

Community Association Management *Insider*[®]

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Discrimination Suit Settled in Omaha Housing Bias Case

An Omaha condominium association and its former president have agreed to pay more than \$127,000 to settle allegations of discrimination against families with children.

The association and its former president were sued in 2008 and accused of interfering with the sale of one of the units. The lawsuit claimed that the association's rules barred the sale or rental of condos to families with children. The lawsuit also alleged that the former president's conduct constituted a pattern of discrimination.

The federal government claimed that potential buyers were wrongfully turned away during a period from 2005 and 2007 because they had kids. The Department of Justice says the defendants have agreed to pay \$112,500 to the victims of discrimination and \$15,000 to the government as a civil penalty.

FEATURE

How to Avoid Discriminating Against Families with Children

Your community may set reasonable rules to protect the safety of your members' children and respect other members' right to enjoy their property. But your community must be careful that your rules do not unfairly single out children, or your association may be charged with discrimination based on familial status. The federal Fair Housing Act prohibits discrimination in housing based on race, color, religion, national origin, sex, disability, and familial status, which generally refers to minor children.

A recent lawsuit initiated by the U.S. attorney for Massachusetts illustrates this point. The lawsuit charges a condo association and its property manager with discriminating against families with children at the community, while allowing some adult residents to violate association regulations without penalty.

On several days last June, a member snapped shots of children playing Wiffle ball in the grassy common area of their 78-unit condominium community. The pictures were used as evidence that five families were violating a rule prohibiting organized sports on the

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CRIME & SECURITY

Defend Against False Claims with Criminal Incident Report

If a crime victim sues your association for negligence, you'll probably be second-guessed for taking inadequate security precautions. If only you had offered better lighting in common areas or had more security patrols, the victim's lawyer and expert witnesses will argue, you could have prevented the crime. To justify your actions or inaction and to ward off a potential damage award, you'll have to prove that your security precautions were reasonable under the circumstances.

Those circumstances include what you knew about previous crimes at the community such as how many, what type, and when. Incident reports are often the best source of that information, since not all crimes are reported to the police. Based on what you knew about previous crimes, an incident report can prove that you couldn't

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Families with Children (continued from p. 1)

grounds. The photos led to fees and fines of about \$2,500 for the children's families. A mother complained about the fines and was later charged an additional \$1,000 in attorney's fees, purportedly to cover the costs of her state discrimination complaint, the suit says.

To help your community avoid these types of discrimination lawsuits, we offer four tips to consider when drafting or reviewing your community's rules.

Tip #1: Ban Bad Behavior—Not Children

Communities have a legitimate reason to adopt rules governing behavior in common areas such as hallways and parking lots and while using amenities such as pools and fitness centers. Such rules generally are necessary to prevent damage, protect safety, and minimize potential liability for injuries suffered by residents and guests using your community's facilities. And rules regulating conduct in the common areas within buildings are a legitimate way to prevent disturbances that interfere with residents' quiet enjoyment of their units.

However, you may not adopt rules that unduly interfere with the ability of families with minor children to use and enjoy the community's facilities.

For example, in one case, a California community agreed to pay more than \$618,000 in an out-of-court settlement for alleged housing discrimination based on familial status. The California Department of Fair Employment and Housing pursued the case on behalf of nine families, who accused the community of discrimination by imposing overly restrictive "House Rules and Regulations" on families living at the complex.

The department alleged that the rules, which included prohibiting children from being in the pool after 6:00 p.m. and playing outside alone—ever—unlawfully restricted the manner in which children could use the common areas of the complex. The complaint also alleged that the management told parents they would be fined and then asked to leave if children were seen playing alone outside their units. In settling the case, the community owners and managers did not admit liability.

For the most part, it's best to adopt rules that focus on dangerous or disruptive behavior in your common areas and facilities—instead of on the age of the person who engages in that behavior.

Tip #2: Make Sure Child-Targeted Rules Are Reasonable and Necessary

Your community may establish rules targeting children's use of your facilities, such as your pool or fitness center, as long as the rules are reasonable and necessary to protect their safety.

For example, you have legitimate concerns about children's safety if you have a pool at your community. While it may allay your fears to ban children from using the pool under any circumstances, adopting such an unreasonable rule would amount to discrimination "in the terms, conditions, or privileges" of rental units, based on familial status.

But it would be lawful to impose conditions that are both reasonable and necessary to protect children's safety when using your pool, such as requiring adult supervision for children under a certain age. Having an objective source, such as state and local law, will help prove that any child-targeted rules are reasonable and necessary.

Tip #3: Enforce Rules Consistently Among Children and Adults

Don't adopt community rules that specifically ban children from doing things you don't want adults to do either. Even if your rules don't unfairly single out children, you have to ensure that you don't enforce your rules in a discriminatory manner.

It would be a violation of fair housing law if, for example, you enforced rules against disruptive behavior in hallways only against children playing in the hallways. Consistent application of your rules is the key to protecting your community from discrimination complaints from families with children.

In one case, several families with children sued a New York apartment building owner, alleging discrimination based on familial status. The families claimed that the management enforced a rule prohibiting residents and their

guests from using the grounds around the building "as a place to congregate or allow children to play." The community, composed of several hundred units, had a playground and other common areas where residents and others could congregate.

The court dismissed the case, ruling that the families failed to prove that the rule was enforced in a way that discriminated against families with children. The evidence showed that the owner sent violation notices not only to the families whose children were playing in the restricted area, but also to adult residents who were playing football or otherwise causing disturbances there [Khalil v. Farash Corp., September 2006].

Tip #4: Watch Your Language

Post signs in and around common areas and amenities to let everyone know your community rules. But the language you use on signs and in written rules can make all the difference in warding off accusations of discrimination by families with minor children, says management expert Anne Sadovsky.

Make sure that signs outlawing dangerous behavior in common areas apply to everyone, not just children, says Sadovsky. If you are concerned about injuries caused

by children riding bicycles on the sidewalk, for example, she recommends that the signs forbid anyone—and not just children—from doing so.

By the same token, signs simply stating "adults only" or "no children allowed" are a sure way to raise eyebrows, according to Sadovsky. As much as possible, avoid use of the word "children" in favor of generic terms like "anyone" or "persons under a particular age." And indicate the reason for the rule by using the key phrase "for your protection," adds Sadovsky. So, for example, a sign posted in your fitness center might read, "For your protection, persons under age 14 must be accompanied by an adult."

Signs need to be clear, and visible to anyone in the vicinity. Make sure signs are posted low enough for someone in a wheelchair to read them. Be careful about putting signs on the backs of doors, where they can't be seen when the door is open.

Insider Source

Anne Sadovsky, CSP: Anne Sadovsky & Co., Dallas, TX; (866) 905-9300; anne@annesadovsky.com.

www.communityassociationinsider.com

Search by Key Words: fair housing; discrimination; familial status; community rules; common areas; children

Criminal Incident Report (continued from p. 1)

have reasonably foreseen or prevented the current crime.

"Unfortunately," says security consultant Norman Bates, "managers too often keep inadequate reports." With the help of experts, we prepared a Model Form: Use Criminal Incident Report to Limit Premises Liability, to help you reduce the risks of a lawsuit. This

form can be filled out whenever a crime is attempted.

Defeat False and Exaggerated Claims

Thorough incident reports are your defense against false and exaggerated claims—and the trial lawyers, security experts, judges, and especially juries who may sec-

ond-guess the security decisions you make.

Victims may exaggerate their injuries or change their stories to make you look bad. In such cases "an incident report is the single most important piece of evidence in an inadequate security trial," says New York attorney Alan Kaminsky.

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Criminal Incident Report

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Thorough incident reports can smoke out flaws, inaccuracies, and distortions in the victim's story. They can also show that lighting, locks, surveillance cameras, and other security equipment were in proper working order when the incident took place, notes Kaminsky.

Essential Elements of a Crime Incident Report

Here are 10 essential items to consider when putting together an incident report form. You can use the following items to upgrade your current incident report form or to start from scratch.

Date and time. Many incident reports list the date, but leave out the time of the crime. If you know the time of the crime, you can check your records to see which staff members were on duty, and where.

Description of lighting conditions. Demonstrating that the crime scene was well lit can defeat negligence lawsuits for nighttime crimes. Create an entry for listing "measurable facts" regarding lighting at the scene of the incident. It prompts the user to list specifics, such as the type of light source, number of bulbs, wattage, etc. This encourages detailed responses such as "five banks of 400-watt high-pressure sodium floods, four fixtures per bank, one bulb missing, fixture two," instead of vague judgments or conclusions like "lighting adequate," "sort of dim," or "well lit."

Weather conditions. Rain, snow, fog, and other weather conditions can affect a victim's vulnerability, a staffer's reaction time, and the effectiveness of certain security measures like surveillance cameras and lighting.

Photos and videotapes. Photographs and videotapes taken at the time of an incident can be an effective way to quash false claims by victims about physical conditions like broken locks or overgrown shrubs. But you can't count on your insurer or staff to have the foresight to immediately take pictures. Our Model Form reminds the user to take photos or a videotape of the crime scene and to record the date, time, and name of the photographer.

Victim's identity. Incident reports typically ask only for the name, address, and phone number of victims. But this won't help you locate victims who move after crimes occur. It also doesn't tell you anything about the victim's vulnerabilities and what he was doing at the community—for example, member, guest, contractor, trespasser. This information could have a major impact on your association's liability. For example, trespassers are owed the lowest duty of care.

Victim's comments. Immediately after an incident, the victim could make a remark that exonerates you—for example, "It was my fault." Unfortunately, incident reports usually don't ask for such compromising information.

You should set aside two lines for a victim's remarks. The victim may admit to having left a window open, for example, or a door unlocked. Kaminsky uses statements like these to settle cases with victims who have changed their stories after consulting a lawyer.

Medical assistance. Incident reports typically indicate if medical assistance was provided. But it's often far more important to know if such assistance was refused. In some instances, victims will claim to be fine and refuse medical assistance, only to claim later that they have major medical problems.

Extent of injuries and property loss. The extent of injuries and the value of property lost are crucial. Again, victims are most likely to tell the truth right after the crime. It is important to make an account at that time in case losses are overstated later. You should describe all stolen and damaged property in detail. Ask the victim for the estimated value of each item.

Police information. Incident reports may indicate that police officers were on the scene, but overlook important information about the identity of the responding officers and the police report. Make sure the form identifies the responding officer(s), their badge numbers and department, and the police report number assigned to the case. This information can help you locate witnesses or obtain copies of relevant reports when you need them.

Investigator/reporter. Incident reports typically include the signature of the person who fills out the report, but not the signature of the person who investigated the incident. If these two people are different, the victim's lawyer may later question the report's accuracy. The form should ask for the signature and Social Security number of both the person who investigated the incident and the person who filled out the report, if they are different people. To further ensure accuracy, the form should include an affirmation of the report's accuracy. Finally, ask for the signature of supervising manager, who has double-checked the report for accuracy.

Insider Sources

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Alan Kaminsky, Esq.: Partner, Lewis Brisbois Bisgaard & Smith, LLP, 199 Water St., New York, NY 10038; www.lbbslaw.com.

MODEL FORM

Use Criminal Incident Report to Limit Premises Liability

Fill out this form whenever a crime is attempted in your community. You may need to refer to this form when you defend against exaggerated claims from victims seeking damages or to defend your security actions.

CRIMINAL INCIDENT REPORT

1: INCIDENT INFORMATION

Date _____ Time _____
 Location (list proximity in yards or feet to specific units, common areas, roads, etc.) _____
 Lighting conditions (list measurable facts, e.g., number of bulbs, wattage, etc.) _____
 Weather conditions _____
 Photos/video taken? Yes No Attached? Yes No
 If not attached, give location _____
 Taken by _____
 Date & Time _____

2: VICTIM INFORMATION

(If more than one victim, list information on a separate page and staple it to this form.)
 Name (Last, First, MI) _____
 Home Address _____
 City/State/Zip _____
 Tel. # _____
 Work Address _____
 City/State/Zip _____
 Tel. # _____
 Soc. Sec. # _____
 Date of Birth _____
 Sex _____
 Approx. ht. _____ Approx. wt. _____
 Other physical characteristics _____
 Status (resident, guest, trespasser) _____
 Victim's comments about the incident: _____
 Medical assistance offered? Yes No
 Medical assistance accepted? Yes No
 If yes, describe medical assistance provided _____

3: SUSPECT INFORMATION

(If more than one suspect, list information on a separate page and staple it to this form.)
 Name (Last, First, MI) _____
 Home Address _____
 City/State/Zip _____
 Tel. # _____
 Work Address _____
 City/State/Zip _____
 Tel. # _____
 Soc. Sec. # _____
 Date of Birth _____
 Sex _____
 Approx. ht. _____ Approx. wt. _____
 Additional physical description _____

4: VICTIM'S INJURIES & PROPERTY LOSS OR DAMAGE

Describe the victim's injuries in detail _____

CODE*	ITEM	SERIAL #	AGE	VALUE (\$)

* Code: L=Lost; S=Stolen; R=Recovered; D=Damaged; O=Other

5: VEHICLE INFORMATION

(If more than one vehicle involved, list information on a separate page and staple it to this form.)
 Registered Owner _____
 Make & Model _____
 Color _____ Year _____

(continued on p. 6)

CRIMINAL INCIDENT REPORT (continued)

Lic. plate # _____ State _____

VIN _____

Identifying characteristics (e.g., dents, decorations, decals)

_____**6: WITNESS & POLICE INFORMATION***(If more than one witness, list information on a separate page and staple it to this form.)*

Name (Last, First, MI) _____

Home Address _____

City/State/Zip _____

Tel. # _____

Work Address _____

City/State/Zip _____

Tel. # _____

Soc. Sec. # _____

Date of Birth _____

Name of responding officer(s) _____

Badge #(s) _____

Police dept. _____

Police report # _____

7: NARRATIVE OF INCIDENT

Describe objectively what happened. Tell the truth, and list facts, not opinions or conclusions.

_____**8: INVESTIGATION INFORMATION**

I/we affirm that the foregoing information is true to the best of my/our knowledge.

Investigated by (*print name*) _____

Position _____

Signature & Date _____

Form completed by (*print name*) _____

Position _____

Signature & Date _____

Approving supervisor (*print name*) _____

Position _____

Signature & Date _____

RECENT COURT RULINGS**► Roof Lease for Wireless Communication Equipment Ruled Invalid**

Facts: A group of members sued the board and a wireless telephone company to invalidate a lease contract between them and to prevent the company from constructing and erecting cellular telephone antennas and related wireless communications equipment on the roof of the condominium.

According to the association's governing documents, the roof of the building constitutes a common element of the condominium. The trial court ruled for the members based on relevant provisions of the governing documents that required common elements to be used for purposes related to the residential use of individual units. The board appealed the trial court's decision.

Ruling: A New York appeals court agreed with the lower court's ruling.

Reasoning: The members established that by allowing the wireless company to install its equipment on the

roof of the building for the purposes of continuing its business, the board had exceeded its authority by permitting the common elements to be used for a purpose that was not related to the residential use of the units. Since the board or the company failed to argue that there was some sort of residential use involved, the court ruled that the lease was void.

■ Kaung v. Board of Managers of Biltmore Towers Condo Assoc., February 2010

► Members Didn't Submit Evidence to Show Improper Assessment

Facts: A townhouse community charges its members an annual assessment. Since 1974, the assessment has increased three times. For a few years, some members did not pay their assessment because they believed that an increase imposed in 2002 was not valid. As a result of nonpayment, the association filed a lien on the members' properties and pursued foreclosure for a money judgment.

The members argued that the assessment increase should not be allowed because a quorum was not present when the increase was voted upon. In support of the increase, the board submitted a letter from the president of the board at the time describing the need for a vote of the members to increase the assessment, a notice of the meeting, and a follow-up letter from the board to members indicating that the assessment had been increased and that a quorum was present. The members' response was to challenge the truth of the documents. The trial court granted a judgment without a trial in the association's favor, and the members appealed.

Ruling: A Michigan appeals court agreed with the lower court's judgment.

Reasoning: The court pointed out that the members did not offer any documentary evidence that would call into question the legitimacy of the letters. Without such evidence, the trial court properly concluded that there was no genuine issue of fact that needed a trial.

■ Grove Park Homes Improvement Assoc. v. Chadwick, March 2010

► Board-Approved Special Assessment Deemed Valid

Facts: A condominium association raised its monthly assessment. A member continued to pay the old amount, claiming that he was not notified that the condominium's board of directors had approved the increase.

The board had also approved a special assessment on each owner to repair carport roofs and repave the community's roads. The member refused to pay the special assessment, arguing that it was invalid because it had not received approval from a majority of the members. Eventually, the association prepared a lien against the member and sought foreclosure on the lien for the past-due amount. The trial court ruled for the association.

Ruling: An Ohio appeals court agreed with the lower court's decision.

Reasoning: With regard to the special assessment, the member tried to argue that state law barred imposing a special assessment because the law obligated an association board to budget sufficient reserves so that it need not resort to one to repair and replace major capital items. The court ruled otherwise. State law left open the possibility that if, despite careful budgeting, a special assessment becomes necessary, a condominium board may impose that assessment.

Also, the governing documents allowed a special assessment approved by the board and not by the majority of members if the money was used to make repairs rather than improvements. Here, the board

president testified that the carport roofs had been leaking and the roads were in bad shape. As a result, the special assessment was valid.

■ Olentangy Condominium Assoc. v. Lusk, March 2010

► Member Knowingly Exceeded Construction Height Guidelines

Facts: An association's architectural committee is charged with reviewing plans for any improvement within the community to ensure that they comply with the governing documents and are in harmony with neighboring buildings. Once the plans are approved by the committee, actual construction of any improvements is required to comply strictly with the approved plans.

The architectural review committee approved a member's plans for building a home. Beneath the approval stamp on each page of the plan, the committee had printed, "structure height not to exceed 17 feet from control point of lot."

After receiving complaints about the height of the member's new home, the committee concluded that he had exceeded the height guidelines by 9 feet. The association sued. The member argued that the height restriction was invalid because there was no direct evidence of the guideline's adoption. The trial court ruled for the association, concluding that the member knowingly violated the guideline and had caused irreparable injury to neighboring members. The member appealed.

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

Reasoning: Although a witness had testified that he could not locate any documents reflecting the result of any vote of the members of the committee on any rule involving height, the court stated that this did not necessarily support a finding that the height requirement was not properly adopted. In other words, the absence of records regarding the adoption of the guideline more than 10 years ago did not outweigh the substantial circumstantial evidence supporting its proper adoption.

The guidelines were available in printed form and distributed to all who planned to build in the community at the time the member sought to build his home and were believed by committee members to constitute enforceable regulations governing construction in the community. Also, a witness testified that the height guidelines had been enforced by the committee since at least 1995. According to the court, this was enough evidence to support the finding that the height guideline was properly adopted.

■ Clear Lake Riviera Community Assoc. v. Cramer, February 2010

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- ◆ Major topics include:
- ◆ Knowing how to avoid discrimination against families
- ◆ Learning what constitutes religious and national origin discrimination
- ◆ Understanding disability discrimination involving prospects and residents
- ◆ Handling reasonable accommodation and modification requests
- ◆ Avoiding discrimination in advertising and marketing
- ◆ Reacting to troublesome residents and establishing fair eviction policies
- ◆ Training your maintenance staff, contractors, and vendors about what constitutes a violation

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