Community Association Management *Insider*®

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INSIDE THIS ISSUE

N.Y. Banks Required to Maintain Foreclosed Homes

A new law has taken effect in New York State that aims at protecting repossessed homes from becoming eyesores by requiring banks to maintain the properties during the foreclosure process, but before they legally own the homes.

The new law allows municipalities to perform maintenance work on foreclosed properties and bill the lender if the property remains unkempt. The provision is part of a series of changes to the state's property maintenance law and code, signed by Governor Paterson in December. Another component requires a 90-day foreclosure notice and a mandatory settlement conference.

Enforcement falls to the municpalities, and the average fine ranges from $500 to $1,000 a day, depending on the infraction. Foreclosed homes located within a homeowners association are subject to the fines, as well.

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FEATURE

Three Tips for Avoiding Liquor Liability at Community Events

Summer is approaching and your association may be planning some sort of community-building events, such as pool parties or cookouts with plenty of food and drink. Often at these events, an association will serve alcohol. The association knows that more members will attend an event that provides alcoholic beverages than they would for a "dry" event.

Against the backdrop of a board member expertly handling the grill, kids running around celebrating summer vacation, and community members enjoying each other's company, it becomes easy to put aside any worries you may have concerning liability that could arise from serving alcoholic beverages at your event.

However, because it is more likely for a member or minor to have too much to drink at an association-sanctioned event with alcohol,

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NEW REGULATIONS

New EPA Rule Requires More Care Around Lead Paint

On April 22, 2010, a new federal Environmental Protection Agency (EPA) lead-based paint rule called "The Renovation, Repair, and Painting Rule" took effect. The new rule requires managers and associations to follow lead safe work practices when disturbing a painted surface in pre-1978 housing and child-occupied facilities. Disturbances can occur when painted surfaces are sanded, demolished, renovated, or repaired.

The rule changes the way association managers, renovation and remodeling contractors, maintenance workers, painters, and other specialty trades do business in housing built before 1978 and child-occupied facilities. It includes new training requirements, additional notifications and disclosures, new work practices, new clearance requirements, and expanded records requirements.

With the help of Joshua Sarett, president of ALC Environmental, Inc., a national environmental and engineering firm based in New York City, we will cover the rule's requirements. An understanding

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Liquor Liability (continued from p. 1)

the potential for liability if someone is injured or killed increases. Although there is no way to ensure that the association will not be sued in a situation like this, the association can use the following tips to help minimize the exposure to such liability.

Tip #1: Avoid Selling Alcohol

Every state has laws that assign liability in cases where an intoxicated guest leaves a social event and causes personal or property damage to a third party. Many states will label the person or entity that serves the alcohol as "licensees" or "social hosts," and enforce different standards of care for each category.

Social hosts. If your association is not selling alcoholic beverages, it will be deemed a "social host." A social host is liable for damages suffered because of the intoxication of a person under the age of 21 when the social host or its agent willfully and knowingly served alcohol to the underaged person. Based on this principle, if your association controls and furnishes alcohol as a social host, your association could be liable only for injuries resulting from the service of alcohol if an individual acting for the association, such as a board member, knowingly and willfully serves alcohol to someone under the age of 21.

Licensees. If an association decides to sell alcohol, however, it will be considered a licensee, and as a result, you will need to get a liquor license from the state. Your association's potential liability also increases. As a licensee, your association will be liable for injuries resulting from the actions of an individual who became intoxicated from the beverages sold at your event if your association served or sold alcohol to a person under the age of 21 or to a person who was visibly intoxicated.

Insurance expert Ronald Brunell of B&B Coverage recommends avoiding selling drink tickets or charging an entry fee. This way, there is no chance that your association would be considered to be in the business of selling, serving, or providing alcohol, and your insurance should cover you in case there's an accident.

Tip #2: Get the Appropriate Insurance

You can't be 100 percent sure that someone under the age of 21 won't be served alcohol or that a volunteer bartender will always refuse to serve an inebriated member. Therefore, an association should never hold an event with alcohol without liquor liability insurance. This insurance generally will cover your association in the case that any unforeseen tragedies occur.

Your association should first check its general liability policy to see if it includes some type of "host liquor liability" coverage. If host liquor liability coverage is included, the terms of the policy should be carefully reviewed to ensure that the coverage is adequate. This coverage will indemnify and defend the association against third-party

liability claims arising out of the serving of alcoholic beverages. This would also cover claims of causing intoxication to another person, serving a minor, or continuing to serve someone already under the influence of alcohol.

If your general liability policy excludes liquor liability, which is likely, your association should get a host liquor liability policy, often known as an "event policy." It is important to note that host liquor liability coverage pertains only to events in which the alcohol is served, not sold.

Tip #3: Hire Professionals to Serve the Alcohol

Your association should also seriously consider hiring licensed professionals to serve the alcohol. Professional companies will carry their own liquor license insurance that will give them and your association protection, says Brunell. However, to ensure that your association will be covered by the insurance of the company that you hire, make sure that you are listed as an additional insured on its insurance policy for your event.

An additional bonus to hiring professionals is that trained bartenders will have experience in identifying minors and those who have had too much to drink, which will help lower the chances that matters may get out of hand. These are skills that your employees most likely have not developed.

Insider Source

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For more information, visit:

www.communityassociationinsider.com

Search Our Web Site by Key Words: alcohol; liability; insurance; event policy; social host

IN THE NEWS

➤ *Federal Agencies Recommend Gutting of Homes with Tainted Drywall*

Homes with tainted Chinese drywall should be stripped down to the studs, according to a recent recommendation from two federal agencies, the Department of Housing and Urban Development (HUD) and the Consumer Product Safety Commission (CPSC). In a joint statement, the agencies stated that the corroded electrical wiring, outlets, circuit breakers, fire alarm systems, carbon monoxide alarms, fire sprinklers, gas pipes, and other systems should also be removed.

For more than a year, there has been an increasing number of complaints regarding toxic drywall imported from China. The complaints state that defective drywall has caused health problems and corroding air conditioning components and wiring wherever it has been installed.

Based on scientific study of the problem to date, HUD and CPSC recommend homeowners remove all possible problem drywall from their homes. Taking these steps should help eliminate both the source of the problem drywall and corrosion-damaged components that might cause a safety problem in the home.

This interim remediation protocol is being released before all ongoing scientific studies on problem drywall are completed so that homeowners can begin remediating their homes. CPSC will continue to release its scientific studies as they are completed.

Completed studies show a connection between certain Chinese drywall and corrosion in homes. And the CPSC is continuing to look at long-term health and safety implications.

The CPSC also released a staff report on preliminary data from a study that measured chemical emissions from samples of drywall obtained as part of the federal investigation for CPSC.

The top 10 reactive sulfur-emitting drywall samples were all produced in China. Certain Chinese samples had emission rates of hydrogen sulfide 100 times greater than non-Chinese drywall samples. The patterns of reactive sulfur compounds emitted from drywall samples show a clear distinction between the certain Chinese drywall samples manufactured in 2005 and 2006 and non-Chinese drywall samples. Some Chinese drywall samples were similar to non-Chinese samples. Finally, several Chinese samples manufactured in 2009 demonstrate a marked decrease in sulfur emissions as compared to the 2005 and 2006 Chinese samples.

Also, the Federal Trade Commission (FTC) warns consumers to exercise caution in hiring contractors

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In the News (continued from p. 3)

who claim to be experts in testing for and removing problem drywall. In a December 2009 Consumer Alert, the FTC recommended that homeowners confirm a contractor's references, qualifications, and background before agreeing to hire him.

➤ FCC Allows Bulk-Billing Agreements Between Associations and Cable Providers

The Federal Communications Commission (FCC) recently affirmed the right of condominium associations to enter into exclusive marketing contracts and bulk-billing agreements with video service providers, but it also expressly reserved the right to change its mind down the road if circumstances warrant.

This FCC order was a follow-up to its original order banning exclusive contracts between condo buildings and cable companies as unfair competition. The FCC had sought comments in that original order about whether the prohibition should extend to bulk billing and marketing.

But after considering the comments, the FCC concluded that bulk-billing agreements "predominantly benefit consumers, through reduced rates and operational efficiencies." In a bulk-billing agreement, the owner contracts with, and directly compensates, one video provider to serve the entire community at a significant discount, but residents are free to contract with an additional provider. The agency also cited the advantage of "enhancing deployment of broadband," which is arguably its primary goal at the moment.

As to marketing, the FCC said that it would not prohibit targeted marketing deals because the record did not support some commenters' arguments that they prevented other cable providers from providing service to residential buildings.

Under an exclusive marketing agreement, a condo community can promote one video service provider to residents, but may allow additional providers to serve the property. This is a key distinction from exclusive access agreements, which prevented more than one provider from serving a building and were retroactively banned by the FCC in 2007.

Unlike the cost-benefit trade-off for bulk billing, the FCC said that it could find no "significant harms" in targeted marketing, while saying that some of the benefits included making information about video services available to residents. That usually comes in the form of exclusive branding in common areas and on associations' Web sites.

But while the FCC said that the practices are okay for now, it left some wiggle room. It said the decision was based on the current marketplace and evidence before it.

New Regulations (continued from p. 1)

of the new rule will allow managers and associations to be diligent in making sure their maintenance staff and outside contractors thoroughly understand their obligations and avoid fines of up to $37,500 and even more headaches down the road.

New Training Requirements

The rule requires individual renovators and contractors to complete a state- or EPA-accredited course and obtain certification. This includes association employees who do work that disturbs lead-based paint. Associations, managers, and contractors can get a list of accredited trainers at *www.epa.gov/lead/pubs/trainingproviders.htm.*

The rule also requires associations and management companies that employ workers that may disturb lead paint to have a company license issued by the EPA. In the past, the EPA rules for lead-based paint only governed activities for abatement. Workers who have already been trained under a state or city lead paint program and who already have a Lead Safe Work Practices Certificate can be grandfathered in by taking a four-hour refresher course given by a certified training firm.

Sarett recommends that associations that use outside contractors make sure they are properly trained in lead safe work practices under the new rule and ask to see their certificates.

Notifications and Disclosures

The new rule requires contractors to notify members before disturbing any painted common areas by giving them a handout called the

"Renovate Right" pamphlet. This pamphlet replaces the "Protect Your Family from Lead" pamphlet previously required. You can get a copy of the pamphlet by going to the EPA Web site at *www.epa.gov/lead/pubs/rrp.htm.*

Contractors must also give members a disclosure form informing them of the nature and timing of renovation activity and the potential of lead hazards. The EPA has a sample form contractors and associations can use at *www.epa.gov/lead/pubs/rrp.htm.* In addition, workers—including your maintenance staff—are required to post warning signs around the affected areas.

If the association's employee is acting as the contractor for the work, the manager must give the pamphlet and disclosure form to the members. Associations that are using an outside contractor should be certain that the contractors have a copy of the "Renovate Right" pamphlet and a proper disclosure form.

Safe Work Practices

The new EPA rule requires strict safe work practices. Workers are required to cover all HVAC ducts, remove or cover loose objects, and cover floor surfaces and doors.

Upon completion, the work area is required to be properly cleaned using a HEPA vacuum or wet mopping.

Clearance Requirements

Upon completion of the work, the certified renovator must perform the post-renovation cleaning verification by using the EPA-provided post-verification "check card" to determine whether clearance is met. This will be done by using disposable cleaning cloths to wipe various surfaces in the work area. The color of the cloth is then compared to the color of the verification check card. If the cloth matches or is lighter than the card, the surface will pass the cleaning verification.

Surfaces that do not pass the first attempt must be re-cleaned. It is important to note that the post-verification check card does not supersede any additional safety check requirements that may be required by your state or city. For example, in New York City, building managers and condo associations will still need a certified lead inspection firm and lead inspector to perform clearance testing per the local ordinance dealing with lead paint.

Records Requirements

Associations and contractors must maintain documents demonstrating compliance with the new rule for three years. These include the signed disclosure form, any association opt-out forms, and documentation that safe work practices and clearance requirements, as described above, were used.

Exemptions

The rule allows for exemptions from these requirements. The new rule doesn't cover lead abatement as defined under the previous rules. It also doesn't cover minor repair, which is defined as work disturbing less than six square feet inside the building or 20 square feet outside the building. Maintenance activities are also exempt. For example, the rule would not cover the painting of a unit or common area if the owner or association did not do any surface preparation that would cause dust to be released.

The rule also does not apply to areas found free of lead-based paint by a certified inspector or risk assessor and work performed by a unit owner in an owner-occupied residence. Associations that may have obtained an exemption under local or state guidelines where no lead-based paint was found to be present will be exempt from the new EPA rule.

Check References, Get Trained

Associations that hire contractors to do work in their buildings that may disturb lead paint should ask for references. The best way to insure that your contractors are achieving compliance with the various rules is to use a qualified lead paint consultant.

EPA-Accredited Renovation, Repair, and Painting Program Training Providers, such as ALC Environmental Inc., offer training and certification to your employees. The trainers are certified professionals with expert knowledge of federal, state, and local regulations and should be able to answer any questions that you may have regarding safety and compliance.

Insider Source

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For more information, visit:

www.communityassociationinsider.com

Search Our Web Site by Key Words: EPA regulations; lead-based paint; disclosure requirements; contractors

Q & A

Granting Membership List Request

Q A member asked the association for the names and addresses of all members in the community. Are there any privacy concerns or potential liability for damages related to providing this information without each member's express permission?

A Under many state laws, members of an association are entitled to the names and addresses (but not telephone numbers or other identifying information) of all other resident and nonresident members as long as the information is used for a "proper" purpose. Most states provide members with a right to inspect association records, and this right usually includes a right to copy.

According to attorney Michael Karpoff, a membership list may be necessary so that the requesting member can communicate with other members about issues concerning the community, seek signatures on a petition, solicit proxies, or campaign for office.

However, before providing the information, Karpoff recommends that associations require as a condition of releasing the list that the member who requests the list sign a confidentiality and indemnification agreement. Your agreement, like our Model Agreement: Get Signature Before Providing Membership List, should state that the member will: (1) use the list only for lawful association business; (2) not use it for any commercial or unlawful purpose; (3) not disseminate it to any other person; and (4) indemnify the association against claims and be subject to damages caused by any violation of the agreement.

Insider Source

Michael S. Karpoff, Esq: Partner, Hill Wallack LLP, 202 Carnegie Ctr., Princeton, NJ 08543; *www.hillwallack.com.*

MODEL AGREEMENT

Get Signature Before Providing Membership List

This model agreement was developed with the help of New Jersey attorney Michael Karpoff. You should have the requesting member sign this agreement before giving the member access to the information in the membership list. Be sure to speak with your attorney before using this agreement.

CONFIDENTIALITY AND INDEMNIFICATION

In consideration for being allowed to copy the membership list with the names and addresses of all members of XYZ Condominium Association ("the Association"), I, _____, hereby agree to the following:

1. I will not disseminate the information contained therein to any person who is not a member of the Association, other than to my attorney-at-law or accountant to the extent necessary for his or her professional services on my behalf, unless authorized in writing by the Association's board of Trustees to do so;
2. I will not disseminate copies of such records or the information contained therein to any person except for lawful use in matters regarding the governing of the Association and the XYZ Condominium;
3. I will not utilize or disseminate any such information for any commercial purpose;
4. If I disclose any such copies or information to any person and such disclosure gives rise to a claim for damages against the Association or me, I will hold the Association harmless and indemnify the Association against such claim and any damages awarded, regardless of the nature of the claim; and
5. Nothing herein shall be construed as the right to make copies of any such records. Whether copies may be made will depend upon the types of records being inspected and the Association's policies regarding copying records.

SIGNATURE: _____ DATE: _____

RECENT COURT RULINGS

➤ Permission for Unit Addition Can Be Granted Without Amending Governing Documents

Facts: A condominium community's units were developed in several different styles. Some were built with two stories and others with one. Over time, several owners asked the board for permission to build second-story additions to their one-story units, and the board liberally granted permission.

One member requested permission to construct a second-story addition to his home. Without putting the matter to a vote of the condominium members or seeking an amendment to the declaration, the board granted him permission to proceed with his construction plans. The addition required construction of new exterior walls, which were designated as common areas under the governing documents.

A neighboring member objected to the addition and sued the member and the association. A trial court dismissed the suing member's complaint. An appeals court reversed the trial court's ruling, and ruled that the second-story addition, by enveloping air space, took a common area for a unit area. This combining of common area with private area required changes to the declaration, and this triggered the state law's requirement of unanimous consent of the condominium owners. The association appealed to the state supreme court.

Ruling: The Supreme Court of Washington reversed the appeals court's judgment and ruled in favor of the association.

Reasoning: The court ruled that the neighbor's addition might have reduced the total amount of the association's common area, but it did not change the percentage rates by which each owner's rights and responsibilities were determined. Because the association's declaration did not prevent the division of the condominium's common areas, the unanimous consent of members to combine a portion of the common area with the member's unit was not required.

- Lake v. Woodcreek Homeowners Assn., April 2010

➤ Association Must Process Foreclosures Through the Courts

Facts: A member sued her association for wrongful foreclosure. Beginning in January 2007, the member stopped paying her monthly assessment. In August of that year, after giving the member notice of default, the association conducted a nonjudicial foreclosure on her condominium and then sold the property.

Nonjudicial foreclosures are processed without court intervention, with the requirements for the foreclosure established by state laws. When a loan default occurs, the homeowner will be mailed a default letter, and in many states, a notice of default will be recorded at approximately the same time. If the homeowner does not cure the default, a notice of sale will be mailed to the homeowner, posted in public places, recorded at the county recorder's office, and published in area legal publications. After the legally required time period has expired, a public auction will be held, with the highest bidder becoming the owner of the property.

In this case, the member argued that only a judicial foreclosure was permitted under the community's governing documents; therefore, a judicial foreclosure was her right by contract. The association argued that its nonjudicial foreclosure was valid and authorized by state law. The trial court ruled for the member. The association appealed.

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

Reasoning: The association relied on a state law that broadly gives associations the authority to enforce assessment liens as they choose. But for condominiums created before the pertaining state law's effective date, the association's authority is limited by specific existing provisions to the contrary in the community's declaration. Here, the governing documents allow only judicial foreclosure of assessment liens. Therefore, the state law allowing nonjudicial foreclosure does not apply in this case.

- Holly Park Condo. Homeowners' Assn., Inc. v Lowery, March 2010

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