

Community Association Management *Insider*[®]

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INSIDE THIS ISSUE

Model Letters: Send Letters to Compel Member to Maintain Property	3
Recent Court Rulings	4
▶ Association Not Legally Bound to Enforce Terms of Declaration	
Fair Housing: Don't Let Community Rules—or How You Enforce Them—Lead to Discrimination Claims	6
Annual Index	7

Is 'Up' House Bringing Utah Community Down?

The most unique house in Salt Lake Valley, Utah, is creating controversy among neighbors in a quiet Herriman planned community. Many of the community's owners said they were attracted to the area by the "muted" paint tones of the homes there. The yellow, orange, green, and lavender color palette of the controversial house—inspired by the Disney-Pixar cartoon movie "Up"—has drawn national attention for its retro design and bright siding. While an increasing number of visitors to the area appreciate the hues, neighboring owners are hoping the outside paint job gets toned down.

Neighbors said that when they originally bought in the community, they were told that all the houses had to abide by certain paint colors on the outside, and they now expect the "Up" house to be painted an earth-tone color similar to the other houses in the

(continued on p. 8)

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FEATURE

Take Action When Member Shirks Maintenance Obligations

Typically, associations' governing documents require members to maintain their properties, and authorize the association to compel compliance. And when members purchase their homes, they sign documents saying they understand that their home is in a deed-restricted HOA community. The draw to residential communities for most owners is that there *are* rules that keep homes looking decent, and when their neighbors neglect their properties, it can not only conflict with the community's aesthetic, but also cause damage. For example, an unresolved plumbing leak can cause damage to adjoining units.

Poor maintenance has been a growing problem since the downturn in the economy. Some owners say that maintaining their homes is a financial stress when they can hardly afford to pay their bills. Recently, struggling Florida suburbs have made the news because residents are taking matters into their own hands. Owners in New Tampa's Heritage Isles and Wesley Chapel's Bridgewater subdivisions

(continued on p. 2)

MANAGER'S LIABILITY

Don't Control Contractors' Employees on Day-to-Day Basis

When you hire independent contractors to perform work at your community, you risk being sued if any of the contractors' workers are injured on the job. Any good community association manager will want to ensure that work is being done correctly, on time, and without risks to the community or its members. So, it's good to keep a keen eye on contractors' employees as they work on projects for which you've hired them.

However, depending on the state where your community is located, too much control over these employees could result in liability for you. That's because, in most states, the risk that an association or manager may be held liable for injuries to a contractor's employee increases if the manager had some control over the work he performed.

The level of control it takes to increase your risk will vary on a case-by-case basis. But you can protect yourself by limiting your

(continued on p. 5)

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Maintenance Obligations (continued from p. 1)

have been bypassing their homeowners associations, which they say have been lax in enforcing maintenance rules, and cleaning things up themselves, for example, by mowing overgrown lawns.

Don't let a maintenance situation get this far! It's very important to address a maintenance problem immediately, before it spirals into an eyesore, causes costly damage, sparks owner dissatisfaction, and reflects negatively on you—all of which can affect property values in the *entire* community. At the first sign of a member's violation of maintenance rules, check your association's governing documents for an explanation of your rights, and send letters compelling the member to follow the rules. We'll give you Model Letters: Send Letters to Compel Member to Maintain Property, which you can adapt for use at your community.

Determine Standards for Care Before Contacting Owner

Don't assume the level, if any, at which owners are required to maintain their properties. If your governing documents have limited or no enforcement powers at all, you need to know before making demands of an owner who isn't properly maintaining his property.

Pay attention to the maintenance standards that members must adhere to under the governing documents. Some associations, like the Boca Pointe Community Association, in Boca Raton, Fla., have specific maintenance standards, says community manager Kathryn Danella. For example, Boca Pointe's standards specify how often members' lawns must be mowed, how long the grass can be, and how often shrubs must be trimmed, among other things, she points out.

Other associations are much less precise, and you can run into trouble if you demand that the owner go above and beyond what's necessary.

Send Polite Letter First

Often, an owner will be happy to comply with the association's maintenance standards, but hasn't been aware that there's a problem. A polite letter reminds the member of his responsibilities.

If the owner isn't able to make the repairs himself, a polite letter will open the door for him to ask the association to make the repairs it deems necessary and give it access to the property to do so. So send the member a letter, like our first Model Letter, politely reminding him that the community has rules about property maintenance and that his property is in disrepair. Remember to specify in what way his property is substandard, and set a deadline for making repairs. You can also ask the member to contact you if he needs help in complying with the rules. Consider offering to make the repairs for him and bill the cost to him. This resolves maintenance problems in senior communities especially. A good letter will inform the owner about the problem and give him options for rectifying it.

Send Tougher Letter Demanding Compliance

If the member doesn't comply with the first letter, either by making the necessary repairs or allowing the association to make the repairs and bill them to the member, send a tougher follow-up letter, like our second Model Letter.

Your letter to an owner who refuses to clean up his property should state: (1) that certain conditions at his unit don't meet the standards set in the association's governing documents; (2) exactly what's wrong with his unit; and (3) which of the association's governing documents this violates. Then tell him that unless he makes the necessary repairs by a specific date, the association will pursue its remedies. You may prefer to have

this letter come from the association's attorney.

Know, Pursue Association's Remedies

Your governing documents will determine exactly what actions you can take and should be included in your letter. Some common ones include: fining the member, suspending voting privileges, and suspending his right to use the community's amenities. Engaging in self-help—that is, entering the property to make the repairs, or getting a court order requiring the repairs—is the most serious remedy and should be very carefully carried out.

In the *Insider's* next issue, we'll explain self-help, show you how

to determine if it's permissible, and give you tips for executing an intervention after a member fails to take maintenance action. But regardless of which remedy you choose, tell the member that the association will bill all costs and attorney's fees to *him*.

Insider Source

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Search Our Web Site by Key Words:
repairs & maintenance; property values; member obligations

MODEL LETTERS

Send Letters to Compel Member to Maintain Property

Here are two letters that you can adapt and send to members who fail to maintain their properties according to community standards. First, send the Polite Letter, reminding the member of his maintenance obligations and giving him a deadline by which to remedy the situation. If the member doesn't respond by the deadline, send him the

Follow-Up Letter, which cites your association's authority to take certain actions against him, according to your governing documents, if he doesn't take immediate steps to comply with community maintenance standards. Have your attorney review these letters before sending them.

► POLITE LETTER

[Insert date]

Dear [insert member's name]:

As you probably recall, when you moved into Shady Acres Community Association you received a packet that included the rules and regulations of the community. These rules and regulations have been designed to ensure that your community remains a wholesome, pleasant place to live and to keep our property values high. As a member of Shady Acres, I'm sure you share in our desire to achieve these goals.

A recent inspection of the community found that the condition of certain things at your unit do not meet the standards set forth in our rules and regulations. Specifically, the following have been found to be out of compliance at your unit: [insert items needing maintenance].

We're sure that this was just an oversight on your part, and because of that, the Board of Directors would like to provide you with 14 days to correct these things so that they are in compliance with community standards. Or, if you prefer, Shady Acres can arrange for the work to be done for you, and will bill you for its cost.

Thank you for your anticipated cooperation, and for doing your part to keep Shady Acres a beautiful place to live.

Yours truly,
Jane Manager

FOLLOW-UP LETTER, see next page ► ► ►

► FOLLOW-UP LETTER

[Insert date]

Dear [insert member's name]:

As you were advised in a letter to you dated [insert date of previous letter], a recent inspection found that the condition of certain things at your unit do not meet the standards set forth in the Association's rules and regulations. Specifically, the following were found to be out of compliance at your unit: [insert items needing maintenance].

This puts you in violation of the following [choose appropriate option(s): bylaws/declaration/rules & regulations]:

[Insert citations to all relevant document sections].

These violations are a serious problem that also may involve health code violations and/or nuisance issues, and therefore require your *immediate attention*. The poor condition of your unit is affecting other units as well as the common elements. As you are aware, there have been numerous correspondences and other communications between you and the Association. Despite these efforts, you have not made the repairs necessary to bring your unit into compliance with the Association's rules and regulations. The Board of Directors, therefore, having a fiduciary obligation to the Association and its members, has no alternative but to take action to correct the situation.

Please be advised that if you do not correct the condition(s) specified above by [insert date], the Association will pursue all legal remedies, including but not limited to [insert remedies authorized by governing documents, e.g., fines, suspension of voting privileges, suspension of right to use of community amenities], as well as the following:

1. As authorized by [insert citation to relevant document section], entering your property to maintain, repair, or replace that portion of your unit and related conditions that are out of compliance. The Association may also request the assistance of local governmental health officials to deal with this condition. *This letter constitutes notice of the Association's intention to exercise this right. All expenses will be imposed against you.*
2. As authorized by [insert citation to relevant document section], getting a court order for the right to enter your property to make these repairs and/or to force you to make the repairs. All costs including attorney's fees will be imposed against you.

Proof from a professional contractor that these repairs have been made and problems remedied must be received by the Association no later than [insert date].

I strongly suggest that you resolve this problem at once. Should you wish to discuss this in greater detail, please contact me at [insert tel. #].

Yours truly,
Jane Manager

RECENT COURT RULINGS

► Association Not Legally Bound to Enforce Terms of Declaration

Facts: An owner in a private residential community complained to the homeowners association that it was failing to enforce the terms of the declaration of covenants as to certain homeowners. The owner alleged that several other owners made changes, modifications, or improvements to their homes without first seeking the association's approval. Under the declaration, changes must be approved first by the association. The owner asked the association to enforce the terms of the declaration, but it refused. The owner sued the association and one of the board

members, asking the court for an injunction—that is, an order from the court compelling the association to enforce the declaration. The association and the board member asked the trial court for a judgment in their favor without a trial. The trial court ruled in favor of the association and the board member. The owner appealed.

Decision: A Florida appeals court upheld the lower court's ruling.

Reasoning: The owner provided the appeals court with a list of residences in the community that he claimed had changes, modifications, or improve-

ments that were made without the association's prior approval, but whose owners hadn't been fined for violations of the declaration. He argued that as a resident of the community, he was "a party to the declaration" and could, therefore, insist that the association comply with its requirements.

The appeals court determined that the association had no legal obligation to take legal action to enforce the declaration. It noted that the section of the declaration entitled "Enforcement of Declaration," states that the association *may* enforce the declaration through legal action to compel compliance with its terms or to prevent a violation or a breach of it. The same section of the declaration also provided that

the association *may but shall not be required* to seek enforcement of it.

The appeals court pointed out that because the plain language of the declaration explicitly makes enforcement of the declaration a "purely discretionary" decision on the part of the association, the owner had no clear legal right to an order from the court compelling enforcement. The appeals court also noted that in order for any plaintiff, including the owner here, to obtain an injunction, he or she must show "the existence of a clear legal right."

■ Heath v. Bear Island Homeowners Association, Inc., and Moscato, December 2011

Manager's Liability (continued from p. 1)

interactions with contractors' employees and tailoring your contract to limit your responsibility for work gone awry.

Keep Involvement to Bare Minimum Necessary

As a general rule, don't get involved in day-to-day control over projects. To get projects executed correctly, you'll have to specify things like the work to be done and the schedule for completion, but keep your involvement to the bare minimum necessary to direct contractors. Let them use their own tools and equipment, and make their own decisions on how best to meet your requirements.

Communicating directly with contractors' employees gives the impression that you're exercising control over them. Report any requests or problems with a contractor's employee directly to the contractor and let him handle it.

For example, a request that an employee cleans up after himself when he leaves for the day should be made to the contractor. Likewise, if an employee has a problem with you, members, the associa-

tion, or the work itself, refer the employee to the contractor for whom he works and explain that you'll resolve the issue with the contractor—not the employee. And instruct your staff to avoid communicating with the contractor's employees—unless it's necessary to prevent a serious problem or deal with an emergency.

Draft Manager-Favorable Contract

Another way to thwart claims made by injured employees is to include a defense and indemnification clause in your contract. A defense and indemnification clause obligates the contractor to defend you if one of its employees sues you, and to pay your damages if you lose or settle the lawsuit. Ask your attorney to help you adapt the following clause to use in contracts for work to be performed at your community:

Model Contract Clause

To the fullest extent permitted by law, Contractor agrees to defend, indemnify, and hold the Association, the Association's Property Manager, and the employees, agents, officers, and servants of

the Association and of the Association's Property Manager (collectively, the "Community") harmless from any claims, damages (including property damage and loss of use of such property), losses, fines, or penalties (including related costs, expenses, and reasonable attorney's fees) that may arise in whole or in part from Contractor's work on behalf of the Community. This includes claims, demands, damages, losses, fines, or penalties for injuries to persons or damage to property, including theft, resulting from Contractor's acts or omissions or the acts or omissions of those persons furnished by Contractor.

It's also a good idea to require your contractors to carry insurance. A defense and indemnification clause won't help you much if the contractor doesn't have any money!

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Search Our Web Site by Key Words:
contractors; liability; indemnification

FAIR HOUSING

Don't Let Community Rules—or How You Enforce Them—Lead to Discrimination Claims

Fair housing claims often stem from adverse actions taken against members for violating community policies or rules. In some cases, it's a claim of "disparate treatment"—that is, that the rules are being selectively enforced because of a member's race or other characteristic protected under the Fair Housing Act (FHA). Less commonly, it's a claim of "disparate impact," where seemingly neutral rules have a disproportionate effect on racial minorities or other protected groups. In some cases, both claims are raised.

That was the situation in a recent lawsuit where a federal court refused to dismiss a claim that a New York co-op violated fair housing law based on a rule requiring that purchasers obtain three references from existing co-op owners. Allegedly, fair housing testing revealed that a broker downplayed the importance of the rule to white testers posing as prospective buyers, suggesting ways to make it easier to get the references. In contrast, according to the complaint, she emphasized the importance of the rule to African-American testers and refused to show them any homes for sale since they didn't know anyone already living there.

The complaint alleged that employees at the co-op were aware of the disparity but did nothing

about it. The court ordered further proceedings on claims of disparate treatment and disparate impact. The court said that the allegations could show intentional race discrimination based on the reference policy itself, and its enforcement, with accommodations for white prospective buyers and none for African-American buyers.

The court also ruled that the reference policy itself might have an illegal disparate impact based on statistical evidence that such policies may serve to keep African Americans out of co-ops in the Bronx [Fair Housing Justice Center, Inc. v. Silver Beach Gardens Corp., August 2010].

Show Nondiscriminatory Reason for Policy, Rule

Communities can successfully defend against claims of disparate treatment or disparate impact with proof of a legitimate, nondiscriminatory reason for the policy or rule that's claimed to be unfair—and proof that it's applied consistently without regard to race or other protected characteristic.

For example, in April 2011, an Illinois condo association fought off a racial discrimination claim based on its decision to stop providing valet parking at the community. The complaint alleged that nearly all of the building's residents were African Ameri-

can. Though residents included both renters and owners, 75 percent of the owners were white and most rented their units to African Americans. Allegedly, African-American renters were "locked out" of the meeting in which condo owners voted to discontinue a longstanding policy of providing valet parking. An African-American resident sued, claiming disparate treatment and disparate impact under the FHA.

The court dismissed the case, ruling that the resident could not pursue a disparate treatment claim because he failed to allege any discriminatory intent for the decision to end the valet parking service. The court also rejected claims that the parking policy had a discriminatory effect. Although nearly all the building's residents were African American, the decision to rescind valet parking affected African-American residents in exactly the same way as it did the building's few white residents. It did not lead to segregated housing or place a burden on African Americans seeking fair housing [Edwards v. Lake Terrace Condominium Assn., April 2011].

Further reading: For a complete lesson you can use to train your staff on avoiding discrimination claims based on race, see "How to Protect Your Community from Race Discrimination Claims," in the January issue of the *Insider's* sister publication, *Fair Housing Coach*, available at www.FairHousingCoach.com.

ANNUAL INDEX

*This index lists all articles published in the INSIDER from January through December 2011.
If you missed any of these articles, you can find them online at www.CommunityAssociationInsider.com.*

► ATTORNEY'S FEES

"Recent Court Rulings: Association Awarded Attorney's Fees for Frivolous Discrimination Claim," June, p. 6.

► BUDGET PREPARATION

"Dos & Don'ts: Consider Four Options for Addressing Budgetary Shortfalls," July, p. 7.
"How the Foreclosure Fraud Scandal May Affect Associations," Feb., p. 1.
"How to Allocate Budgetary Surpluses," Aug., p. 1.
"Set Proper Internal Controls to Safeguard Income and Disbursements," Oct., p. 1.

► COLLECTIONS

"Recent Court Rulings: Association Can Foreclose on Condo Without Bank Intervention," April, p. 5.
"Recent Court Rulings: Association Lien Superior to Tax Lien Before Recorded Date," April, p. 5.
"Recent Court Rulings: Member Liable for Unpaid Dues and Late Fees," April, p. 5.

► CONTRACTORS

"Contracts: Get Seven Key Protections When Hiring Snow Removal Contractor," Oct., p. 1.
"Recent Court Rulings: Signed Agreement Released Association and Contractor from Liability," May, p. 4.

► CONTRACTS

"Contracts: Get Seven Key Protections When Hiring Snow Removal Contractor," Oct., p. 1.
"Recent Court Rulings: Co-op Manager Not Liable for Breach of Management Agreement," Dec., p. 5.
"Recent Court Rulings: Board Can Terminate Member's Proprietary Lease," July, p. 4.
"Recent Court Rulings: Developer and Housing Authority Can Sue Association to Invalidate Leasing Restriction," May, p. 4.
"Recent Court Rulings: Signed Agreement Released Association and Contractor from Liability," May, p. 4.

► CRIME & SECURITY

"Best Practices: What to Consider Before Installing Security Cameras in Common Areas," Special Issue: Crime & Security, p. 1.
"Crime & Security: Train Staff to Spot Illegal Drug Activity in Community," Sept., p. 1.
"Dos & Don'ts: Stagger Hours of Part-Time Security Patrols," Special Issue: Crime & Security, p. 7.

"Dos & Don'ts: Use Landscaping to Boost Security, Reduce Liability," Special Issue: Crime & Security, p. 7.

"In the News: Crime Spikes at Florida Gated Communities," Special Issue: Crime & Security, p. 4.

"Recent Court Rulings: Association Can Install Security Gate," Oct., p. 7.

"Recent Court Rulings: No Duty for Association to Provide Security at 'Vast' Complex," Special Issue: Crime & Security, p. 5.

"When and How to Disclose Presence of Sex Offender in Your Community," Special Issue: Crime & Security, p. 1.

► CRISIS MANAGEMENT

"Best Practices: How to Keep Condo Buildings Safe During Blizzards," Oct., p. 6.
"How to Prevent and Control Bedbug Infestations," Special Issue: How to Prevent and Control Bedbug Infestations, p. 1.

► CUTTING COSTS

"Best Practices: Sustainable Landscapes Offer Associations Long-Term Value," March, p. 1.
"How to Allocate Budgetary Surpluses," Aug., p. 1.

► EMPLOYMENT & LABOR

"Draft Fair Housing Code of Conduct for Maintenance Staff," Nov., p. 1.
"Human Resources: Put Seven Safeguards in Reference Policy to Prevent Defamation Lawsuits," Feb., p. 1.
"Recent Court Rulings: Service Company Can't File Mechanic's Lien Against Association," March, p. 7.

► FAIR HOUSING/ADA

"Draft Fair Housing Code of Conduct for Maintenance Staff," Nov., p. 1.
"In the News: Augusta HOA Denies Housing for Disabled Veteran," Aug., p. 4.
"New Regulations: New ADA Requirements May Affect Association Pools," Jan., p. 1.
"Q&A: Denying 'Unreasonable' Accommodation Requests," Nov., p. 5.
"Q&A: Determining Whether a Requested Accommodation Is Necessary," June, p. 7.
"Recent Court Rulings: Association Not Liable for Racial Discrimination," Feb., p. 6.
"Recent Court Rulings: Association Not Required to Approve Handicap Ramp for Owners' 'Convenience,'" Nov., p. 5.
"Recent Court Rulings: Board Can Terminate Member's Proprietary Lease," July, p. 4.

"Recent Court Rulings: Developer and Housing Authority Can Sue Association to Invalidate Leasing Restriction," May, p. 4.

"Recent Court Rulings: Owner Can Sue Association for Discrimination and Retaliation," Sept., p. 5.

► INSURANCE/RISK MANAGEMENT

"Controlling Owners' Business Use of Their Units," July, p. 1.
"How the Foreclosure Fraud Scandal May Affect Associations," Feb., p. 1.
"How to Minimize Liability Risks Associated with Social Media," May, p. 1.
"How to Prevent and Control Bedbug Infestations," Special Issue: How to Prevent and Control Bedbug Infestations, p. 1.
"Human Resources: Put Seven Safeguards in Reference Policy to Prevent Defamation Lawsuits," Feb., p. 1.
"Recent Court Rulings: Association Can Install Security Gate," Oct., p. 7.
"Recent Court Rulings: Association Must Provide Access to Insurance Adjuster," Feb., p. 6.
"Recent Court Rulings: Underinsured Association Liable for Limited Flood-Related Damage," April, p. 5.

► LIABILITY

"How to Minimize Liability Risks Associated with Social Media," May, p. 1.
"Human Resources: Put Seven Safeguards in Reference Policy to Prevent Defamation Lawsuits," Feb., p. 1.
"Recent Court Rulings: Association May Be Liable for Aggravation to Member's Respiratory Condition," Feb., p. 6.
"Recent Court Rulings: Association Not Liable for Racial Discrimination," Feb., p. 6.
"Recent Court Rulings: Association Not Required to Arbitrate Construction Defect Claims," Feb., p. 6.
"Recent Court Rulings: Association Responsible for Leaky Sewer Pipe," Jan., p. 5.
"Recent Court Rulings: Co-op Manager Not Liable for Breach of Management Agreement," Dec., p. 5.
"Recent Court Rulings: Member Liable for Unpaid Dues and Late Fees," April, p. 5.
"Recent Court Rulings: Members May Be Liable for Defamation of Board President," March, p. 7.
"Recent Court Rulings: Owner Can Sue Association for Discrimination and Retaliation," Sept., p. 5.

(continued on p. 8)

Annual Index

(continued from p. 7)

"Recent Court Rulings: Signed Agreement Released Association and Contractor from Liability," May, p. 4.

"Recent Court Rulings: Underinsured Association Liable for Limited Flood-Related Damage," April, p. 5.

► MANAGEMENT TIPS

"Best Practices: Encourage Positive Campaigning with Candidate Code of Conduct," Nov., p. 1.

"Best Practices: Help New Board Member Transition Into Role," July, p. 1.

"Best Practices: How to Implement a Smoking Ban in Your Community," Dec., p. 1.

"Best Practices: How to Keep Condo Buildings Safe During Blizzards," Oct., p. 6.

"Best Practices: Set Sexual Harassment Complaint Procedure to Protect Community from Liability," Aug., p. 1.

"Clearly Define Rights and Terms in 'View Protection' Bylaw," Sept., p. 1.

"Control Members' Access to Association Records," Dec., p. 1.

"Controlling Owners' Business Use of Their Units," July, p. 1.

"Dos & Don'ts: Consider Four Options for Addressing Budgetary Shortfalls," July, p. 7.

"Dos & Don'ts: Require Signature When Distributing House Rules," July, p. 7.

"Draft Fair Housing Code of Conduct for Maintenance Staff," Nov., p. 1.

"How to Allocate Budgetary Surpluses," Aug., p. 1.

"How to Conduct an Association Membership Survey," March, p. 1.

"How to Identify and Handle Board Member Conflicts of Interest," May, p. 1.

"How to Prevent and Control Bedbug Infestations," Special Issue: How to Prevent and Control Bedbug Infestations, p. 1.

"Human Resources: Put Seven Safeguards in Reference Policy to Prevent Defamation Lawsuits," Feb., p. 1.

"Q&A: Determining Whether a Requested Accommodation Is Necessary," June, p. 7.

"Q&A: Responding to Vague or Unsubstantiated Complaints," Nov., p. 5.

"Recent Court Rulings: Member Allowed to Keep Pet Bird," Jan., p. 5.

"Repairs and Maintenance: Beat the Heat with Air Conditioning System Inspections," June, p. 1.

"Resolve Internal Conflicts with Alternative Dispute Resolution," June, p. 1.

"Set Proper Internal Controls to Safeguard Income and Disbursements," Oct., p. 1.

"Use Licensed Structural Engineer to Assess Concrete Cracks in Condo Building," April, p. 1.

"Use Well-Drafted Architectural Review Form to Minimize Disputes," April, p. 1.

► MAINTENANCE & REPAIRS

"Recent Court Rulings: Association Responsible for Leaky Sewer Pipe," Jan., p. 5.

"Repairs and Maintenance: Beat the Heat with Air Conditioning System Inspections," June, p. 1.

"Use Licensed Structural Engineer to Assess Concrete Cracks in Condo Building," April, p. 1.

► MEETINGS & RECORDS

"Best Practices: Help New Board Member Transition Into Role," July, p. 1.

► RULES & REGULATIONS

"Clearly Define Rights and Terms in 'View Protection' Bylaw," Sept., p. 1.

"Control Members' Access to Association Records," Dec., p. 1.

"Controlling Owners' Business Use of Their Units," July, p. 1.

"In the News: Florida Adopts New HOA and Condo Laws," Aug., p. 4.

"In the News: Retired Marine Wins Battle Over Flagpole," Aug., p. 4.

"New Regulations: New ADA Requirements May Affect Association Pools," Jan., p. 1.

"Recent Court Rulings: Amendment Prohibiting Renters Was 'Reasonable'," Sept., p. 5.

"Recent Court Rulings: Association's Boat Prohibitions Can Be Enforced," Aug., p. 3.

"Recent Court Rulings: State Law Unconstitutionally Impaired Association's Governing Documents," June, p. 6.

"What Associations Need to Know About the Federal 'Red Flags' Rule," Jan., p. 1.

► TECHNOLOGY

"How to Minimize Liability Risks Associated with Social Media," May, p. 1.

Utah Community (continued from p. 1)

neighborhood. Whether the 2,800-square-foot home will have its colors muted is still under consideration, according to the community association. The approval to build the "Up" house with bright colors was conditional, according to the builder, who completed it in November. While they acknowledged that the homeowners association has rules, some owners would like to see the house be allowed to stay these colors because they claim that it's sparked tourism by movie fans that improves property values.

A decision is likely to be made later this winter, but the owners, who purchased the home shortly after it had been built, hope the association will allow them to keep the pastel exterior that prompted them to make the move to their native Utah a few years earlier than they anticipated.