Community Association Management *Insider*®

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INSIDE THIS ISSUE

Community Suing U.S. Government Over Asbestos

An association in Oregon has filed a $3.2 million lawsuit against the federal government and other previous owners of the military camp that preceded the community, citing asbestos contamination. The association says it discovered asbestos material in a six-acre site where demolished military buildings were buried. The government purchased the site in 1942 for use as a U.S. Army combat engineer training camp. The camp consisted of nearly 100 buildings, "some or all of which" featured cement asbestos board siding, as well as insulation, floor tiles, ceilings, and walls containing asbestos, the suit alleges. The former camp became a private residential community in 1968. The tainted land was discovered during design work for a proposed 22-acre aquatic, sledding, and amphitheater complex.

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FEATURE

Important Points to Include in Your Repointing Contract

In last month's issue, the *Insider* explained how to identify when the brick façade on your building needs repointing work. Repointing work is the chiseling out of old, worn mortar between bricks and having it replaced with fresh mortar.

Once you have decided that your building needs repointing work, doing nothing is not a financially sound or viable option. Some associations may decide to hide the problem by painting the façade. But this will only seal in moisture already in the wall as it keeps the wall from "breathing." The masonry may look better for the short term, but the interior will continue to disintegrate.

In theory, repointing is one of the most common and straightforward jobs that general and waterproofing contractors have to do. However, there are many ways in which a contractor can cut corners and take advantage of you. One common way is just to place new mortar over the old without chiseling out the bad.

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RULES & REGS

Handling Member Complaints About Marijuana Grow Operations in Community

Recently, a Montana mixed-use condominium association board voted to amend its governing documents to specifically prohibit medical marijuana dispensaries in the community. The association had sent out a survey to its members regarding medical marijuana in February 2010 asking the owners of the association how they would like to address medical marijuana and its place in the community. In that survey, 73 percent responded, with 72 percent in favor of prohibiting medical marijuana dispensaries in the community. That survey prompted the official vote discussed at the association's annual meeting. According to the board president, the members were concerned about unattended grow operations in the commercial part of the complex.

This association's reaction to marijuana grow operations may become more commonplace as more states consider legalizing medi-

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Repointing (continued from p. 1)

If it is a straightforward job and you have confidence in your contractor, it will draw up a repointing contract for you to sign. This is a good option for associations because they can avoid the added cost of consulting a structural engineer or architect.

However, if you need extensive repointing work, you should definitely have specifications, or "specs," drawn up by a professional engineer or a registered architect. Running from 10 to 100 pages, depending on the size of the job, specs explain to a contractor exactly what areas need to be fixed, and what kinds of materials should be used and in what quantities. After reviewing the specs, you can then let various contractors bid on the information contained in the specs.

In either situation, whether you need straightforward or extensive repointing work, you will need a solid contract to minimize liability, lessen disturbances to residents, and ensure quality workmanship and materials. To you help you ensure that all the bases are covered in your repointing contract, the following is an inventory of basic points that should be included.

General Terms

❑ **Changes.** The contract should state that you must agree in writing to any changes to the contract that the contractor has signed, or else those changes won't be effective.

❑ **Nontransfer clause.** You should always include a "nontransfer" clause in the agreement. That way, the contractor can't sign the contract, and then subcontract the job out to someone else. The clause in your contract should read something like this: "None of the work described herein shall be subcontracted to another contractor without express written approval from the association."

❑ **Insurance.** State that the contractor must have public liability and property damage coverage as well as workers' compensation insurance, and that the contractor's public liability and property damage insurance must co-insure you and your engineer.

❑ **Permits.** Require the contractor to obtain and pay for all necessary permits, and comply with all local codes and ordinances.

❑ **Safety.** State that the contractor must provide all the work-protection equipment required—such as barriers, scaffolding, and bridges—for the protection of the workers, building occupants, and the general public during the job.

Time Frame

❑ **Completion.** State that the contractor must assure that the work shall be completed as expeditiously as possible.

❑ **Date.** The date of the contract should be filled in, or it will not be valid.

❑ **Begin/end.** Make sure the contract clearly states when your job will begin and the estimated date of completion.

❑ **Terrace.** Where terrace access is required by a contractor, require that it gives you at least 48 hours' notice.

❑ **Progress.** Make sure that the contractor shall continuously advise your building superintendent on the progress of work.

❑ **Schedule, delays.** The agreement should note that within a week of being hired for the job, the contractor must submit a schedule of when each part of the job will be done. The schedule should include a 20 percent allowance for time lost due to bad weather. The work should be conducted in a continuous manner during the normal work days, however. State that failure to follow these rules will be considered a "breach of contract."

❑ **Penalty.** Some associations may want to put in a penalty clause covering work that is not completed on time. However, this clause, known as a "Liquidated Damages Clause," is very tough to prove because you have to show in court that the contractor's delay directly caused you to lose money.

Scope of the Work

❑ **Materials.** State that the contractor, not you, shall furnish and install all materials, labor services, guarantees, and permits required for the job specified in your specs or the contractor's proposal.

❑ **Substitutions.** State that only products equal to those in your specs or the contractor's proposal may be substituted. Make sure the contract states that a sample of these materials must be given to you for your approval in advance.

❑ **Name brands.** Specific brand names, quantities, and how they are going to be used must be laid out in detail. If your engineer's specs give the contractor this information, make sure he agrees to abide by it before work begins.

❑ **Precautions.** For safety reasons, the contractor should be required to use only equipment that is in sound operating condition. State that all procedures and work should include the highest safety considerations for those involved in the work, and that the contractor must observe all OSHA and local regulations.

Terms of Payment

❑ **Approved expenses.** If the contractor submits a monthly bill, your engineer—if you hire one—should be the one to check the expenses on the bill and approve them.

❑ **Final payment.** State that work shall be completed to the satisfaction of the association or association's representative before final payment is made. If you are having an engineer periodically check the work being done, you should get him to approve the job before you hand over the final payment.

Labor

❑ **Workers.** Get a rough estimate of how many workers you can expect on your site on any given day, what their hours will be, and what days you can expect them.

❑ **Skill.** The agreement should state that all work shall be performed by skilled workers who are regularly engaged in, and specialize in, the work they need to perform. You must make sure that the workmen on the scaffold, who are doing the actual repointing, are skilled and experienced in repointing.

Job Site Debris

❑ **Carting.** Require the contractor to have all debris carted away daily from the site.

❑ **Protection.** Require the contractor to properly protect all areas of the interior and exterior from damage and dirt.

❑ **Storage.** Limit storage of materials in the building to an area designated by the superintendent or manager.

❑ **Cleanup.** Stipulate that the contractor must leave his work and the building clean and in good condition. Splatters on windows, sills, terraces, and other areas shall be removed by the contractor before the job is finished.

❑ **Workmanlike condition.** Make sure that all work shall be left in a neat, clean, and workmanlike condition. Add that work shall be carefully trimmed, stains shall be removed, and all removed material shall be swept, collected, and disposed of by the contractor.

❑ **Dust, dirt.** Include that all work shall be done in a way that precludes the creation of dust that may be a nuisance to building occupants, neighbors, and pedestrians.

Guarantees

❑ **Workmanship, materials.** Guarantees for repointing work are usually one to two years in duration and cover both workmanship by the contractor and materials by the supplier. Make sure that you don't sign the contract until the contractor agrees in writing to the guarantee. Here's an example of what your contract should say about guarantees:

> The Contractor must guarantee all work under this contract for a period of two (2) years after completion of all the work. Crack-

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Repointing (continued from p. 3)

ing, peeling, separation, or significant discoloration of materials installed under this contract shall be repaired by the Contractor at no additional cost to the Association, within the guarantee period. Upon notification of problems, the Contractor shall promptly make the required repairs.

EDITOR'S NOTE: Once you have considered your options and have made sure that you are hiring a good contractor, keep in mind that you need to complete your repointing work before winter begins. Frozen mortar is obviously difficult to work with; but if the temperature falls below 40 degrees Fahrenheit, you can expect the mortar not to settle well into the joints. Some contractors may add antifreeze into the mortar, but this will always weaken it, according to our experts. Also, repointing should be avoided in midsummer in most of the country because in temperatures above 80 degrees Fahrenheit, the mortar will dry out too quickly to bind well.

Insider Sources

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Search Our Web Site by Key Words: pointing; repointing; façade; maintenance; contractor

Rules & Regs (continued from p. 1)

cal marijuana. With so many states' facing budget deficits, legalization of medical marijuana provides a means for additional revenue for the state through registration fees and taxes. Colorado Governor Bill Ritter recently made headlines when he announced that medical marijuana registration fees were helping the state meet a $60 million fiscal emergency.

As more states and localities consider marijuana legislation, your members may become more vocal about what can be done to prevent home growing operations in the community. Some members may be concerned about bright fluorescent lights through the night, accompanied by loud fans that some grow operations utilize. They may be worried about the amount of electricity needed to operate a grow house, which, together with a lack of safeguards, may increase the chances of electrical fires.

In addition to worrying about electrical hazards, some members may also be concerned about the potential for theft and burglary. Since medical marijuana producers/caregivers usually deal in cash, members may believe that the home grow operation could be the target of criminal activity.

This article will explain the distinctions between federal and state laws concerning medical marijuana. We will also cover which restrictive covenants your association may be able to utilize and how local ordinances may be applied to limit home-based marijuana operations in the community if your association is located in a state that permits medical marijuana.

Federal vs. State Law

Fourteen states now allow the cultivation and use of marijuana for medical reasons. These states include California, Michigan, New Jersey, and Colorado. And recently, the District of Columbia Council approved a law to allow people with HIV, glaucoma, cancer, and other chronic diseases to buy medical marijuana from a small number of dispensaries in the city.

In many of these states, "caregivers" are allowed to grow a certain number of marijuana plants and give their product up to a certain number of patients. Because the laws have not been around for long, many states do not specify how many square feet is required for a home grow operation, or what safety precautions must be adopted.

Under federal law, however, medical marijuana is illegal. The Controlled Substances Act makes it unlawful to manufacture, distribute, dispense, or possess any controlled substance [21 U.S.C. 801]. And the federal government does not recognize any acceptable medical use for marijuana [21 U.S.C. 812(b)(1)].

The problem associations may face in attempting to limit growing operations occur when federal authorities are not actively pursuing violations of federal law if the activity falls within the bounds of the state law. This hands-off approach seems to be the new stance. Late last year, Attorney General Eric H. Holder Jr., the nation's top lawyer, directed federal prosecutors to back away from pursuing cases against medical marijuana patients, which signaled a broad policy shift. At the time,

Holder stated that in 14 states with some provisions for medical marijuana use, federal prosecutors should focus only on cases involving higher-level drug traffickers, money launderers, or people who use the state laws as a cover.

Review Governing Documents

If members start to complain about a medical marijuana growing operation in the community, you should check the governing documents to see if there is something that allows you to prohibit it. Any member who moves into a community with restrictive covenants gives up, by contract, certain rights, in order to live in harmony with his or her neighbors.

Most governing documents prohibit illegal activities in a community, and possessing or cultivating marijuana is illegal under federal law, and under state law unless with a doctor's recommendation. For those members who cultivate marijuana, your association can take a hard stance and disallow the marijuana-related business on the grounds that it violates federal law, or your association can require the cultivating members to produce a doctor's recommendation before it declines to enforce a covenants, conditions, and restrictions provision.

If your governing documents do not have language barring illegal activities, your association's declaration may include language that prohibits commercial uses of homes or home businesses. With this restriction, the association may have a valid covenant enforcement action against an owner growing medical marijuana in the home.

Local Ordinances, Zoning

If the association's governing documents do not give it much help, the association should also look into local ordinances. In many instances, nothing in state law will preclude local governments from passing ordinances addressing local use issues.

In your town, the use of a home to grow or distribute medical marijuana may already be a violation of local zoning ordinances. In California, for example, the city of Anaheim recently won its argument in appeals court that its local ordinance banning medical marijuana dispensaries did not violate civil rights [Qualified Patients Assoc. v. City of Anaheim, August 2010].

Associations confronted with a grow operation or dispensary in its community should seek legal counsel to determine if the association has a valid covenant enforcement claim. An attorney can help the association navigate local zoning ordinances and pinpoint which covenant may yield the quickest path to member satisfaction.

RECENT COURT RULINGS

➤ Association Allowed to Amend Governing Documents

Facts: An association board had determined that it would be in the association's best interest to completely restate the association's covenants, conditions, and restrictions (CC&R) to bring the documents up to date with current law, delete obsolete developer references, and clarify ambiguous provisions that had caused confusion.

Under the CC&R, the association was required to obtain approval from 75 percent of the property owners for a valid amendment. In 2008, the board mailed each member a new, revised CC&R, ballot materials, a letter from the association's legal counsel explaining the reason for the changes, and a three-page document entitled "Summary of Changes." The members were told of the deadline. However, not enough ballots were returned by that deadline even though the association sent reminders and twice extended the deadline.

Although more than 85 percent of the members who voted marked the ballot in favor of the changes, this vote was not enough to satisfy the requirement that 75 percent of the members approve the changes. As a result, the association filed a special petition under California law, requesting that a court order the restated CC&R approved based on the votes already cast. One member opposed the petition, alleging that the restated CC&R contained unreasonable changes, including a new policy concerning views and tree-trimming. The trial court gave the association permission to reduce the percentage of votes necessary for a revision of its governing documents. The member appealed.

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

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Recent Court Rulings (continued from p. 5)

Reasoning: The court found that all the requirements had been met under California law to allow the association to reduce the percentage of affirmative votes required to amend the governing documents. Notice was properly given; the balloting was properly conducted; reasonable efforts were made to permit eligible members to vote; members having more than 50 percent of the votes voted in favor of the amendment; and the court ruled the amendments to be reasonable.

The court found that the new tree-trimming policy to be reasonable because it had come about after the board consulted with experts in the legal field, horticulturists, members, and those with architectural expertise. Furthermore, the board had already adopted this policy and just wanted to incorporate it into the governing documents. The court noted that after implementation of the view policy, there were fewer disputes among members regarding privacy, views, and trees.

- Alga Hills Homeowners Assoc. v. Gallagher, July 2010

➤ Association Not Required to Arbitrate Construction Defect Claim

Facts: A condo association filed a construction defect lawsuit against its developer. The developer asked the court to move the lawsuit out of court and order the association to arbitrate the claim. Arbitration, a form of alternative dispute resolution, is a legal technique for the resolution of disputes outside the courts, wherein the parties to a dispute refer it to one or more persons or "arbitrators" by whose decision they agree to be bound. It is a settlement technique in which a third party reviews the case and imposes a decision that is legally binding for both sides.

The governing documents contained a provision citing the Federal Arbitration Act, waiving the right to a jury for resolving construction disputes, and barring amendment of that provision without the developers' written consent. The purchase and sale agreements state that the parties agreed to comply with the dispute resolution provisions of the governing documents. The trial court denied the developer's request, and the developer appealed.

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

Reasoning: The court ruled that the arbitration provision did not bind the association because it could not have consented to it. The association did not exist until the governing documents were recorded. Under California law, there needs to be an actual agreement to be bound by arbitration to compel arbitration.

The court stated that the developer was allowed to include an arbitration provision in the initial governing documents. However, the court took issue with the clause because it waived the association's right to a jury trial and was not allowed to be changed without the written consent of the developer. The court concluded that there was no reason a developer could not place an arbitration provision in the governing documents to be later ratified by the members through the amendment process. Also, the dispute resolution clause in the purchase and sale agreements was not enforceable against the association because the court ruled that it was unfairly one sided.

- Pinnacle Museum Tower Assoc. v. Pinnacle Market Development LLC, July 2010

DOS & DON'TS

✓ *Pass Leasing Restrictions Bylaw for Legitimate, Nondiscriminatory Reasons*

If your association is considering amending or passing a lease restriction bylaw, be sure that there's no possible discriminatory reason for the passage of the bylaw. A valid reason can include concerns about property values, since members tend to take better care of their units and common areas than renters do, or because lenders are sometimes reluctant to offer mortgages to new buyers buying into a community with a high rental rate.

In June 2010, a Georgia appeals court reinstated a lawsuit filed by a condo owner, who accused her condo association of discrimination and interference with the exercise of her fair housing rights by amending its bylaws because of racial discrimination. The condo owner bought her unit as her primary residence in 2004 and bought a second unit a few months later. The condo owner alleged that when she told the condo association president that she rented the second unit to an African-American woman, the president expressed concern about how other residents would react. The night before the tenant was to move

in, the condo owner said that she received a call from a neighbor who used racial epithets and said that she didn't want minorities living there. Allegedly, the president told her that amendments prohibiting leasing were being proposed because of her new tenant. After the rule change was approved, the condo owner said that the new tenant moved for personal reasons, and that the unit was vacant when the rules took effect.

A year later, the condo owner sued under state fair housing law. The trial court dismissed the case, but the appeals court reversed, ruling that the condo owner was entitled to further proceedings in her claims of racial discrimination and interference with her fair housing rights. Although the condo association argued it had discussed restricting unit owners' ability to lease their property because of concerns about property values a year before the condo owner bought her units, the court said that the minutes of its meetings did not mention these discussions. The court ruled that the timing of the bylaw amendments combined with alleged racially discriminatory comments of the president and the neighbor could suggest that the rule changes were adopted for discriminatory reasons [Bailey v. Stonecrest Condo. Assoc., Inc., June 2010].

✗ Don't Retaliate Against Employees Who Help Alleged Discrimination Victims

The Fair Housing Act's ban on retaliation applies not only to prospective members who claim to be victims of housing discrimination, but also to anyone who helps or encourages alleged discrimination victims to pursue their rights under fair housing law. Those provisions protect employees from adverse employment actions—such as being fired, demoted, or harassed—for opposing discriminatory practices or advising aggrieved residents to contact fair housing agencies. That means that, in addition to any liability to the victims of alleged discrimination, an association or management company could be required to pay damages to any employee who was subjected to disciplinary action because she supported the alleged victims in pursuing their rights.

For example, earlier this year, the U.S. Department of Justice announced a combined $2.13 million settlement to resolve allegations that the owners and managers of a Kansas City high-rise apartment building created a racially hostile environment and retaliated against a former employee for cooperating with Department of Housing and Urban Development (HUD) investigators and assisting others to file complaints with HUD. According to the complaint, the building manager openly displayed racially hostile materials, such as hangman's nooses, frequently referred to African Americans with racial epithets, and generally treated white residents more favorably than African-American residents. The complaint also alleged that, upon learning about what the employee told HUD and an alleged discrimination victim, the manager falsely accused her of improper conduct, leading to the employee's suspension and ultimate dismissal.

The claims were resolved in February 2010, when the court approved a settlement calling for the owners to pay $1.89 million in damages and a $95,000 civil penalty. In May 2010, the court issued a separate order against the manager, permanently banning her from working in rental housing and ordering her to pay a $55,000 civil penalty [United States v. Sturdevant, May 2010].

✓ Spread Association Deposits Over $250K Across Several FDIC-Insured Institutions

On July 21, 2010, basic FDIC insurance coverage was permanently increased to $250,000 as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act. The Federal Deposit Insurance Corporation (FDIC) insures the safety of checking and savings deposits in member banks. The standard maximum insurance amount of $100,000 had been temporarily raised through Dec. 31, 2013. That increase is now permanent.

The coverage applies per depositor, per insured institution. So if an association places $500,000 in a single bank and the bank fails, the association would lose $250,000. Associations should not exceed $250,000 per financial institution unless the bank has private insurance to cover the monies. Instead, associations should spread their money across various FDIC-insured institutions.

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