

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

JUNE 2011

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## Board Changes Bylaws to Crack Down on Delinquent Owner

The high-profile owner of a collection of penthouses in a luxury condominium building in New York City's SoHo neighborhood has created a controversy with his refusal to pay nearly \$40,000 in common area maintenance (CAM) charges the condo board claims he owes.

The celebrity photographer, Ken Nahoum, and his supermodel companion, Basia Milewicz, are being sued by the condo board, which has been forced to raise charges for other members to compensate for the late payments. Because the couple owns one-fifth of the building's interest, the arrears are substantial, said board president Jesse Newhouse.

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## FEATURE

## Resolve Internal Conflicts with Alternative Dispute Resolution

From time to time, there will be internal conflicts within your community. When there's a dispute between or among members, or between members and the association or its directors, the board will have to determine the best strategy for a resolution.

There are two strategies to consider: alternative dispute resolution (ADR) and litigation. To address issues that don't truly require a trip to court, ADR can save unnecessary legal costs—and any goodwill that exists among members and directors. If the association's governing documents don't already allow for ADR, consider recommending that the board adopt an amendment that will either mandate the use of ADR or give the association the option to use it.

### Benefits of ADR

Litigation is the most expensive and time-consuming strategy for resolving disputes, and offers little control over the issues because they're decided by a third party, the judge. Compared to litigation, ADR is less expensive and has several other benefits. ADR preserves

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## REPAIRS & MAINTENANCE

## Beat the Heat with Air Conditioning System Inspections

One sure way you can beat the heat this summer is to be certain that your community's central air conditioning system or members' individual units are ready to go before the temperatures peak. Malfunctioning systems are likely to waste energy and money—and they'll certainly lead to member complaints. What's more, some health conditions can be aggravated by excessive heat, and you could put the association in a position of liability if failure to maintain the air conditioning system compromises a member's health.

### Follow Inspection Fundamentals

The number-one tip for air conditioning maintenance is regular inspections, says Paul Crosby, director of Maintenance and Safety

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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 12**

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**Alternative Dispute Resolution** (continued from p. 1)

ongoing relationships by offering creative resolutions tailored to particular disputes. A judge's decision may not foster diplomacy when both sides still are unhappy with the outcome.

"When you're in a dispute with a contractor, you typically don't have to see him again. But you'll have to see disgruntled members or directors frequently, which could be awkward and unpleasant," says New Jersey attorney David J. Byrne.

ADR also protects privacy. Court documents from a lawsuit become public record; arbitration and mediation proceedings don't.

When a dispute arises, check your association's governing documents to see whether they contain ADR provisions that either require a dispute to go to ADR before a lawsuit can be filed or give the association the option to use ADR. If ADR is either mandated or an option, one of two forms—mediation or arbitration—is generally specified. Depending on the types of disputes that most often arise in your community, one form may be more appropriate than the other.

**Mediation.** Mediation works well for a "slam-dunk" violation—that is, the objective violation of a rule, such as keeping unauthorized pets, using freight elevators, or making excessive noise. A mediator would facilitate a discussion that diffuses hostilities between the parties, allowing them to reach a resolution about how they will handle the situation. Mediation is also used for ongoing disputes that the parties can resolve by talking out the issues and coming to a mutual agreement. Unlike judges and arbitrators, however, mediators don't resolve disputes themselves.

"Mediation is less adversarial than arbitration where, because a third party makes the decision, there is a 'winner' and 'loser,'" says Byrne.

The four steps required for the mediation process also lead to quicker settlements than arbitration and litigation. When you want to resolve a dispute in your community via mediation, you must first contact a mediation service. Private companies, public and government agencies like county mediation commissions, neighborhood groups, and community association trade organizations (including chapters of the Community Association Institute) offer mediation services, says Byrne. The service will notify the parties in the dispute

**Delinquent Owner** (continued from p. 1)

The situation led the board to change its bylaws in February to prevent anyone who is more than 60 days late on CAM payments from using the elevator, and to give it the authority to remove the names of delinquent owners from the building's intercom. In court papers, Nahoum denied that he's in arrears. Despite the lawsuit and discord with other owners, Nahoum recently expressed interest in running for the board, said Newhouse.

about your request and they'll be asked to agree, in writing, to use that particular mediation service. However, if one or both parties refuse to sign that agreement, you'll have to find another mediation service.

Next, the parties will typically select the mediator based on a list the mediation service supplies. The mediation will probably be scheduled a few weeks after the request is submitted, at a mutually convenient time. You and one or more of the association's directors are likely to attend the mediation. The association may also ask its attorney to attend. The mediator, the parties involved, and you will meet in the same room where the mediator will ask each side to make opening statements outlining the issues in dispute.

If the parties are able to settle the dispute, they must follow through with any agreed-upon actions. For example, if the settlement involves amending an existing board resolution, the board must pass the necessary amendment. A mediated settlement isn't automatically legally binding, notes Byrne. But the parties can choose to make their settlement binding by signing a settlement agreement. Then, if one of the parties doesn't comply with the settlement agreement, the other party can sue to have it enforced, he explains.

If the parties can't resolve the dispute, either can walk away. "Even without a resolution, you may have benefited from the mediation—you may be closer to a resolution, which could make a future arbitration or lawsuit easier to resolve," says Byrne.

If the mediation didn't adequately resolve the dispute, either party can use arbitration or file a

lawsuit. Keep in mind that nothing said at the mediation can be used in that lawsuit or arbitration.

**Arbitration.** Arbitration works well for subjective "he said-she said" disputes, where both parties still are arguing about whether there has been a violation, or issues related to a confirmed or alleged violation. While the mediator acts as an interpreter and communicator, the arbitrator (or panel of arbitrators) makes a decision after weighing the merits of both sides of the dispute.

To be successful, mediation requires the parties to cooperate, be open-minded, and engage in good-faith discussions, but it may be pointless if either side is opposed to it. That's why arbitration can be more effective than mediation if there is considerable party resistance.

In some cases, if arbitration doesn't produce results, litigation ensues. However, an unsuccessful arbitration isn't necessarily a waste of time and money. It can help by narrowing the scope of the issues to be addressed in the lawsuit, ultimately saving the association time and money.

### Add ADR Provision to Governing Documents

What if your association's governing documents don't contain an ADR provision? If you believe your association could save a good deal of money—and goodwill—by submitting internal disputes to ADR before turning to litigation, recommend that the board amend the governing documents. Explain the benefits of mediation and arbitration, and let the board decide which option might better suit the association's needs.

Then, to make mediation or arbitration of a dispute compulsory, ask your association's attorney about adapting a clause like this one—depending on which method the board decides to use—and adding it to the governing documents:

#### Model Language

- a. At the request of any party, any dispute concerning or involving one or more unit owners and the association, its board, managing agent, or one or more other unit owners relating to the interpretation, application, or enforcement of the association's declaration, bylaws, or house rules, adopted in accordance with its bylaws, shall be submitted to [insert ADR method, e.g., arbitration or mediation].
- b. The parties agree to participate in [insert ADR method, e.g., arbitration or mediation] in accordance with the procedures of United States Arbitration & Mediation.
- c. The [insert ADR method, e.g., arbitration or mediation] shall be administered by [insert chosen ADR service, e.g., Washington Arbitration and Mediation Service].
- d. Nothing in subsection (a) shall be interpreted to mandate the [insert ADR method, e.g., arbitration or mediation] of any dispute involving: [insert disputes exempt from arbitration, e.g., personal injury claims; the real estate commission; the general contractor for the project].

#### Insider Source

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**Search Our Web Site by Key Words:** alternative dispute resolution; mediation; arbitration; resolving conflicts

## Repairs & Maintenance

(continued from p. 1)

for Indiana-based Gene B. Glick Company, which manages more than 18,000 residential units in 10 states. That way, Crosby says, you can spot common problems and deal with them before they become bigger problems.

**Central A/C systems.** You should conduct both visual and physical inspections of your central air conditioning system. Spring is a good time to do your inspections. Be sure your staff is well trained and follows safety procedures. Crosby recommends hiring an outside service company to do the yearly maintenance on a cooling tower system if no one on your staff has advanced training in servicing this type of equipment.

Here are tips for inspecting central air conditioning systems with cooling towers:

- Grease the motor bearings, the parts that make the pumps and motors turn, and check them for wear and tear. A good rule of thumb is to check the bearings at least twice a year.
- Tighten electrical connections. Loose connections will cause a voltage drop, which will make the motors and relays run at a hotter temperature and reduce the life expectancy of your equipment.
- Grease pump bearings and check that they're operating smoothly.
- Drain and clean the cooling tower. Clean the inside and outside of the cooling tower using a pressurized hose.
- Check the fan belt in the cooling tower. Make any necessary adjustments and replace the fan belt if it shows wear and tear.

- Check and replace filters. Checking filters monthly is a good practice.

- Clean evaporator coils. Make sure the coils are free of algae, dirt, bird droppings, and any other substances that may have accumulated over the winter months.

- Clean drain pans. Clear out any debris and standing water that may have accumulated.

- Check thermostat calibrations. If controls are out of calibration, your air conditioning system could run inefficiently, remaining on too long and overcooling.

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**PRACTICAL POINTER:** "Now more than ever it's critical to maintain existing equipment," Crosby says. "Several years ago legislation was passed outlawing the manufacture of R-22 equipment. That often means that the rest of a split-system HVAC is incompatible with the 410a equipment that took the place of R-22. So where you could once replace the condensing unit if the coil went bad, now you'll probably need to replace evaporators, line sets, etc., in addition to the condensing unit. Neglecting equipment hastens the date when you'll face that dilemma."

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**Individual units.** If you're responsible for maintaining members' individual condensing units, you should inspect the outdoor and indoor portions of them. Here are some tips for doing so:

### Outdoor inspection:

- Visually inspect the outdoor portion of the individual unit. You can discover the majority of common air conditioning unit problems with a simple visual inspection. Check for leaves, bugs, bird nests, and any other accumulation from winter.

- Test the electrical connections to the condenser compressor and evaporator to be sure they

aren't loose. Also check supply and return ducts for damage.

- Clean debris from the condensers.

- Clear condensate drains. Over the winter, moisture that remained in the drains may have dried up and formed clogs. Clogs would prevent condensate water from flowing into the drain, creating the potential for water to back up out of the drain pan and flood the member's unit.

- Clean outside condensing coils. Use a coil cleaner and rinse thoroughly.

### Indoor inspection:

- Change filters. Do this every spring, even if the filter doesn't look dirty.

- Clean each unit's coils. A self-rinsing coil cleaner should take care of minor dirt buildup. For heavy buildup, conduct a more thorough cleaning.

- Insert sludge tabs in condensate pans. Sludge tabs help melt the sludge and buildup that can accumulate in condensate pans over the winter.

- Test the unit. If you discover a problem, repair or replace the unit as quickly as possible to avoid cooling problems and high electric bills.

### Common Problems

Over the course of many air conditioning system inspections, Crosby sees a few problems time and again. "A common problem is clogged condensate lines," he says. "This problem can result in emergency calls not only because the member came home to a hot condo, but also because the condensation couldn't drain properly and spilled out on the carpet."

(continued on p. 6)

**MODEL FORM**

**Use Checklists When Inspecting Air Conditioning System**

Here are checklists that your maintenance staff can use to inspect and record the condition of your community's air conditioning system before summer temperatures peak. The first checklist is for communities that use systems that work off central chillers with cooling towers; the other is for communities that use individual condens-

ing units and are responsible for maintaining them. Your maintenance workers should check off each box after they've completed each task and record what corrective measures were taken or still need to be taken to correct any problems. Completed checklists should be filed in the management office.

**AIR CONDITIONING INSPECTION CHECKLIST: CENTRAL COOLING SYSTEMS**

COMMUNITY NAME \_\_\_\_\_

ADDRESS \_\_\_\_\_

STAFF MEMBER(S) CONDUCTING INSPECTION \_\_\_\_\_ DATE \_\_\_\_\_

**INSTRUCTIONS:** Check the appropriate box for each air conditioning component after completion of the step. Use the Comments column to record whether a problem was found and, if so, its location, a brief description of the problem, and what corrective measures were or need to be taken.

A/C SYSTEM COMPONENT	COMMENTS
<input type="checkbox"/> Grease Motor Bearings	
<input type="checkbox"/> Tighten Electrical Connections	
<input type="checkbox"/> Grease Pump Bearings	
<input type="checkbox"/> Drain And Clean Cooling Tower	
<input type="checkbox"/> Check Cooling Tower Fan Belt; Replace If Needed	
<input type="checkbox"/> Replace All Filters	
<input type="checkbox"/> Clean Evaporator Coils	
<input type="checkbox"/> Clean Drain Pans	
<input type="checkbox"/> Check Thermostat Calibration	
<input type="checkbox"/> Other	

**AIR CONDITIONING INSPECTION CHECKLIST: INDIVIDUAL UNIT**

COMMUNITY NAME \_\_\_\_\_ UNIT # \_\_\_\_\_

STAFF MEMBER(S) CONDUCTING INSPECTION \_\_\_\_\_ DATE \_\_\_\_\_

**INSTRUCTIONS:** Check the appropriate box for each air conditioning unit after completion of the step. Use the Comments column to record whether a problem was found and, if so, its location, a brief description of the problem, and what corrective measures were or need to be taken.

OUTDOOR MAINTENANCE		INDOOR MAINTENANCE	
A/C COMPONENT	COMMENTS	A/C COMPONENT	COMMENTS
<input type="checkbox"/> Conduct Visual Inspection		<input type="checkbox"/> Change Filters	
<input type="checkbox"/> Clean Debris from Condensers		<input type="checkbox"/> Clean Coils in Each Unit	
<input type="checkbox"/> Clean Condensate Drains		<input type="checkbox"/> Insert Sludge Tabs in Condensate Pans	
<input type="checkbox"/> Clean Outside Condensing Coils		<input type="checkbox"/> Ask Member to Test Operation of Unit	
<input type="checkbox"/> Other		<input type="checkbox"/> Other	

## Repairs & Maintenance

(continued from p. 4)

Look for furniture blocking return air ducts. This will reduce efficiency considerably.”

Crosby also advises careful attention to coils. “Outside coils should be cleaned at least every spring,” he recommends. “In

regions where trees, particularly cottonwoods, shed cotton-like fibers, you may need to do so more often. Anything that can restrict the air flow through the coil can overheat the compressor, thereby reducing efficiency and life span. Filters should be replaced a minimum of four times per year.”

### Insider Source

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**Search Our Web Site by Key Words:** air conditioning; HVAC; maintenance

## RECENT COURT RULINGS

### ► State Law Unconstitutionally Impaired Association's Governing Documents

**Facts:** Organized in 1986, a Florida community is a mixed-use condominium with 810 residential units, 259 commercial units, and 141 retail units. The community's governing documents provide for a seven-member board of directors governing the association, with two members each elected by the residential unit members, the commercial unit members, and the retail unit members, and the seventh member elected-at-large.

In 1995, the Florida State Legislature enacted laws regulating mixed-use condominiums. According to the laws, in mixed-use condominiums with 50 percent or greater residential composition, the residential unit members must be entitled to vote for a majority of seats on the board of directors. In 2007, the legislature amended the laws to make it retroactive.

A residential member at the condominium then requested that the association change its voting system accordingly. The association then asked the court to declare that the retroactive application of the law was an unconstitutional impairment of contract as applied to the association. The trial court granted the association's request, ruling that the retroactivity provision was unconstitutional under the state's constitution, which prohibits the enactment of any law “impairing the obligation of contracts.” An appeals court agreed with the lower court's decision. The member appealed.

**Ruling:** The Florida Supreme Court agreed with the lower courts' decisions.

**Reasoning:** In Florida, a condominium community is established by recording a declaration of condomin-

ium, which is the document that governs the condominium and is binding on all members. A declaration operates as a contract among members and the association, spelling out mutual rights and obligations of everyone involved.

Here, the association's declaration establishes that the retail and commercial unit owners, collectively, shall have majority vote control over the board of directors. Therefore, by changing the distribution of voting power, the retroactive application of the state law pertaining to mixed-use condominiums would alter the rights of the association's members in violation of their contractual agreement.

■ Cohn v. The Grand Condominium Assoc., March 2011

### ► Association Awarded Attorney's Fees for Frivolous Discrimination Claim

**Facts:** An African-American couple bought a condominium in 2004 as a rental property investment. When the bylaws were amended in 2007, the couple sued the association and its individual board members, alleging housing discrimination. The couple claimed that the association's new leasing restrictions had a negative impact on the availability of rental housing for minorities and other protected classes in the area. The couple also claimed that the restrictions unreasonably interfered with their tenant's lease and with their own reasonable expectation to receive rental income.

After a three-day hearing, the court denied the couple's request for an injunction against the association because there was no evidence of discrimination or discriminatory intent. The association then asked the court to award it attorney's fees and costs as prevailing parties in the lawsuit under the Federal Rules

of Civil Procedure and the Fair Housing Act. The association believed that it was entitled to the award of fees and costs as a sanction for having to mount a defense against groundless discrimination claims.

**Ruling:** An Indiana district court granted the association's request for attorney's fees and costs.

**Reasoning:** The dismissal with prejudice of the couple's federal and state housing discrimination claims is a final judgment in the association's favor, and it makes the association the prevailing party in the lawsuit. And the Fair Housing Act provides that "a court, in its discretion, may allow the prevailing party a reasonable attorney's fee and costs."

Here, the court found that the couples' claims were frivolous and unreasonable. They sued on the theory that by selectively excluding renters, the bylaws had a greater impact on minorities. This theory was based on a case involving similar issues. But the Indiana Supreme Court overturned that decision before the couple filed their complaint, yet they continued to rely on the overturned decision, arguing that the lower court's reasoning was stronger. Considering that the couple are attorneys, the court found that they should have known that the opinion of the state's highest court would be controlling.

■ Clark v. Oakhill Condominium Assoc., March 2011

## Q & A

### *Determining Whether a Requested Accommodation Is Necessary*

**Q** A disabled member asked the board to allow his car to be permanently parked in a guest parking space as a reasonable accommodation, after the board asked him to remove the car. The car has not been moved in two years. It has an expired inspection sticker and is, therefore, inoperable. Under the reasonable accommodation provisions of the Fair Housing Act (FHA), are we required to grant him this request?

**A** The FHA bans housing discrimination based on disability, so it is unlawful to exclude or otherwise discriminate against applicants and residents because of their disability—or the disability of anyone associated with them. The FHA also imposes additional responsibilities on associations to, among other things, make reasonable accommodations to rules, policies, practices, or services, when necessary to afford a person with a disability an equal opportunity to use and enjoy his or her housing.

In essence, the reasonable accommodation provisions require communities to make exceptions to their general rules for individuals with disabilities under certain circumstances. Only individuals who qualify under the FHA's definition of "disability" are entitled to a reasonable accommodation. Under the FHA, a disability generally means a physical or mental impairment that substantially limits one or more major life activities.

In addition, a reasonable accommodation must be necessary—one that allows an individual with a

disability an equal opportunity to enjoy the housing. To determine whether a requested accommodation is necessary, there must be an identifiable connection between the requested accommodation and the individual's disability. Here, the connection between the member's disability and the need for the requested accommodation is not clear.

A recently decided case from the federal court in New Jersey is directly on point. A member sued his condo association for rejecting his request to leave his car in a guest parking spot as a reasonable accommodation for his disability. According to the community, the car was inoperable. Allegedly, the condo association informed him that he was violating its rules and threatened to have the car towed. Although the resident asked to keep the car where it was, the condo association rejected the request. The car was towed and later crushed by the towing company.

The court ruled that the resident failed to prove his requested accommodation was necessary because there was no direct linkage between the requested accommodation and his disability. Although he was disabled, the resident couldn't prove that granting him the right to store an inoperable car in a certain space for a long period afforded him an equal opportunity to use and enjoy his housing [Coe v. Society Hill at Piscataway Condo Association, April 2010].

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