Community Association Management *Insider*®

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INSIDE THIS ISSUE

Age-Restriction Rules Challenge Set for Trial

A member of Bayside Estates, an age-restricted community in south Fort Myers, Fla., won't give up his right to let family, friends, and employees younger than 55 years old stay at his house. The community's homeowners association is just as determined to clamp down on the 76-year-old homeowner. In a letter to the member in 2008, the then-association president wrote that without rules there is "anarchy and disorder."

A year later, the association filed lawsuits against the member and his ex-wife, who also owns a house in Bayside and has similar issues with the association. Mediation failed and the two sides remain locked in the bitter dispute. Each side has racked up almost $80,000 in legal fees. Both members let their children and grandchildren stay in Bayside when they visit Southwest Florida, and they sometimes let their employees go there for a free vacation as a reward. They've been fined $1,000 apiece, but

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FEATURE

Clearly Define Rights and Terms in "View Protection" Bylaw

If the community you manage is located in a scenic area, like near a beach or lake, or in a city with a famous skyline like New York, Boston, or Seattle, the view that owners enjoy from their units might be very important to them. Owners often buy their particular units because of the views and are dismayed if they're obscured by structures or foliage added later. Owners who have paid for a specific view that they can no longer enjoy or that previously made their unit more valuable and unique than others, making resale easier, could sue the association.

That's why, if your association doesn't already have one, it should consider passing a view protection bylaw that prohibits owners from building or planting anything that would block other owners' views. To pass and implement a successful view protection bylaw, carve out key rights for your association and clearly define terms in the bylaw.

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CRIME & SECURITY

Train Staff to Spot Illegal Drug Activity in Community

Since the downturn in the economy, the number of homeowners struggling to pay their mortgages has skyrocketed. And across the country a shocking number of reports about drug activity occurring in private residential communities has surfaced. Even in very exclusive communities with expensive homes and condos, some owners have resorted to drug activity to make ends meet. In fact, the popular cable TV show "Weeds," which features a fictional suburban mother working as a marijuana dealer, glamorizes this lifestyle.

But illegal drug activity, especially drug manufacturing in makeshift methamphetamine, or "meth," labs in units at your community can be dangerous, even creating health issues with lasting effects. And you could be liable for that, even if you had no idea that drugs were being used, distributed, or manufactured in your community. That's why you need to train your staff to spot common signs of illegal drug activity in owners' units.

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FROM THE EDITOR

The Insider Is Going Digital

Dear Subscriber:

Over the years, ***Community Association Management Insider*** has strived to provide you with up-to-date how-to information and the best practices you need to manage your community association. Now, as the industry and technology have changed, we recognize your need for quick, easy access to resources—whether on your office computer or on your smart phone when you're out at a site.

Therefore, I am pleased to announce that starting next month, the ***Insider*** is going all digital. Beginning with the October issue, you will be receiving a downloadable PDF that you can print and take with you or read online. In addition, you will have online access to a complete library of past issues of the ***Insider*** so that you can quickly research and get answers to your questions on what you need to know to manage your community association effectively.

Although this is the last print version of the ***Insider*** you will receive, I think you will be pleased with our digital version, which will contain timely, in-depth articles for effective association management.

To ensure that you continue to receive ***Community Association Management Insider*** and have access to all the features of our Web site at **CommunityAssociationInsider.com,** make sure you add or update your email address by calling (800) 519-3692 or emailing *customerservice@vendomegrp.com*.

I look forward to serving you, and want to hear your thoughts and suggestions as we continue to provide you with need-to-know information. Please feel free to contact me at *epurcell@vendomegrp.com* or at (212) 812-8434.

Yours truly,
Elizabeth Purcell
Editor

"View Protection" Bylaw

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Association Pulled into Litigation

Many times, lawsuits over building or planting something that blocks a view are between the owners. But because associations generally have an obligation to enforce their rules, the associations are sometimes sued too, explains Colorado attorney and *Insider* board member Loura K. Sanchez. An association could also be sued by an owner if it denies the owner's request to build an improvement, she notes.

Associations with ambiguous view protection bylaws often lose these cases, warns Sanchez. At the very least, a vague bylaw and the prospect of losing a case often force associations to settle the case on less favorable terms than they otherwise could have, and only after they've spent a lot of money on legal fees.

For example, an association that Sanchez represented was sued by an owner because the association had approved a neighbor's landscaping plan that included many trees. The owner claimed that when the trees grew to their full height, they would obstruct his view of the Rocky Mountains. But the association's view protection bylaw had several undefined terms that were subject to different interpretations. Because of that ambiguity, the association eventually settled the case with the member—but not before paying for costly legal fees.

Key Rights to Carve Out

It's important to specify two major things in your bylaw: (1) at what point in time a view is "protected"; and (2) whether the association must enforce the bylaw that protects the owner's right to that view. For an example of terms that you can adapt when drafting your view protection bylaw, see our Model Bylaw: Include Five Details to Make Your View Protection Bylaw Enforceable.

Right #1: Protected views can't be established post-construction. Sometimes members might add a deck, for example, after construction on their unit is finished, and then claim that someone else's unit is blocking their newly created view from the deck. This could even happen years after the unit was originally built. To avoid this type of never-ending difficulty, say in your bylaw that protected views can't be established post-construction, suggests Sanchez [Bylaw, par. d].

Right #2: Association has right not to enforce bylaw. In some situations, the board might decide that it's in the association's best interests not to enforce a view protection bylaw—for example, if the specific facts of the case make it a tough one to win, says Sanchez [Bylaw, par. e].

PRACTICAL POINTER: Make sure that before changing your bylaw to give the board this right, you check your governing documents. If the governing documents say that the association *may* enforce its bylaws through legal action, you can probably give the board the authority to choose not to enforce them in any given case. But if your governing documents say the association *shall* enforce its bylaws through legal action, you probably can't give the board the authority not to enforce a view protection bylaw at its discretion, explains Sanchez.

Define Important Terms

An unclear bylaw may lead to litigation among your owners, which is always bad news for an association. You must make sure that your association's view protection bylaw is drafted so that it's clear and contains all of the details it needs—otherwise, courts may not allow you to enforce it.

Also, an unclear bylaw will make it difficult for your architectural control committee to decide whether to approve members' requests to build an improvement or to plant trees or shrubs that could potentially infringe on another owner's scenic view. Remember that an association can get sued not only for approving a request it shouldn't have, but also for *refusing* to approve a request it should have.

Clarify these key terms to prevent ambiguity in your view protection bylaw:

Term #1: "Protected view" or "view." Often, view protection bylaws simply refer to a protected view, without defining specifically what view is protected, says Sanchez. "For example, many bylaws say, 'There shall be no improvement which substantially impedes the view of any adjacent lot owner,'" she says. But this can refer to any view, and that can lead to trouble if two neighbors disagree over what view is protected. Sanchez has faced many situations where members have blocked

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"View Protection" Bylaw

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neighbors' views of Rocky Mountain valleys because they believed that the bylaw only protected members' views of the mountain peaks. Rather than rely on a court to determine who's right, write a bylaw, like our Model Bylaw, that specifies the exact view that's protected [Bylaw, par. a].

Term #2: "Substantially obstruct." Bylaws often say that an obstruction must be substantial in order for it to violate the bylaw. But many bylaws don't explain how complete an obstruction must be before it's considered substantial. That can lead to unnecessary litigation.

For example, in a Missouri case, residents sued to prevent a developer from building a house between their home and a scenic lake. The restrictive covenant in question read: "No building or structure shall be erected so as to substantially obstruct the view of any other building or structure." The court allowed the builder to construct the house, provided any blockage of the view wasn't substantial. It sent the case back to the lower court to determine what amounted to a substantial obstruction. If the restrictive covenant had been clearer, litigation might have been avoided altogether [Blackburn v. Richardson].

To avoid confusion, make sure your bylaw, like ours, includes some definitive measure, such as a percentage, that defines "substantial" [Bylaw, par. b]. You might say, for instance, that anything that blocks more than 50 percent of a member's view will be considered substantial.

Term #3: "Height" or "above grade." View protection bylaws often restrict the maximum height of any improvements—such as trees and swing sets—but don't explain where this height should be measured from, except sometimes to say "above grade." And they often don't define what grade the bylaw is referring to.

In Washington, a homeowner sued her neighbor for building a home in such a way that it blocked her view of Puget Sound. But in that case, the restrictive covenant had been written clearly, allowing the court to dismiss the case. The covenant said that homes couldn't be built more than 18 feet in height, measuring "from the highest point on the lot." The other homeowner had tried to argue that the home shouldn't have been built more than 18 feet above the height of the footprint on which the house sat. But the

MODEL BYLAW

Include Five Details to Make Your View Protection Bylaw Enforceable

Here's a model view protection bylaw that we drafted with the help of Colorado attorney Loura Sanchez. Show this bylaw to your attorney before adapting it for use in your community.

PROTECTED VIEWS

a. **Protected view.** All Lots shall have a protected view of [*insert description of protected view(s)*] (the "Protected View").

b. **No substantial obstructions.** No object, thing, planting, vegetation, or other improvements shall be erected, placed, constructed, planted, or maintained in such location or of such height as to substantially obstruct the Protected View from any immediately adjacent Lot. A view shall be considered "substantially obstructed" if the object, thing, planting, vegetation, or other improvements in question shall reduce visibility of the Protected View by more than [*insert percentage, e.g., 50 percent*].

c. **Maximum height.** Not by way of limitation, no object, thing, planting, vegetation, or other improvements shall be erected, placed, constructed, planted, or maintained that shall exceed a height of [*insert height, e.g., 18 feet*], measured from [*insert explanation of measurement, e.g., "the highest point of the Lot in question"*].

d. **Post-construction.** A Protected View cannot be established by improvements (e.g., a second-story deck addition to a Unit) added to a Lot after the time of initial construction of the Unit.

e. **Board discretion.** The decision of the Association to pursue enforcement action in any particular case shall be left to the Board's discretion, subject to the duty to exercise judgment and be reasonable, as provided for in the Declaration, and further restricted in that the Board shall neither be arbitrary nor capricious in taking enforcement action. A decision of the Association not to pursue enforcement action shall not be construed as a waiver of the Association's right to enforce such provisions at a later time under other circumstances, or to preclude the Association from enforcing any other covenant, restriction, or rule.

court said the wording was clear and dismissed the lawsuit [Alexander v. Anderson].

Make sure your bylaw, like ours, specifies where one is to measure from to determine the allowable height of trees, swing sets, or other improvements [Bylaw, par. c].

Insider Source

Loura K. Sanchez: Managing Partner, 5610 Ward Rd., Ste. 300, Arvada, CO 80002-1310; *www.hindmansanchez.com.*

www.communityassociationinsider.com

Search Our Web Site by Key Words: rules & regs; alterations; view protection bylaw; architectural control

RECENT COURT RULINGS

➤ Amendment Prohibiting Renters Was "Reasonable"

Facts: The declaration of covenants and restrictions of a private residential community included an amendment that prohibited owners from renting their homes to tenants. After the association learned that one of the owners in the community was renting her home to a tenant, it sued the owner. The association asked the trial court for an injunction—that is, an order from the court to the owner to stop renting her home to the current tenant and not to rent to future tenants—without a trial. The trial court granted the injunction, and the owner appealed.

Ruling: A New Jersey superior court upheld the trial court's decision.

Reasoning: The owner claimed that the amendment was void, and therefore unenforceable to stop her from renting her home to third parties, because it had been adopted nine years after the owner bought her home in the community and 14 years after the original declaration was recorded. She also asserted that the amendment's restriction against renting interfered with the owners' alienability of their property. That is, the owners would not be able to use their property however they wanted or to their advantage, such as by renting their homes when not in use.

However, the trial court had applied a "reasonableness" standard to the issue of whether the amendment was valid and could be enforced against the owner, despite it having been passed after she bought her home and allegedly restraining the alienability of the property. The trial court found that the amendment satisfied that standard, and the appeals court agreed with its reasoning.

The trial court said that the circumstances here supported a finding of reasonableness because those imposing the restraint—the association members who are the homeowners in the community—clearly possess an interest in the land they are seeking to protect by enforcing the restraint against renters. "The enforcement of the restraint accomplishes a worthwhile purpose by preserving the stable residential character of the community, which has never before been marked by weekly rentals to vacationers, and the association members had a rational basis for believing that the peace and tranquility of the community would be disrupted if such rentals were permitted," stated the trial court.

Additionally, renting to tenants "would not likely be employed to a substantial degree by any of the homeowners, as evidenced by the fact that no homeowner in the history of the community had ever leased his or her home to a third party, and, indeed, some of the homeowners did not even know that leasing was permitted under the original declaration," noted the trial court. In this case, where the owner wasn't occupying her home while she was trying to sell it, even she would be leasing only for the period of time it would take her to sell her home, the trial court pointed out. "Thus, the number of persons to whom the alienation is prohibited is small," it concluded.

When upholding the decision of the trial court, the appeals court noted that it agreed with the ruling against the owner because it found that the amendment "did not constitute an impermissible restriction on the alienation of a fundamental property right and satisfied the test of reasonableness" under the circumstances. Thus, it was enforceable against the aggrieved owner, said the appeals court.

- Cape May Harbor Village and Yacht Club Association, Inc. v. Sbraga, et al., July 2011

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Recent Court Rulings (continued from p. 5)

➤ Owner Can Sue Association for Discrimination and Retaliation

Facts: An owner sued the homeowners association, two board members, and two employees of his condo complex for discrimination and retaliation, claiming that they had discriminated against his family on the basis of their national origin (Indian) by depriving them of services provided to white residents. The district court concluded that the owner's allegations were "insufficient to state plausible claims of discrimination or retaliation under the Fair Housing Act (FHA)." The owner appealed.

Ruling: An Illinois appeals court vacated the district court's ruling and sent the case back for a new trial.

Reasoning: The appeals court disagreed with the district court's assertion that the owner hadn't presented facts that could support his claims of discrimination and retaliation.

The appeals court explained that that was because the owner alleged all of the elements of an FHA discrimination and retaliation case. He alleged that: (1) the association doled out privileges and services to white homeowners, while withholding them from his Indian family; (2) the association failed to maintain the owner's home's aluminum siding, roof, sump pump, sidewalk, and parking space, while providing those services to white homeowners; (3) the association engaged in preferential treatment when maintaining the grounds of the subdivision; and (4) an association employee shouted at him in racial terms.

Moreover, said the appeals court, the owner provided fair notice of his retaliation claim because he alleged that, after he complained of disparate treatment, the association retaliated by placing his family's account on delinquent status, changing the gate to his home without notice, and fining him.

■ Mehta v. Beaconridge Improvement Association, July 2011

Crime & Security (continued from p. 1)

Put Maintenance Staff on Alert

Because your maintenance staff are occasionally inside members' units for repair calls, they're the best people to detect potential illegal drug activities there. But they may not know what to be on the lookout for. To train your staff appropriately, do the following:

Tell staff to look for warning signs, not search for evidence. You don't want to suggest that your maintenance staff should use an opportunity inside a member's unit to actively search for signs of illegal drug activity, because that can be viewed as an invasion of privacy and can open you up to liability, points out security expert and attorney Jon Groussman.

Instead, tell staff that they should be on the lookout for signs of illegal drug activity in "plain view," but that they shouldn't open drawers or closets or look under beds or anywhere else where a member would have a reasonable expectation of privacy. Explain that items in plain view are things that can be seen without having to conduct an actual search for them—for example, a scale and bags filled with a white powdery substance on a kitchen counter.

List warning signs of drug sales and manufacturing. These are telltale signs of drug sales or manufacturing in a unit:

❖ **Blacked-out windows.** People committing crimes in their homes often put up material such as tin foil or black trash bags on their windows to prevent others from seeing in, says security expert Chris McGoey.

❖ **Grow lights.** If a unit is filled with special high-intensity lights, known as "grow lights," this can be a sign that the person living there is growing marijuana.

❖ **Odors.** Almost all drug manufacturing produces an odor. Sometimes the odor can be extremely foul-smelling, and even dangerous. The growth of marijuana plants inside a unit gives off a strong, sweet-smelling odor. The manufacture of methamphetamine creates a very strong, pungent odor, described as similar to urine, ether, or ammonia. And the heating of crack cocaine often produces a smell similar to the smell of burning electrical wires.

❖ **"Chemistry" setups.** Methamphetamine and other drugs produced in crystal form are usually produced with what looks like

an old chemistry set, says McGoey. Maintenance staff should look for items such as glass beakers, hot plates, glass cookware, funnels, coffee filters, and plastic tubing. These items will often be set up on bathroom or kitchen countertops, near sources of water and drains.

❖ **Large amounts of chemicals.** Large amounts of chemicals, such as antifreeze, camp stove fuel, gasoline, or ether, in a unit may indicate that illegal drugs are being manufactured there, says Groussman.

❖ **Many packages of cold pills.** Pills containing ephedrine, such as cold pills, are used to manufacture methamphetamine. One or two packs of cold pills lying around a member's unit are probably normal. But if tens or hundreds of packs are lying around, the owner could be using them to produce illegal drugs.

❖ **Baby food jars with milky liquids inside.** This is an example of how a common household item can be used in connection with the manufacture of illegal drugs. People who produce crack cocaine often cook and store the drug in baby food jars.

PRACTICAL POINTER: Two other common household items that should raise suspicion if found in large quantities are baking soda, which is used to make crack cocaine, and small, empty bags of junk food. These are often used to surreptitiously store drugs, Groussman says.

❖ **Weight scales and packaging materials.** A common sign of drug selling is the presence of a weight scale and large amounts of small plastic bags for packaging drugs.

❖ **Plumbing alterations.** Sometimes, someone setting up a drug-manufacturing operation will remove the fixtures in a sink or even remove a toilet to use the water pipes, points out McGoey. So exposed pipes in a kitchen or bathroom may be a sign that illegal drugs are being manufactured in the unit.

❖ **Deadbolt locks or hasps on doors.** The installation of a deadbolt lock or a hasp on a door in the unit may be a sign that illegal drug activity is occurring there.

❖ **Stained walls, windows, or carpets.** The manufacture of drugs such as methamphetamine can leave mustard-colored stains on walls and ceilings and dark brown or orange stains on carpets, says Groussman. And it can leave burgundy-colored stains on aluminum windows, he adds.

Tell staff what to do if they suspect illegal drug activity. Tell your maintenance staff to immediately report to management any suspicions they have that an owner is engaging in illegal drug activity in his unit.

Consult Attorney Before Taking Action

If you learn about any illegal drug activity in a unit in your community, speak with your attorney immediately about what steps you should take to correct the problem. Although the presence of these signs implies that illegal drug activity might be occurring in a unit, you shouldn't jump to conclusions if your staff informs you that they noticed any of them. Keep in mind that there could be perfectly legitimate explanations for the presence of any of these signs in a unit. So if your staff alerts you to any of the signs mentioned above, speak with your attorney and with local law enforcement before taking any direct action.

Insider Sources

Jon D. Groussman, J.D.: President, COO, CAP Index Inc., The Commons at Lincoln Center, 150 John Robert Thomas Dr., Exton, PA 19341; *www.capindex.com.*

Chris E. McGoey, CPP, CSP, CAM: Security Consultant; *www.crimedoctor.com.*

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Search Our Web Site by Key Words: illegal drugs; drug manufacture; warning signs; liability

Age-Restriction Rules (continued from p. 1)

refuse to pay. The association is asking a judge to stop their violations or pay the association steep fines if they balk.

Both members claim that the 55-and-older restriction was set several years after they bought their homes, and therefore, they should be "grandfathered in" under the old rules, which didn't place any restrictions on the type of activity that the members are engaging in. The association disagrees, however. A trial date is scheduled for October, but a judge could decide the case before then, at a hearing in late September. Experts say that lawsuits such as this one aren't typically resolved quickly and easily.

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