTICES

### Reduce Condo Trash Collection Costs with a Recycling Program

Communities that have successfully engaged members in recycling often find savings in their waste management costs. In San Diego, for example, the average cost of a trash pickup is \$21.50 per Dumpster, while it costs only \$10.50 to pick up a recycling Dumpster. If a condo community with 10 trash Dumpsters serviced three times a week replaced five of the trash Dumpsters with recycling Dumpsters, the waste disposal bill would decrease by \$165 per week, which comes out to an annual savings of approximately \$8,750.

Another immediate benefit of recycling is the increased community pride members feel knowing that the community is cleaner and that they are helping the environment. To begin or boost a recycling program at your community, our experts offer the following pointers.

#### Publicize Your Program

Make it known and make it fun, say those who have been successful implementing a recycling program. You can do outreach in the form of flyers and doorhangers, and community meetings.

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Director of Production: **Kathryn Homenick**

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VP & Managing Director: **Mark Fried**

Editorial Director: **Anita Rosepka**

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**Social Clubs** (continued from p. 1)

If an unfortunate accident happens at an event or some sort of fraud becomes apparent in the running of a club, the concern for managers and association boards is that the association will be ultimately responsible or will have to expend time and resources proving that it was not at fault. The association's insurance coverage most likely does not extend to clubs and their numerous unregulated activities. Also, volunteer officers of an unincorporated club may sue the association after discovering that they may be personally liable in the event of a lawsuit against their club.

You can avoid many potential problems by taking the necessary steps to help structure clubs appropriately. The following guidelines will help avoid serious risks while allowing social clubs to enhance the quality of life for your members.

**Make Clear Club, Association Distinctions**

It is important to make and record a clear distinction between the club and the association. You need to be able to show that the clubs in your community are not sponsored by the association or operated by it. The association needs to be able to show a separation of operations and finances.

To minimize an association's liability, the club can become properly incorporated as its own entity, adopt its own bylaws, maintain separate financial records, and have separate bank accounts.

To ensure that clubs are operating independently of an association, certified public accountant Edward Guttenplan and New Jersey attorney Jennifer Loheac recommend that associations maintain a "club file" for its records. Associations should annually request the following documentation:

- Copies of documentation with the club's legal name, current bylaws, and a membership list;
- A certificate of insurance covering general liability and naming the association as an additional insured;
- Copies of any necessary licenses or permits for activities such as selling or serving alcoholic beverages or playing bingo;
- An annual list of proposed activities requiring reservation of association property; and
- Annual certification by the club board acknowledging compliance with all legal and tax requirements.

**Inform Clubs of Insurance Coverage Needs**

Clubs may not be covered by their insurance policies for lawsuits arising out of bodily injury or property damage. The association's policy covers only the "named insured." Liability policies cover only

entities and activities owned, controlled, and managed by the named insured.

Clearly, where private clubs exist independent from the association, under most association policies, neither the club nor the association would be protected for the club's activities. Another concern is that as clubs develop and grow in membership, they frequently schedule trips or host outings off-site. Most associations' insurance coverage does not extend to activities held off the property. Similarly, certain clubs venture into activities that include hiring performers or workers who may not be covered under the association's worker's compensation policy.

Therefore, it's important for private clubs to obtain their own general liability protection. "We advise clients to inform residents that certain club activities, and most particularly those events held off the premises, are probably not covered under the association's policy," says Guttenplan.

### Reporting Tax Liabilities

Clubs and organizations may be subject to tax on income such as dues and outside fundraising amounts. If the club operates as an independent entity, then it can receive a tax exemption from the Internal Revenue Service (IRS) if it meets certain requirements to qualify as a "social club."

A club cannot be considered "automatically" tax exempt. Clubs should apply for tax-exempt status using IRS Form 1024. Without this approval, the club or organization is at risk that fundraising receipts

and dues may be subject to income tax. Once approved, tax-exempt organizations are required to file annual forms with the IRS and may also be required to file in the resident state.

Another aspect of tax liability is sales tax. Items purchased by clubs are subject to sales tax in the same manner as any other business organization. If sales tax is not charged, the club may be required to pay use tax with respect to the purchase and will therefore have to file the necessary sales tax forms. There are specific compliance rules surrounding these issues, but it is important for the clubs to be aware of, and comply with, applicable regulations. The sales tax implications are dependent on the state where the club operates, but may apply to both independent clubs and those under the auspices of the association.

### Require Financial Reporting for Smaller Social Clubs

An association may want to allow smaller social clubs in the community that do not wish to incorporate or file their own taxes to operate under the standards set by the association. If this is the case, the board must have full knowledge of these clubs' financial activity to ensure that any income or sales tax implications of their activities are handled by the association.

Problems for clubs in this category can occur if: the club treasurer, other club board member, or club member misplaces or misappropriates funds; funds are used for political contributions; club/activities funds are not reported—

either by the club or by the association where it operates; funds are used for unauthorized or illegal purposes; funds are spent for purposes unrelated to the club's activities; and no documentation is maintained by the club to support the financial activity.

Loose financial reporting and controls by a small club operating under an association's umbrella have spillover effects for the association. Unintended expense or loss may be imposed on the association.

Technically, all small club activity should be reported on, and included in, the association's financial statements and at a minimum, in connection with the annual audit. The only situation where this does not need to occur is in the case of clubs operating under a national organization, such as a local chapter of a national charity. In that instance, they are independent of the association and are not required to be included in the financial statements.

#### Insider Sources

**Edward Guttenplan, CPA, MBA:** Managing Partner, Wilkin & Guttenplan, PC, 1200 Tices Ln., E. Brunswick, NJ 08816; [www.wgcpas.com](http://www.wgcpas.com).

**Jennifer A. Loheac, Esq.:** Associate, Greenbaum Rowe Smith & Davis LLP, Metro Corporate Campus One, Woodbridge, NJ 07095; [www.greenbaumlaw.com](http://www.greenbaumlaw.com).

**For more information, visit:**

**[www.communityassociationinsider.com](http://www.communityassociationinsider.com)**

Search Our Web Site by Key Words: social clubs; insurance; tax liability; financial reporting

## Best Practices

(continued from p. 1)

According to Samantha MacBride, deputy director of New York City Department of Sanitation's Recycling Unit, it's important to properly set up a recycling area. Having the right signs and receptacles will boost your publicity efforts. "We have found through independent statistical research that the biggest predictor of how well a building recycles is whether the management has properly set up a recycling area with the right signs and the right receptacles that are labeled correctly and are serviced regularly so that they are not overflowing," she says.

### Use Young People as Ambassadors

Sharon Russell-Mack, manager of a 331-unit complex in Massachusetts, found great enthusiasm and success by involving young people to lead the way toward recycling. After working with the City of Boston to initiate pickup service for recyclables, Russell-Mack turned to the kids. The program officially kicked off in March 2009.

"We held recycling events where we explained to residents

what could be recycled and what couldn't," she says. "We did games to test their recycling IQ and had prizes. The youth coordinated the games. They made posters that we put around the buildings and at the Dumpsters. They were very creative and very excited about helping."

Russell-Mack says she believes having the kids play such a visible role had a positive effect. "Their involvement made it very personal for our residents," she says. "We saw a real commitment to our site. The kids are still involved and help out our maintenance staff. I think the recycling program is growing because of that."

### Solicit Feedback

Be sure the communication about your recycling program isn't just a one-way street. Ask both your members and staff for feedback. Encourage them to tell you what works and, more importantly, what may not work about your program. Always follow up on comments and suggestions.

"If the recycling bins are overflowing, maybe it's a logistics issue or a matter of capacity," says environmental consultant Katherine Liske. If your members report

overflowing bins, you should take immediate action to address it. Prompt action will encourage participation.

### Monitor Your Progress

Liske also recommends conducting both baseline and follow-up surveys so that you can measure the impact of your recycling program efforts.

In one community, the baseline survey showed that just 2 percent of waste disposed was diverted to recycling," Liske says. "Our follow-up survey showed it was up to 18 percent. Not where we'd like it to be, but still it was up."

### Insider Sources

**Kirsten Liske:** VP, Pollution Prevention/Zero Waste Group, Ecology Action, 201 River St., Santa Cruz, CA 95060; (831) 426-5925; [kliske@ecoact.org](mailto:kliske@ecoact.org).

**Samantha MacBride:** Deputy Director, Recycling Unit, NYC Department of Sanitation, 346 Broadway, New York, NY 10013.

**Sharon Russell-Mack:** Manager, Orchard Gardens, Roxbury, MA; 52 Chauncy St., Boston, MA 02111-2375.

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Search Our Web Site by Key Words: recycling; trash removal

## RECENT COURT RULINGS

### ► Association May Be Liable for Slip-and-Fall Injury

**Facts:** A member sued his condominium association, the management company, and a snow removal company for injuries sustained when he slipped on a recently plowed pathway to his garage. The association had hired the snow removal company to clear snow from the community's common areas. Included in the common areas was a driveway leading to the member's garage.

After a snowfall, the company plowed a single, narrow path up the middle of the driveway creating a snow mound in front of the garage door, which impeded access to the garage by foot or car. The company also did not salt or sand the path, nor was any warning posted regarding the conditions of the driveway. The member sued all the parties for failing to inspect the common areas of the development to make sure they were free from the unnatural accumu-

lation of snow and ice and for failing to provide a safe pedestrian route.

The trial court dismissed the member's complaint because an Illinois state law prevents any person to be found liable for damages due to her efforts in the removal of snow from sidewalks. The member appealed.

**Ruling:** An Illinois appeals court reversed the lower court's decision.

**Reasoning:** The court ruled that the state law applies only to injuries sustained on sidewalks and not those sustained on driveways. The court looked at the common definitions of sidewalks and driveways to make the distinction. Also, it concluded that if the court expanded the law to include driveways, they effectively would be repealing prior cases where a remedy was given for negligent creation of an unnatural accumulation of snow and ice on driveways.

■ Gallagher v. The Union Square Condominium Homeowner's Assoc., January 2010

### ► Association May Have to Count Member's Votes

**Facts:** According to an association's bylaws, a member cannot stand for election for the board of directors at the annual meeting if the member is engaged in litigation, arbitration, or mediation against the association.

Five days before an election, a member told the association that she planned to dismiss her lawsuits against the association and run for a seat on the board. On the day of the election, the member filed with the court clerk a request to dismiss all her lawsuits against the association. At the annual meeting, the board president told the rest of the members that she was ineligible for a seat because she was suing the association. The president was corrected. The election proceeded, and the member received enough votes to join the board. However, the association refused to accept her votes and refused to seat her on the board.

The member sued the association, and the trial court ruled for the association on the grounds that her lawsuit arose out of the board president's comments about her eligibility, which made the lawsuit an issue of free speech.

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

**Reasoning:** The main thrust of the complaint was not the board president's comments about her eligibility to serve on the board, which arguably may have been the exercise of free speech on a matter of public concern. The court ruled that the main element of the member's complaint was the association's refusal to count her votes. Even if the board president had said nothing about her eligibility, the core of her claims would remain.

■ Kashani v. Bunker Hill Tower Condo Assoc., January 2010.

### ► Management Company Not Deemed a Debt Collector

**Facts:** A member failed to pay his \$200 monthly assessment because he felt the association was not properly handling his complaints involving water, rodent, and trash issues. The association's board of directors' secretary contacted the association manager and asked him to call the member to resolve the member's issues. The manager called the member while he was at work.

The member sued the association's management company for violating the Fair Debt Collection Practices Act (FDCPA). The member claimed that the manager violated FDCPA by contacting him at his place of work and attempting to collect an alleged outstanding debt.

The trial court granted a judgment without a trial in the management company's favor, and the member appealed.

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

**Reasoning:** The court ruled that the management company's principal purpose is not debt collection; therefore, it is not subject to the FDCPA provision barring debt collectors from calling people regarding their debts while they are at work. The court looked at the management contract with the association and the company's statements that it spends less than 2 percent of its time on delinquent assessments. The management company sends one reminder letter immediately after a monthly assessment has not been paid. And thereafter, the board handles the collection of past-due assessments through its attorneys. The member could not rebut these assertions by the management company.

■ Vogler v. Grier Group Management Co., February 2010

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## **Recent Court Rulings** (continued from p. 5)

### ► **Association Required to Show Management Company Mismanaged Funds**

**Facts:** A management company sued an association for failing to pay management fees and reimbursements for property repairs. During the course of their relationship, the board began to suspect that the management company was accepting money for repairs that never occurred. The association terminated its contract with the company.

The association countersued, alleging fraud and breach of fiduciary duty. During the trial, the association claimed that the management company bore the burden of showing that it properly managed the association's funds. A lower court, however, disagreed and awarded the management company a judgment

for fees and repairs. The association appealed the decision.

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

**Reasoning:** The relationship between the management company and the association was strictly governed by the management contract. It was not a fiduciary relationship because the association does not exert "dominion and control" over the management company to the extent that they have some sort of confidential relationship. The management company was acting under the oversight of the board of directors and was not acting as a corporate officer. Therefore, the association had to show that the management company mismanaged the funds.

■ Condominium Management Associates v. Fairway Village Owner's Assoc., February 2010

## DOS & DON'TS

### ✓ **Require Contractors, Maintenance Staff to Follow New Lead Paint Rule**

New Environmental Protection Agency (EPA) rules are set to take effect in April 2010. If you manage a condo building that was built before 1978 and has not been certified as lead-free, you should be aware of the new rules. The rule addresses remodeling and renovation projects disturbing more than six square feet of potentially contaminated painted surfaces for all residential and multifamily structures built before 1978 that are inhabited or frequented by pregnant women and children under the age of 6.

The rule requires a cleaning inspection after the work is completed and grants the remodeler flexibility in determining the size of the work area, which can reduce the size of the area subject to containment.

The EPA rule also lists prohibited work practices—including open-torch burning and using high-heat guns and high-speed equipment such as grinders and sanders unless equipped with a HEPA filter.

Additionally, the rule establishes required lead-safe work practices, including posting warning signs for occupants and visitors; using disposable plastic drop cloths; cleaning the work area with HEPA vacu-

uming and wet washing; and individual certification through a training course. The full rule and brochures can be downloaded from the EPA's Web site at [www.epa.gov/lead/pubs/renovation.htm](http://www.epa.gov/lead/pubs/renovation.htm).

### ✓ **Refer to Federal Criteria When Handling Member's Chinese Drywall Complaints**

Federal agencies recently released a new set of criteria to help members and inspectors determine whether recent renovations or construction definitively has defective drywall. During the housing boom, it is estimated that more than 500 million pounds of possibly defective Chinese drywall was used throughout the country.

This drywall reportedly emits sulfur fumes that produce a "rotten eggs" odor and cause metals such as air conditioning coils to corrode. Calling it a "preliminary" protocol, the Consumer Product Safety Commission (CPSC) and the Department of Housing and Urban Development (HUD) outlined standards for homes built from 2001 through 2008. It was the first time that they acknowledged that a wider range of possible homes may be affected than the earlier estimates of 2004 through 2007.

The guidance takes into account visual signs of metal corrosion, evidence of drywall installation in the relevant time period, and the identification of other corroborating evidence or characteristics. HUD and CPSC's two-step guidance requires a visual inspection that must show blackening of copper electrical wiring and/or air conditioning evaporator coils; and the installation of new drywall for new construction or renovations between 2001 and 2008. To view the full text of this guidance, visit CPSC's Web site at [www.cpsc.gov](http://www.cpsc.gov).

The guidance also describes obtaining additional corroborating evidence of problem drywall, since it is possible that corrosion of metal in homes can occur for other reasons. For example, homes with new drywall installed between 2005 and 2008 (and the significant increase in imported problem drywall due in part to Hurricanes Katrina and Rita) must meet at least two additional criteria related to: the chemical analysis of metal corrosion in the home; elemental markers in the drywall; markings on the drywall; or specific chemical emissions from the drywall.

### **X Don't Use Members to Perform Reserve Study to Save Money**

Some associations have tried to perform a reserve study using their members to save money. Not only may the members lack the engineering experience to accurately evaluate the property, but their judgment may not be objective. They may be reluctant to apply accurate assessments of the costs that must be set aside to perform long-term repairs, because members "know where they live."

A good reserve study has a comprehensive list of the items the association is obligated to maintain and a good funding plan that outlines each item's anticipated life and how the association will raise the money for anticipated repairs and replacement. Funding may be accounted for using reserve funds, special assessments, and loans. A detailed reserve study is important for a properly functioning association and to protect the board of directors from lawsuits questioning its judgments.

An expert will know exactly what to include in a study. And experts have software to calculate the useful life of every aspect of the structure such as roofs, siding, and water heaters.

To find these qualified reserve study specialists, you can contact the Association of Professional Reserve Analysts (APRA) at [www.apra-usa.com](http://www.apra-usa.com). In addition, you can access Community Associations Institute's (CAI) Web site at [www.caionline.org](http://www.caionline.org) to find local chapters. These chapters will have directories listing vendors that provide reserve studies.

### **✓ Offer Assessment Deferral Program to Financially Struggling Active-Duty Military Members**

As more military personnel are being called to active duty, you may find that service members in your community are falling into financial hardship from decreased income, and they may be having difficulty receiving notification of pending litigation against them. The Servicemembers Civil Relief Act (SCRA) protects these persons called to active duty from debt collections, foreclosure, and eviction.

Many mortgage companies and lending institutions offer deferral programs to military personnel deployed overseas during times of war. Your association also may want to consider offering this option to those called to active service if the member can show financial hardship due to military service. Associations should also consider leniency for late fees and fines incurred by a member during the time of active service. Offering this program gives associations a chance to become aware of struggling service members in the community, rather than finding out after default judgment proceedings have already been initiated.

Associations should mail notices or newsletters to all its members discussing the options available to military personnel called to active service. All deferrals should be in writing. Ask the service member to provide active-duty orders; a Leave and Earnings Statement (the military equivalent of a pay stub); proof of financial hardship; and the name, address, and telephone number of a family member who may accept communications from the association on behalf of the service member. Associations should also encourage automatic debiting for payment of assessments, if available.

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