Community Association Management *Insider*®

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INSIDE THIS ISSUE

NRA Helps Shoot Down Association Gun Ban Plan

A community in El Dorado County, Calif., has historically allowed some sport shooting. But when one board member wanted to change that, he started the process to change the governing documents to completely ban the discharge of firearms and air guns and eliminate all target and other shooting throughout the gated equestrian community.

One member of the community, who is also a National Rifle Association (NRA) member, brought this issue to the attention of the NRA's California attorneys. And they assisted him and other neighbors in defeating the attempt to do away with shooting in the community. At a meeting, they pointed out the many flaws in the proposed revisions, including that the revisions would inappropriately ban the discharge of BB guns, air guns, bows, and

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FEATURE

How to Minimize Liability Risks Associated with Social Media

Social networking is growing at an exponential rate. According to a report by technology and market research firm Forrester Research, 55.6 million U.S. adults visited social networking sites in 2009, double the number of users reported in 2007. As more adults become engaged with social networking sites such as Facebook and Twitter, property management companies and associations are increasing their presence in an effort to be where their members are. These communities are discovering that Facebook, in particular, is especially adept at conveying information and building community. They are able to have a conversation with members, especially the younger ones, more effectively than with Web sites, email, and traditional newsletters.

While the use of social media may be a valuable communication tool for an association, it also creates new liability risks for associations. It's important to know not only how to choose which social media platform is right for your community, but also how your community can minimize its exposure to liability when using social media.

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BEST PRACTICES

How to Identify and Handle Board Member Conflicts of Interest

Association boards are filled with people from all walks of life. And although the volunteer position offers no financial compensation, board members have considerable responsibilities. They are basically in charge of running a "business" with all the same attention paid to revenues, expenses, and assets. On top of carrying out the association's administrative duties, board members have to be concerned with exposing themselves to one of the perils of their position—the potential for conflicts of interest.

Avoiding conflicts of interest—or even the appearance of them—is important for a board because nothing undermines a community's faith in the board leadership faster than impropriety and self-dealing among the board members and management team. Conflicts of interest can be hard to avoid completely, but how they are handled is of the utmost importance.

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Social Media (continued from p. 1)

Which Platform Is Right for Your Community?

Facebook, Twitter, LinkedIn, MySpace, blogs, YouTube, Flickr… what's the best platform to start with? "The best tool to use is the one where your audience is," says social media consultant Charity Hisle. "When you're building your social media strategy, you first have to figure out whom you want to talk to. If you want to talk to members, that's great, but now you have to find out where they're talking. Nine times out of 10, it's Facebook. But it's important to poll your members frequently—otherwise you're shooting in the dark."

Once you determine which platform the majority of your members use, don't just jump in; be a spectator for a while. "Watch how they use those spaces to learn how you can fit into their culture," Hisle says.

If you decide that Facebook is the best social platform for your needs, research the process for setting up your page and using the proper Facebook tools. For instance, a common mistake is creating a *personal* profile page for a company or organization. Be sure to create pages that are designed for organizations and businesses—it will offer you many more functions and research capabilities than a personal profile or group. Tools for Facebook fan pages allow you to monitor activity, such as which articles or photos get the most hits, which videos are viewed most often, and how many fans are gained or lost.

Social Media Access and Disclaimers

Chicago attorney Damon Dunn advises you to "carefully monitor your social media venues." Social media risk exposures are no more severe than the risks arising from the association's Web site or newsletter. However, the risks are magnified on social networking sites because of the audience potential. Statements made on sites such as Facebook or Twitter can be instantly multiplied, forwarded, or "retweeted," increasing both the audience and the association's potential for liability.

Community associations that establish a social media site can protect themselves to a certain degree by strictly controlling access and use. For example, Facebook's privacy controls can effectively make an association's page "read only." The controls can allow only members or the appropriate "friends" to read information posted on the site. It can also allow only board members or those they designate to post content.

However, fans of social networking view the ability to engage in conversation as one of the primary appeals of these platforms. Taking advantage of social media requires interaction. If you choose to open up your social media site, and if you get negative comments on your fan page, you can turn them around by responding in a positive manner.

However, you can't turn an obscene or profane post into a positive one, says Hisle. She recommends including a disclaimer in the information section that states that the fan page administrator has

the right to remove posts that are obscene, include profanity, or attack or harass other fans. "If someone posts an obscene comment, we take a screen shot of it, remove it, block the fan, and then post an apology and a reminder that we want to keep the page PG," she explains.

Associations that want to take advantage of social media's open forum features and allow members to post comments on a Facebook page, should also include in the disclaimer a statement saying that the goal is to encourage an open exchange of information, but that the views expressed do not represent the official position of the association.

Establish Social Media Principles

Even with the disclaimers, the worries for an association are defamation and disparagement, where someone writes bad and untrue things about another person, or invasion of privacy. Invasions of privacy can include using someone's photo without his permission or a waiver. Another risk could be copyright infringement. These exposures existed before social media, but now with social media your association's reach is broader and quicker—and things can go "viral."

Therefore, before allowing anyone to speak or post on the association's behalf, an association should be mindful of these points:

Don't be impulsive. Media companies engage in fact checking and prepublication review, and so should you, says Dunn. Also, social media or other online forums should never be used to accuse anyone of anything. There are more appropriate forums, such as board meetings, to deal with any accusations.

Avoid disclosing confidential information. "Because of the viral nature of these sites, preventing the spread of confidential information is very difficult once it reaches the Web, particularly if it goes viral due to public interest," says Dunn. In addition, disclosure of confidential information on social media sites could give rise to a possible waiver of attorney-client and work product privileges, he adds.

Consider getting liability insurance. Before establishing a social media presence, discuss your coverage with your association's insurance agent. Most directors and officers (D&O) liability policies specifically exclude coverage for defamation and emotional distress or mental anguish, which is often part of claims involving social media.

If the association's D&O policy covers defamation and does not specifically exclude social networking, then the coverage would apply to your community's social networking activities. But as noted earlier, defamation is not the only liability risk related to social media.

Insider Sources

Damon Dunn, Esq.: Member, Funkhouser Vegosen Liebman & Dunn Ltd., 55 W. Monroe St., Ste. 2300; Chicago, Il 60603.

Charity Hisle: Chief Executive Officer, Socially Engaged Marketing, LLC; *www.sociallyengagedmarketing.com.*

www.communityassociationinsider.com

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IN THE NEWS

FHA Issues Waiver on Leasing Restrictions

Many associations have struggled with Federal Housing Administration (FHA) restrictions related to rentals within a community. Associations often seek FHA approval so that units for sale, whether through foreclosure or otherwise, may be sold to individuals who have obtained FHA financing.

But to qualify for FHA financing, an association needs to have FHA approval, and the FHA guidelines historically have prevented associations from qualifying if they had any rental restrictions in place. The local Housing Opportunities Commission offices across the country have been denying condominium association approvals because of a determination that all types of leasing provisions violate Section 203.41(a)(3), which prohibits "legal restrictions on conveyances."

Especially recently, this requirement has created tension with another FHA requirement, that the association be at least 50 percent owner occupied. In fact, other loan guarantee agencies have their own owner-occupancy requirements that might not be satisfied if an association doesn't at least limit the percentage of units that may be rented.

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In the News (continued from p. 3)

On March 18, 2011, David H. Steven, Assistant Secretary for Housing—Federal Housing Commissioner, issued a waiver that clears up some of the confusion related to leasing restrictions in condominium communities. The waiver provides greater flexibility on those leasing restrictions. The waiver in its current form has a one-year term. However, the waiver provides a welcome relief for many associations that are currently struggling with the FHA requirements and yet believe that placing a cap on the number or percentage of units that may be rented is also important for preserving the association's property values and resale potential.

The waiver acknowledges that it's common for condominium declarations to contain restrictions on leasing in order to improve the marketability and stability of the entire condominium project. Therefore, the FHA will be waiving Section 203.41(a)(3) as it relates to certain leasing provisions for one year. According to the waiver, the following provisions will no longer be grounds for rejection for the next year at least:

- A requirement that all leases must be in writing and be subject to the declaration and bylaws;
- A requirement that the association receive a copy of subleases or rental agreements;
- A requirement that the association receive the names of all tenants;
- A requirement that the association approve prospective tenants;
- A prohibition against leases for an initial term of less than 30 days;
- A requirement that leases cannot exceed a maximum lease term (such as six months, 12 months, etc.);
- A limit imposed by the association on the total number of rental units allowed, provided the percentage of rentals doesn't exceed the current FHA owner-occupancy requirement of 50 percent owner-occupied units.

If your community has previously been rejected by the FHA or has been holding off on a submission, now may be the time to reapply or move forward with a necessary amendment to your documents to meet the waiver provisions. The waiver will be effective until March 18, 2012.

RECENT COURT RULINGS

➤ Developer and Housing Authority Can Sue Association to Invalidate Leasing Restriction

Facts: The Chicago Housing Authority (CHA) and a community's developer filed a lawsuit against the master association and its board of directors for leasing restrictions the association adopted. The community consists of single-family homes, townhomes, and two-flat condominium buildings.

In late 2009, the CHA began negotiations to purchase eight townhomes and one two-flat building. The CHA then planned to lease these units as low- and moderate-income housing. In July 2010, the CHA and the developer executed a purchase and sale agreement for these units, conditioned on the CHA's ability to lease the units. In September 2010, the board recorded a leasing restriction amendment to the governing documents that provides that: "Except as otherwise provided herein, no residential units may be leased. All members who own a residential unit as of the effective date of this Amendment shall have the right to lease the member's unit."

The board asked the court to dismiss the lawsuit because, it argued, the CHA does not have standing to sue. The CHA doesn't own any units, so the board believed the CHA couldn't be injured by the leasing restriction. Similarly, the developer isn't injured because it's not prohibited from leasing the units it owns as the restriction doesn't apply to those owning property on the date of the amendment's enactment.

Ruling: An Illinois district court ruled that the CHA could sue the association.

Reasoning: The court pointed out that the CHA and the developer have entered into a contract for the sale and purchase of certain units in the community. The leasing restrictions effectively killed this deal because the contract was expressly conditioned on the ability to lease the units. Also, the developer and the CHA allege that the adoption of the leasing restriction was racially motivated. And such allegations of racially motivated interference in the sale of residential real estate have been found to establish an injury in fact to organizations similarly situated to the CHA and the developer. As a result, the CHA and the developer can pursue the lawsuit.

- Chicago Housing Authority v. Board of Directors of Enclave at Galewood, March 2011

➤ Signed Agreement Released Association and Contractor from Liability

Facts: A member's condominium was substantially damaged by a fire. The governing documents required the member to appoint the association as attorney-in-fact to interact with the insurer regarding the coverage of the fire damage. A contractor was subsequently engaged to perform the necessary repairs. And the association was to oversee the contractor to ensure that the work was completed.

Following the contractor's work on the unit, the member was dissatisfied with the quality and extent of the repairs. The member consulted with another building contractor to evaluate the work that was done, and the new contractor prepared a list of additional repairs that he believed were still necessary.

All the parties then met to discuss the member's complaints, and a signed agreement was reached. According to the agreement, the member is to be paid in full when she receives her check from the insurer, and the contractor owes no money to the member. Also, the contractor agreed to finish a specified list of items.

The member sued the association, insurer, and contractor for the work that was never completed initially. She also complained that the additional improvements were not completed in a substantially workmanlike manner. A trial court ruled against the member. The member appealed.

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

Reasoning: The signed agreement clearly stated that the contractor does not owe the member any funds and that it is only responsible for conducting a very limited number of repairs. Although the member complained that the additional repairs were not properly completed, this was not the basis of the lawsuit. She sought damages for alleged failure to complete all the necessary repairs that were detailed in the original extensive list.

■ Boyd v. Hunter Pointe Condominium Assoc., February 2011

Best Practices (continued from p. 1)

What Is a Conflict of Interest?

In legal terms, conflict of interest "is a term used to describe the situation in which a public official or fiduciary who, contrary to his obligation and absolute duty to act for the benefit of the public or a designated individual, exploits the relationship for personal benefit—typically pecuniary," says New Jersey attorney David Byrne. He goes on to explain that "a member of an association board is a 'fiduciary.'"

In other words, board members must always make decisions based on what's best for the association as a whole, says New York attorney David L. Berkey. They may not place their own interests, or those of their friends and supporters, above those of the other members, he adds. In simplest terms, this means that they must place the interests of their community above all other interests, including their own.

Conflicts commonly occur when a board member is negotiating for himself at the same time he is negotiating for the board. Many conflicts of interest begin innocently enough. They can start as favors to friends or family members that, rightly or wrongly, are perceived as special treatment. For example, a relative may have started his own landscaping business and he may have asked a related board member to send business his way. While it may not seem like a huge deal, this sort of behavior can stink of impropriety to members in the community.

"I have seen board members related to owners or principals of vendors or professionals servicing that association, or trying to service the association," says Byrne. Or the board president himself might be the one in the landscaping business.

This was the case recently, when a former board member of a homeowners association in Henderson, Nev., whose landscaping company performed work for the association he represented while he sat on the board, was disciplined by the state's board that regulates homeowners associations.

According to the complaint against the former board member, while the member served on the board of directors, the board hired his landscaping company to maintain the community's park and common areas. Apparently, he failed to disclose his conflict of interest when he ran for reelection to the board.

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Best Practices

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Conflicts are not always about vendors, contracts, and bids. Any board member is also a homeowner or member, and as any board member knows, members sometimes have conflicts with the board. A board member acting as an individual member may sue the board, or a board member may be delinquent in maintenance payments, assessments, or other fees, so that the board must take action against him. In these cases, the inherent responsibilities of the board member and unit owner are in direct conflict with each other.

Dealing with Conflicts of Interest

The surest way to deal with conflicts of interest is to not let them happen in the first place. "A board member essentially should never take a position adverse to the legal rights of his association, if that position will benefit him," says Byrne. "There are exceptions to that, but that's the general rule."

But there are occasions when what might initially appear to be a conflict of interest might be good business. A board member with his connection may be able to procure superior services at a lower price.

If this is the case, transparency is the key. The board member must first disclose the conflict as a potential conflict of interest. After the details of the financial relationship between the association and the conflicted board member are disclosed to the board, a majority of the disinterested board members may then vote in good faith to accept the contract. In any scenario, however, the contract must be fair to the association.

To further avoid controversy, the board may wish to disclose all the details and carefully document the disclosure in the minutes. If the transaction is later questioned, the board can refer members back to the minutes and show that the conflict was fully disclosed, and that the board acted properly.

Allowing all the members to vote on the conflicted transaction may be an even better way to avoid a question of impropriety, but gaining member approval may be too time consuming and expensive to be practical. The alternative is for the board to disclose the details to the members and then approve the contract by a vote of a majority of the disinterested board members at a board meeting.

Also, for propriety's sake, board discussions regarding a contract or transaction involving an interested director are more likely to be candid and complete if the interested director does not participate in the deliberations. Individual board members with reservations or concerns about the contract or transaction may not feel free to express them in the presence of the interested director, even though it would be a breach of their fiduciary duty not to do so.

Adopt Written Conflict of Interest Policy

Regardless of the method a board chooses to resolve conflicts of interest, it's always best to have a written policy in place before a conflict arises. To help your association navigate these issues, you can refer to our Model Policy: Adopt Written Policy on Board Member Conflicts of Interest. When drafting your policy, your board will want to consider the following questions:

- Are board member conflicts of interest allowed?
- If allowed, how will the conflict of interest be resolved?
- If the board is voting to approve the contract, will the conflicted board member abstain from voting or will his vote simply not count toward the majority?
- When the board is discussing whether the contract should be adopted after the conflict has been disclosed, will the conflicted board member participate in the discussion? Will he be available to answer questions about the conflict or the contract? Will he leave the meeting during the discussion and vote?

Insider Sources

David L. Berkey, Esq.: Partner, Gallet Dreyer & Berkey, LLP, 845 Third Ave., 8th fl., New York, NY 10022; *www.gdblaw.com*.

David J. Byrne, Esq.: Shareholder, Stark & Stark, 993 Lenox Dr., Lawrenceville, NJ 08648; *www.stark-stark.com*.

Gun Ban Plan (continued from p. 1)

nail guns, because these devices discharge projectiles by means of compressed air or springs.

They also pointed out that the proper procedure to implement a change to the governing documents had not been followed. Under the bylaws, proper procedure for amending the governing documents calls for the association's Revision Committee to first consider a proposal to revise the documents, then recommend items for change to the board only if the committee finds the suggested change appropriate.

MODEL POLICY

Adopt Written Policy on Board Member Conflicts of Interest

Here's a Model Policy that your association can follow to ensure proper disclosure and voting procedures when a board member has a conflict of interest. Review the policy with your attorney and decide which procedural approaches work best for your association.

BOARD MEMBER CONFLICTS OF INTEREST

The purpose of this document is to define the procedure to be followed when a Board Member has a conflict of interest, to ensure proper disclosure of the conflict and voting procedures and to adopt a code of ethics for Directors.

The Sunny Hills Homeowners Association (HOA) hereby adopts the following Policy as follows:

- The Board of Directors shall use its best efforts at all times to make decisions that are consistent with high principles, and to protect and enhance the value of properties of the members and Association. All Board Members shall exercise their power and duties in good faith and in the best interest of, and loyalty to, the Association. All Board Members shall comply with all lawful provisions of the Declaration and the Association's Articles, Bylaws, and Rules and Regulations.
- A conflict of interest exists whenever any contract, decision, or other action taken by or on behalf of the Board would financially benefit: a Board Member, a Board Member's relative, or an entity in which a Board Member has a personal financial interest.
- Board Members shall not enter into any contract or financial transaction with the Association. Other conflicts of interest, as defined above, shall be orally disclosed to the other Board Members in open session at the first open meeting of the Board of Directors at which the interested Board Member is present prior to any discussion or vote on the matter. After disclosure, the interested Board Member may participate in the discussion, but shall not vote on the matter.
- The minutes of the meeting shall reflect the disclosure made, the abstention from voting, and the composition of the quorum, and record who voted for and against.

CODE OF ETHICS

In addition to the above, each Director and the Board as a whole shall adhere to the following:

1. No contributions will be made to any political parties or political candidates by the Association.
2. No Board Member shall solicit or accept, directly or indirectly, any gifts, gratuity, favor, entertainment, loan, or any other thing of monetary value from a person who is seeking to obtain contractual or other business or financial relations with the Association.
3. No Board Member shall accept a gift or favor made with the intent of influencing a decision or action on any official matter.
4. No Board Member shall receive any compensation from the Association for acting as a volunteer.
5. No Board Member shall willingly misrepresent facts to the members of the community for the sole purpose of advancing a personal cause or influencing the community to place pressure on the Board to advance a personal cause.
6. No Board Member shall interfere with a contractor engaged by the Association while a contract is in progress. All communications with Association contractors shall go through the Board President or be in accordance with policy.
7. No Board Member shall harass, threaten, or attempt through any means to control or instill fear in any member, Board Member, or agent of the Association.
8. No promise of anything not approved by the Board as a whole can be made by any Board Member to any subcontractor, supplier, or contractor during negotiations.
9. Any Board Member convicted of a felony shall voluntarily resign from his or her position.
10. No Board Member shall knowingly misrepresent any facts to anyone involved in anything with the community that would benefit himself or herself in any way.

Any contract entered into in violation of this policy shall be void and unenforceable. In such event, the Board, at the next meeting of the Board, shall vote again on the contract, decision, or other action taken in violation of this Policy.

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