

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

APRIL 2011

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## City Not Responsible for Condo Roads

The city of Brookfield, Wis., does not have to plow, maintain, or repair the private roads in condominium developments, the 2nd District Court of Appeals found in a recent decision.

Four condo associations sued the city in 2008, saying that the city's refusal to maintain the roads was a violation of the constitutional clause requiring equal protection under the law. The case was dismissed earlier by a U.S. District Court for the Eastern District of Wisconsin, which found that saving money was a rational basis for the city's requirement that the associations have private roads, but ruled that there were state issues that should be resolved.

Ultimately, the appellate court found that the condominium developers chose to accept the private road requirements in order to build more units. This meant that the members benefited because the cost per unit was less expensive.

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## FEATURE

## Use Well-Drafted Architectural Review Form to Minimize Disputes

There are times when members may want to make modifications to their homes. In these instances, the concern for associations is that these changes may affect the harmonious design of a community, decrease property values, and increase liability. For example, low-quality construction can drive down property values, increase the premiums on your community's liability insurance, or even render important warranties void. Some types of work, such as a new roof deck, if not done right, can lead to injuries and increase your community's exposure to personal injury liability.

To combat this, many governing documents include language forbidding any significant modifications without prior written consent from the board. Usually, an association's governing documents provide a review process for architectural changes, and the approval or denial of a member's application for changes must be made in compliance with the procedures contained in the governing documents, says New Jersey attorney David Byrne. In other words, the approval or denial may not be made arbitrarily.

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## BEST PRACTICES

## Use Licensed Structural Engineer to Assess Concrete Cracks in Condo Building

Concrete cracks. They're a fact of life. Some cracks might not need attention, while others could have serious structural consequences. But how can you tell the difference? Much of the time you can't, and expert advice is required. After the beating your condominium building probably took this winter, you may notice cracks beginning to form in your façade or at other points in your building.

"It is important to accurately assess structural cracks to determine what is significant and what is not," says John Duntemann, a principal at consulting engineering firm Wiss, Janney, Elstner Associates (WJE). "You have to properly identify the extent and cause of cracking before you can implement the right repair solution."

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*Community Association Management Insider* (ISSN 1537-1093) is published by Vendome Group, LLC, 149 Fifth Avenue, New York, NY 10010-6823.

Volume 10, Issue 10

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## Architectural Review (continued from p. 1)

To ensure that written consent is obtained and to assist in the uniform and consistent application of the procedures and assure members that everyone is treated alike, your architectural review committee should use a well-drafted application form. A good form—like our Model Form: Use Architectural Application to Protect Association—will communicate to the applicant what is expected, and it will help protect the association in the event the applicant member fails to follow the process.

### Why Require Prior Consent?

There are many reasons to require members to get board consent before making any modifications to their homes. Among the most important reasons are:

**Prevents low-quality workmanship.** Unqualified contractors might build something that's unsafe and results in liability for both the member and the community association. In the case of a condominium building, a contractor might damage another condominium unit in the course of its work. Even if it doesn't cause obvious damage, if a contractor builds something improperly, it could affect other building systems. An example of this is an improperly installed heating system that overloads the building's electrical capacity.

**Avoids disrupting community's architectural and aesthetic uniformity.** By getting to see the plans before they're carried out, you can ensure that they don't disrupt your community's appearance. A poor appearance can affect property values.

**Maintains control over construction.** Including appropriate language in your declaration will allow you to exert control over noise, dust, safety, and the hours during which work may be done.

**Avoids setting dangerous precedent.** Allowing modifications without board consent can lead to future arguments. A member might say that the board has legally given up its right to control the construction process or might accuse the board of selective enforcement.

### Causes of Disputes and Litigation

Many owners believe that architectural requirements create an unnecessary, time-consuming burden. Most likely, these owners have had negative experiences with their architectural review committees, and, in many cases, these experiences have led directly to court where the committee was blamed for having acted arbitrarily.

There has been much litigation in the area of architectural controls. And courts have made it clear that language in the governing documents regarding architectural controls is valid and enforceable, provided there are clear policy guidelines establishing the overall standards. Boards of directors must establish fairly specific guidelines, and if those rules are not already in your association documents, they should be drafted and approved in accordance with your legal documents and the laws of the state in which your community is located.

The directors also should be aware that the following will be valid defenses by an owner when the association tries to seek enforcement of the architectural standards:

**Arbitrary and capricious actions have been taken.** The architectural standards must be applied fairly and consistently, across the board and in good faith. All too often, architectural review committees have been accused of asserting dictatorial powers.

**Delays have occurred.** If a member is in violation of the architectural standards, the board must take prompt action to assure compliance of the standards. In legal terms, delays might lead to “laches” or “estoppels.” This means that the board has permitted a lengthy period of time to elapse before taking action against an owner. Waiting too long to enforce the governing documents against an unauthorized modification might bar the board from doing so.

**A waiver has been granted.** Basically, if the board fails to enforce a covenant in the case of one owner in a similar situation, it may be prohibited from enforcing the same standards against another owner.

### Benefits of Application Forms

All members seeking approval from the architectural committee should fill out a standard application form. A major objective of the architectural review process is to have in place guidelines and procedures that are perceived by members to be fair and reasonable. If members view the process as fair, they are much more likely to comply voluntarily with those guidelines and procedures.

Applications also provide the opportunity to communicate important points to the member. You can use the form to remind applying members of various liability protection issues in your

governing documents. You can include language putting the member on notice that the association can recover any losses incurred as a result of members’ unauthorized modifications of their homes, including reasonable attorney’s fees and costs incurred to enforce the governing documents, says Byrne.

Other important reminders might include the fact that approval does not constitute municipal or county building department approval; the member must notify the committee or board upon completion of an improvement and authorize it to enter onto the property to inspect the improvement; and failure to start or complete an improvement within the time specified on the application shall result in withdrawal of approval unless an extension is requested and approved in writing.

#### Insider Source

**David J. Byrne, Esq.:** Stark & Stark, PC, 993 Lenox Dr., Lawrenceville, NJ 08648; [www.stark-stark.com](http://www.stark-stark.com).

## MODEL FORM

### Use Architectural Application to Protect Association

Here’s a form your architectural committee can adapt to reflect the important points and requirements of your review process. The architectural review requirements for

granting consent should be clearly stated in your community’s governing documents. Show this form to your attorney before adapting it for your own use.

#### ARCHITECTURAL CHANGE APPLICATION

MEMBER’S NAME: \_\_\_\_\_ DATE: \_\_\_\_\_

ADDRESS: \_\_\_\_\_ TEL. #: \_\_\_\_\_

The governing documents require that you submit all proposed exterior additions, changes, or alterations to your house/unit and lot to the Architectural Review Committee for approval. Your application must include detailed information describing the proposed changes.

#### TYPE OF PROPOSED CHANGE:

- |   |   |  |
|---|---|--|
| <input type="checkbox"/> Outside Walks/Stairs         | <input type="checkbox"/> Fences/Retaining Walls           | <input type="checkbox"/> Garage Doors/Exterior Doors |
| <input type="checkbox"/> Landscape Front or Side Yard | <input type="checkbox"/> Driveway/ Walkways               | <input type="checkbox"/> Roofing Replacement         |
| <input type="checkbox"/> Sunrooms/Patio Covers        | <input type="checkbox"/> Painting House or Trim New Color | <input type="checkbox"/> Swimming Pool               |
| <input type="checkbox"/> Decks/Patios                 | <input type="checkbox"/> Other _____                      |  |

(continued on p. 4)

**ARCHITECTURAL CHANGE APPLICATION** (continued)

**DESCRIPTION OF PROPOSED CHANGE:**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**REQUIRED DOCUMENTS FOR CONSIDERATION:**

- Elevations—Include front, side, and rear elevation drawings to scale.
- Site plan—Show improvement in relation to the home and setbacks to scale.
- Color samples—for color changes only.
- Extras—Include sketches, clippings, pictures, and/or catalog illustrations for clarity.

*It is the member's responsibility and obligation to obtain all required building permits, to contact the utility and cable companies, and to construct the improvements in a workmanlike manner in conformance with all applicable building and zoning codes.*

**ACKNOWLEDGEMENT**

The undersigned member hereby acknowledges and agrees that the undersigned shall be solely responsible for determining whether the improvements, alterations, or additions described above comply with all applicable laws, rules, regulations, codes, and ordinances. The Architectural Review Committee and the Association shall have no liability or obligation to determine whether such improvements, alterations, and additions comply with any such laws, rules, regulations, codes, or ordinances. If a member begins a project and cannot complete it due to construction issues that require changes, the member must resubmit all changes for written approval prior to continuing and finishing the project. The undersigned acknowledges that he or she has 90 days from the date of the approval of this form to complete the requested work. If unable to complete the work in time, the member must request a time extension and the extension must be approved in writing.

I agree not to begin this proposed property improvement(s) until the Architectural Review Committee notifies me in writing of its approval. If any change is made that has not been approved, the Committee has the right to ask me to remove the improvement from my property, and I agree to do so. Also, I agree to notify the Committee upon completion of the improvement(s) and authorize it to enter onto the property to inspect the improvement(s).

MEMBER'S SIGNATURE: \_\_\_\_\_ DATE: \_\_\_\_\_

**COMMITTEE ACTION**

- Approval       Disapproval

Comments: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

*Must be signed by three Architectural Committee Members.*

COMMITTEE MEMBER \_\_\_\_\_ DATE: \_\_\_\_\_  
 COMMITTEE MEMBER \_\_\_\_\_ DATE: \_\_\_\_\_  
 COMMITTEE MEMBER \_\_\_\_\_ DATE: \_\_\_\_\_

**COMMITTEE REVIEW**

The action below is taken after notification by the member that the approved work has been completed and inspected by a member of the Architectural Review Committee.

- Accepted       Rejected

Comments: \_\_\_\_\_  
\_\_\_\_\_

COMMITTEE MEMBER \_\_\_\_\_ DATE: \_\_\_\_\_

## RECENT COURT RULINGS

### ► Association Can Foreclose on Condo Without Bank Intervention

**Facts:** A condominium association brought a foreclosure action against a member for unpaid maintenance fees and assessments. The member had purchased two condominium units in the building and had added an internal stairway to connect the two units. The units retained their separate addresses, and the upper unit had no loan recorded for it.

A trial court granted judgment without a trial in favor of the association in its foreclosure action. Meanwhile, a bank had initiated foreclosure proceedings on the lower unit. After the bank discovered the association's action, the bank filed an emergency motion to intervene and vacate the association's foreclosure sale.

In its motion, the bank asserted that it had issued a refinance loan to the member and that the parties intended the loan to be secured by both units. However, because of a clerical error, only the lower unit was identified in the legal description on the mortgage. The trial court denied the bank's request to intervene, and the bank appealed.

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

**Reasoning:** The court ruled that the bank's motion was filed too late. Intervention after final judgment has been entered is unusual and ordinarily will not be granted. In this case, the bank did not find the clerical error at the time it received the title commitment or when the mortgage was recorded. It did not seek to intervene in this action until nearly a year after the case was filed, two months after final judgment was granted to the association, and only four days before a scheduled sheriff's sale of the subject property. Since a judgment had already been imposed, allowing the bank to intervene would prejudice the original parties and the person who had bought the foreclosed property.

■ Grove Court Condominium Unit Owners' Assoc. v. Hartman, January 2011

### ► Member Liable for Unpaid Dues and Late Fees

**Facts:** An association filed a small claims action against a member, seeking unpaid dues and late fees. The member filed a counterclaim alleging slander and

defamation against two board members. At the hearing, the member admitted that he had not paid dues since 2007, but claimed that the association could not collect, because it was not a legal entity capable of initiating a lawsuit. The member argued that the association is in violation of several provisions of Indiana state law relating to associations.

The small claims court ruled in favor of the association on the issue of dues owed, and it decided that the member failed to prove slander or defamation of character, because the statements made were true. The member appealed.

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

**Reasoning:** The court found that the portion of the law relating to associations was enacted in 2009 and applies only to homeowners associations established after June 30, 2009. While the evidence presented at trial does not establish the precise date on which the association was established, the member testified that he paid dues to the association from 1997 until 2007. Therefore, the court concluded that the association was established before 2009 and has the right to sue the member.

Also, the member's claim that board members defamed him by stating that he had not paid his dues was not defamation. The statements regarding the member's unpaid dues were true.

■ Nevill v. Woodland Heights Property Owners Assoc., January 2011

### ► Association Lien Superior to Tax Lien Before Recorded Date

**Facts:** A member became delinquent on his assessment payments to the condo association starting in November 2008. The member had also failed to pay federal income tax, and the Internal Revenue Service (IRS) assessed his tax obligation on March 17, 2008. The IRS didn't record a notice of federal tax lien until January 2009. And during this time, the member remained delinquent on his association assessments.

The association foreclosed on the member's condominium. The association knew that a tax lien has priority over competing liens. However, the association asked the court to acknowledge that its lien was superior to the tax lien for the amount that accrued

(continued on p. 6)

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

before Jan. 16, 2009, the date the federal tax lien was recorded.

**Ruling:** A Washington district court ruled in favor of the association.

**Reasoning:** The general rule is that tax liens attach to property at the time the tax is assessed, but there is an exception to that rule for security interests. When the holder of a security interest also claims an interest in the property subject to a federal tax lien, the federal lien is deemed to have attached when the IRS files a notice of the tax lien with the proper authority, rather than when the delinquent tax was first assessed.

Also, according to state law, assessment liens automatically attach at the time the assessment is due, and the law specifies non-judicial and judicial methods of foreclosing on the lien. Here, the association sought to enforce its lien judicially, rather than pursuing non-judicial foreclosure. That the association chose to enforce its lien through the courts does not negate the association's right to enforce its lien non-judicially. Therefore, before January 2009, the association's lien was superior to the IRS's lien.

■ *Mira Owners Assoc. v. Lawrence*, February 2011

### ► Underinsured Association Liable for Limited Flood-Related Damage

**Facts:** A member sued his condominium association for negligence for failing to pursue a claim on his behalf under the association's flood insurance policy. The member owned a basement condominium unit. The association held a flood insurance policy on the building, and the member held a separate, secondary flood insurance policy on the condominium. The member's policy contained a clause stating that it provided building coverage for flood-related damage in

excess of the policy issued to the association. In other words, the member is entitled to payments only after the primary coverage is exhausted.

In August 2005, the member's condominium, along with the common areas that were also on the lower level of the building, suffered significant flood-related damage as a result of Hurricane Katrina. An insurance claims adjuster inspected the building and determined that the property suffered \$46,414.37 in damages, including \$2,324.04 in damage to the member's unit. It was later discovered that due to a clerical error by the association's insurance agent, the association had underinsured the property. Due to the error, the insurer imposed an 86 percent co-insurance penalty. As a result, the association was reimbursed only \$5,498.01, and the association gave the member 5 percent of its recovery, or \$275.29.

The Louisiana district court ruled against the association for the full amount of damages the member sustained in the flood. The association appealed.

**Ruling:** The Fifth Circuit appeals court reversed the lower court's decision and told the lower court to recalculate the damage to the member's condominium.

**Reasoning:** The court ruled that the member failed to establish that the unit was at or above ground level, and the evidence overwhelmingly suggested the member's unit was in a basement for flood insurance purposes. The insurance policy provides only limited coverage to basement property and excludes many of the member's claimed damages. Therefore, the court ordered the district court to consider which of the member's proven damages would have been covered by the association's insurance policy had the association secured adequate coverage.

■ *King v. Casa Grande Condominium Assoc.*, January 2011

## Best Practices (continued from p. 1)

Cracks in concrete might be caused by a number of factors, such as thermal expansion and contraction, sub-grade settlement, and the loads being applied. This all adds up to internal and external stress that manifests as large and small cracks.

In many cases, however, there is uncertainty as to what to do

about cracks. Pete Barlow, a principal at Contech Services Inc., a company that repairs, strengthens, and waterproofs concrete structures, says his company is constantly being contacted by anxious building managers. "Many times a week, people send us photos of cracking at their facilities asking for advice," he says.

The number-one thing associations should do upon noticing cracks is to contact a professional to assess the extent of the damage. An engineer can help determine whether or not it's a significant issue. "As board members and maintenance staff are typically not engineers, they are advised to retain a licensed structural engi-

neer who can evaluate concrete cracking,” says Barlow.

### Crack Classification

There are various methods of classifying cracks in concrete. One primary way is to split them into two groups: structural and nonstructural.

Structural cracking affects the integrity of the building. Cracking in support beams, columns, and load-bearing areas is of particular concern.

Nonstructural cracks, on the other hand, are not detrimental to building integrity, though they may need to be addressed for cosmetic reasons or to take proactive steps to prevent those cracks from growing over time and eventually reaching the structural stage. Tiny fractures can also lead to other challenges.

“Small cracks in below-grade foundation walls can allow water to migrate into the structure,” says Barlow.

Size of the gap is another consideration. Hairline cracks are generally not a problem, but it depends on where they are. A high frequency of them, though, could indicate an underlying stress issue that needs to be addressed. But as the size of openings increases, so should the concern. As a rule of thumb, cracks larger than 0.015 inches, says Barlow, should be investigated.

“The larger the width, the greater the likelihood you have lost aggregate interlock,” Barlow says. “But repairs can be done on cracks down to 0.005 inches.”

A third issue is location and orientation. Cracks in random directions are of lower priority

than those in beams, columns, or other load-bearing areas.

“If one side of the fracture is offset from the other, that is often a bad sign,” says Barlow. “Other warning signs are closely spaced cracks or repetition of cracking at the same locations on each floor.”

### Concrete Repair with Epoxy

After consulting with the engineer and if the engineer deems your building’s cracks to be a problem, your engineer can recommend a course of action. “When a problem is identified, it is important to retain professionals with experience solving these problems,” says Duntemann. “The correct solution to a problem requires a good understanding of the cause of that problem.”

In many cases, epoxy injection is used as the remedy for concrete cracks, he says. There are high performance epoxies manufactured for structural concrete bonding and crack repair. Duntemann gives the example of cracking that appeared in a cooling tower being constructed at a synthetic fuel plant. Cracking developed at the ends of pre-stressed concrete beams. Demolishing the structure and starting over was not considered an option. Management brought in his firm to find an alternative.

“The beams were injected with epoxy and load-tested to verify their structural capacity,” says Duntemann. In another case, his firm was retained to investigate large cracks in the concrete caps that sat on top of concrete pile foundations for a building. “We developed a method of reinforcing the caps and injected an epoxy into the cracks to reconnect the fragmented caps,” says Duntemann.

Water, however, presented a further challenge—the epoxy had to deal with a saturated environment. His firm requested help from ChemCo Systems, an epoxy manufacturer, and its team of chemists formulated an epoxy that could fill three-quarter-inch cracks and cure in the presence of water.

“You often run into challenging environments, such as cracks full of water, cold temperatures, or exceedingly wide cracks that require a customized solution,” says Duntemann. When it comes to concrete cracks, a do-it-yourself approach may be fine for the most minor problems. In his view, there are too many factors involved in the engineering and chemical formulation side to leave anything to chance, and a reputable epoxy manufacturer is vital.

He points out that while many different types of epoxy are available, one size does not fit all. Concrete cracks require the right combination of materials, chemistry, and expertise. If your engineer recommends epoxy repair, the right epoxy manufacturer can provide advice on the product application. Also, “their chemists should understand the physical properties of the various resins and how to blend them to ensure the job is done right,” says Barlow.

#### Insider Sources

**Pete Barlow:** Principal, Contech Services Inc., 5304 3rd Ave. South, Seattle, WA 98108; [www.contechservices.com](http://www.contechservices.com).

**John Duntemann:** Principal, Wiss, Janney, Elstner Assoc., 330 Pfingsten Rd., Northbrook, IL 60062; [www.wj.com](http://www.wj.com).

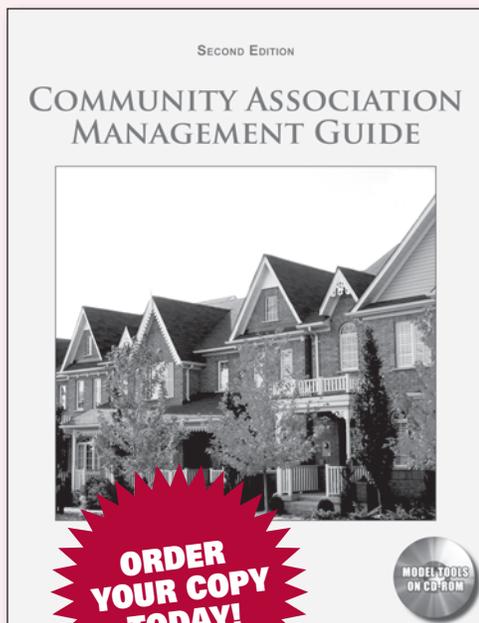
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