

Community Association Management *Insider*[®]

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Obama's Mortgage Refinance Plan: Too Little, Too Late?

Will the Obama administration's proposal to give homeowners with privately held mortgages a shot at record-low rates make an impact on community associations dealing with delinquent members and looming foreclosures? The plan could save those homeowners up to \$3,000. And giving homeowners an opportunity to refinance their mortgages at lower interest rates—even if they owe more than their homes are worth—could make it easier for members to pay not only their mortgages, but also their association dues, taxes, and other fees.

Obama's pursuit of the plan comes at a critical time for public approval, as his re-election campaign will soon kick into gear. The plan tackles a difficult issue that's crucial in states key to Obama's re-election, and is welcome news for struggling homeowners

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FEATURE

How to Address Member-on-Member Harassment and Intimidation

Some states have reported a rise in hostility and aggressive behavior among community association members. When members don't get along, sooner or later, at least one member is going to expect the manager to get involved. To keep disputes between members from escalating into costly lawsuits or bad publicity, community association managers should know how to handle heated arguments between neighbors, or worse, an ongoing battle that involves harassing behavior, intimidation, or, in the worst case, violence.

In our July 2010 feature, "How to Prevent Unacceptable Behavior Toward Board Members," we told you about the danger of a member harassing board members who've made decisions he doesn't agree with. But bad behavior is just as likely to happen between members, who may have to deal with day-to-day annoyances from each other. We'll give you a Model Clause for your declaration or bylaws banning offensive behavior. And we'll give you four steps, including a Model Letter: Send Warning Letter to Abusive Member, you can use to combat member-on-member abusive behavior.

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TOXIC MOLD

Don't Rely Solely on Clause to Escape Liability for Mold-Related Problems

For years, mold has been a controversial issue at residential properties. That's because it can cause serious health problems and be expensive to remediate. Mold prevention techniques and effective remediation of existing mold should be high on your list of maintenance and safety concerns. But perhaps the biggest concern for the community association is the issue of *responsibility* for mold-related problems.

It's not uncommon for a member who finds mold in his unit to claim that the mold has caused health problems. And that member could threaten to sue the association for damages. If your association's governing documents have a clause that provides that the asso-

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Harassment & Intimidation (continued from p. 1)

Take Preventative Measures with Ban

The best way to prevent reports of or complaints about harassment or intimidation is to ban this behavior in your governing documents. This should include “abusive, harassing, and threatening behavior.” Most likely, your declaration gives each community member the right to “quiet enjoyment” of her unit—that is, the right to live in and enjoy her unit without being disturbed, harassed, or threatened by the manager, an employee, or other members or residents.

Most declarations ban members and other residents from making excessive noise or engaging in any other behavior that disrupts the quiet enjoyment of others. But it helps to have a “zero tolerance” clause that specifically deals with abusive behavior to fall back on, recommends Florida attorney and *Insider* board member Ellen Hirsch de Haan. Your clause should make it clear that no one may engage in any harassing or abusive behavior or any intimidation or aggression—either verbal or physical—directed at any member or other resident. It’s also smart to ban abusive behavior directed toward guests, occupants, management, employees, and vendors, de Haan points out.

Ask your attorney about adapting our Model Clause for your community declaration and/or association bylaws.

Model Clause

Members and other Residents shall not engage in any abusive or harassing behavior, either verbal or physical, or any form of intimidation or aggression directed at other members, residents, guests, occupants, invitees, or directed at management, its agents, its employees, or vendors.

Take Four Steps to Handle Abuse Complaint

Because of the right your declaration gives each community resident to quiet enjoyment of her unit, it’s important for you to look into and possibly try to stop the harassment when it occurs, says de Haan. If you don’t, you could face a lawsuit. But, to a degree, how you intervene will depend on the specific facts of the situation. For example, is the member harassing one neighbor or the community at large? Is the member’s behavior merely impolite, or is it vulgar? Be aware that if the member’s harassing behavior is based on others’ race, color, religion, sex, familial status, physical or mental handicap, or national origin, you could be accused of violating fair housing laws and end up having to pay damages.

De Haan gives four general steps that you can take when a member tells you that another member is harassing her and additional steps you can take for unusual circumstances.

Step #1: Verify complaint. When you first learn of a harassment complaint, verify it before acting, says de Haan. It’s important to make sure the complaint is credible. You can do this by having your staff try to observe the behavior. For example, if a member complains that another member yells at her each night, have a staff member be

on call to hear it. Also, talk to other members who live nearby to see if they've heard or seen anything. And bring a witness along, de Haan suggests. Document all conversations, and keep a copy of the reports in the abusive member's file, she emphasizes. Once the complaint is verified, take the next three steps.

However, if the situation is more a matter of two neighbors failing to get along, each to blame in his or her own way, limit your involvement to an offer of informal mediation of the dispute, continue to monitor the situation, and take additional action if it's necessary.

Step #2: Meet with abusive member. In most situations, you should meet with the abusive member and speak to him about his behavior. An exception is when the abusive member has threatened violence or engaged in violence already, in which case you should call the police. But in most cases, you can discuss the incidents with the abusive member.

Tell him you've received complaints and give him the specifics about those complaints, such as the dates and times they occurred. Also, point out that your declaration and/or bylaws ban abusive, threatening behavior. Remember to write down the date and time of your meeting with the abusive member, says de Haan.

PRACTICAL POINTER: You should always be concerned about protecting the identity of the complaining member. While in some cases, mediating the hostility in a neutral environment by scheduling a meeting with the abusive member and complaining member might be productive, consider very carefully

MODEL LETTER

Send Warning Letter to Abusive Member

This letter may be sent to a member who's harassing other members in your community. As Florida attorney Ellen Hirsch de Haan suggests, the letter mentions the specific incidents complained of and warns the member that you can punish him for the behavior. Talk to your attorney about adapting this letter to use under your circumstances.

[Insert date]

Dear Member:

As I discussed with you on [insert date], we have received numerous reports of your abusive behavior toward your next-door neighbors. They have reported that on [insert date] you have [insert nature of insults, threats, or actions, e.g., used racial epithets and told them to move].

These violations are very serious. Your conduct is abusive and threatening toward your neighbors and is a violation of the Declaration and Bylaws of ABC Community Association. Please be advised that your compliance is required by [insert date]. If this conduct is repeated and your neighbors are harassed or bothered again, we may pursue any and all legal remedies available to us against you, including, but not limited to, fines, sanctions, suspension of privileges, or pursuing this matter in the criminal and/or civil courts of this state. Further, you may become liable for the Association's attorney's fees and costs incurred in connection with any legal action when the Association prevails.

We anticipate your cooperation in this matter. Should you wish to discuss this in greater detail, you may contact me at [insert tel. #].

Yours truly,
Jane Manager
ABC Community Association

whether this is safe for the complaining member. And if there's serious animosity between the parties, never set up, or allow a director to set up, a meeting with both sides in attendance.

Step #3: Write warning letter.

If the informal approach doesn't work, send the abusive member a strongly worded letter. Your letter, like our Model Letter, should: (1) mention the specific incidents; (2) tell the abusive member that his conduct violates the declaration and bylaws; and (3) say that you may take legal action against him, which could include the imposition of fines and sanctions, suspension of privileges, and pursuit of the matter in court if the conduct

continues. In your letter, be sure to tell the abusive member what he must do to comply. It's important to check with your attorney before including these actions in any letter because the ability to fine and/or suspend privileges varies from state to state. It could also be regulated by your governing documents.

Step #4: Base further action on resident type. You'll need to take further action against the abusive individual if your efforts fail to stop the harassment. As your warning letter should indicate, that further action may include fines, sanctions, suspension of privileges, and pursuing

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Harassment (continued from p. 3)

the matter in court. However, the exact steps you take will depend on the specific circumstances and should be taken only after you consult your attorney.

Base your action on the type of resident who's causing the problem—that is, a renter or a member. If the abusive individual is renting his unit, contact the unit's owner and demand that he evict his tenant. Provide the unit's owner with written records of complaints and violations. Also, be sure the other association members and witnesses are willing to testify in eviction proceedings, and be ready to testify yourself, if necessary.

The situation is trickier when the abusive individual is a member, because you can't evict a member and foreclosure isn't likely either. Consider talking to the local police about the problem. If the abusive behavior rises to the level of criminal behavior, the complaining member can press charges; if the abusive behavior falls short of criminal behavior, a visit by the police still might sober all parties involved.

When to Take More Drastic Action

These four steps generally should handle member-on-member harassment, but there are two circumstances that call for additional action on your part. And a failure to take action could lead to lawsuits against the association.

Community-wide harassment.

When the harassment isn't directed at one individual, but many, or the abusive behavior affects more than just one neighbor, you have an additional responsibility. If a member is, for example, throwing items off his balcony at anyone who passes underneath, or is verbally abusive and confronts neighbors in a common area, then he's violating the nuisance provisions of your declaration and/or bylaws. But because he's now being abusive toward the community at large, you're no longer a neutral third party; you're involved.

In that case, in addition to involving the police, de Haan suggests you seek an injunction from a court of law. An injunction is a legal order by a judge, prohibiting certain behaviors. When a member has become a nuisance to everyone in the community, it's the association's obligation to put a stop to it. (You can also consider communi-

ty-centered punishment, such as fines, sanctions, and suspension of privileges.)

Discriminatory harassment. If a member is harassing or being abusive to others on the basis of any of the prohibited categories set out in federal fair housing law—race, color, religion, sex, familial status, physical or mental handicap, or national origin—the association's obligation to put a stop to it is *urgent*. If the association does nothing, the harassed member could sue the association for violating fair housing laws. This means that you should take any or all of the steps listed above, as well as any other legal means available to you, to stop the harassment. Additionally, make sure to document everything you do regarding the matter *and* involve the association's attorney.

Be careful about labeling this type of disagreement as a neighbor-to-neighbor dispute and taking a relatively passive role in trying to help resolve it. This can be a very costly mistake, particularly where protected classes of citizens are involved.

Insider Source

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RECENT COURT RULINGS

► Manager Isn't 'Debt Collector' When Pursuing Assessments

Facts: A homebuyer purchased his home, situated in a community association, by a warranty deed that had no reference to the association's declaration.

The homeowner failed to pay dues and assessments imposed by the association—one of the obligations in its declaration. Over time, the manager, on behalf of the association, sent multiple letters and invoices to

the owner requesting payment of the dues and assessments, without results. Eventually, the association had its attorney send letters to the owner, attempting to collect the amounts owed. But the owner still refused to pay.

The association sued the owner to collect the debt. In response, the owner filed a third-party lawsuit against the attorney and manager. The owner claimed

that he had no knowledge of the existence of the association and wasn't subject to its fees and assessments because the declaration creating the association and listing this obligation wasn't part of the documents he signed at the time he bought his home. The owner also claimed that the attorney and manager had violated the Fair Debt Collection Practices Act (FDCPA) in pursuing collection of the assessments.

A trial court ruled in favor of the association, attorney, and manager. The owner appealed.

Decision: An Indiana appeals court upheld the decision of the lower court.

Reasoning: On appeal, the owner argued that because the obligation to pay fees and assessments to the association had been created in a declaration that had been filed *after* the previous owner purchased the home, that obligation didn't apply to the previous owner or him. The appeals court noted that, because of the timing, the subsequent sale by warranty deed to the new owner mistakenly made no reference to the declaration. The association also conceded that the declaration was filed *after* the previous owner purchased the home and that the declaration wasn't mentioned in the deed pertaining to the new owner's purchase. However, according to the association, the owner was "estopped"—that is, prevented by legal principles of equity and fairness—from claiming that he didn't know of the existence of the association or its declaration and, therefore, wasn't obligated to pay its dues and assessments.

The appeals court agreed for two reasons. First, it was clear that the owner knew about the existence of the association because he had taken advantage of the services it offered, which he couldn't refuse to pay for now. The appeals court noted that, in this case, the association performed many services for the owner. It hired managers, paid county property taxes and drainage assessments, hired landscapers to maintain common areas, provided liability insurance, maintained common drainage, and enforced the association's restrictive covenants. And the owner accepted these benefits while fully aware of the existence of the association, stressed the appeals court.

Second, the owner also acknowledged the association's role and authority when, on four separate occasions, he responded to the association's requests that he correct problems with his property relative to the restrictive covenants in the declaration. And there

was evidence that he attended annual association meetings and in so doing never protested his obligation to pay dues.

While the appeals court acknowledged that there was an irregularity as to the declaration not being mentioned in the warranty deed, it pointed out that the declaration was a *matter of public record* and applied to the property notwithstanding that irregularity.

The owner had, at a minimum, *constructive* knowledge of the existence of the association and, therefore, his obligations under its declaration. Moreover, his conduct demonstrated *actual* knowledge of the association, as reflected in his attendance at association meetings and his submission to its authority to monitor and regulate the use and appearance of his property. He accepted the benefits of the association for four years after purchasing his lot before he registered his refusal to pay dues. As a result, the appeals court determined that he couldn't challenge the legitimacy of the association and the declaration now.

The appeals court also agreed with the lower court that the attorney and manager hadn't violated the FDCPA. It pointed out that Congress passed the FDCPA to eliminate abusive debt collection practices by debt collectors. But liability under the FDCPA is contingent upon a party's classification as a "debt collector," meaning any person who uses any instrumentality of interstate commerce or the mails in any business that has the "principal purpose" of collecting any debts. This extends to anyone who attempts to collect debts owed to another party—here, the association.

Because of its role, the manager had a "fiduciary" relationship with the association, which it said didn't fall within the primary definition of debt collector. Additionally, there was evidence that the manager provided *numerous* management services to the association, only *one* of which was collecting resident fees. The attorney also was acting in his fiduciary capacity in collecting fees on behalf of the association because he served as its legal counsel, said the appeals court. Attorneys who regularly engage in debt collection are governed by the FDCPA, but the principal purpose of the association's attorney's work wasn't collecting fees from members.

■ Plunkitt v. Beckoning Way Community Association, January 2012

Toxic Mold (continued from p. 1)

ciation is not liable to any member for damage or injury resulting from a leak, you might think that you're off the hook for damages. But in some cases, associations *are* liable for members' mold-related injuries notwithstanding the clause.

Don't rely on your clause alone to relieve you of responsibility. Here are additional steps you can take, including asking members for help in keeping the community mold-free.

Make 'Good Faith Efforts'

Even if your governing documents state that the association isn't liable, a member who suffers a mold-related illness could win a claim against the association depending on how the association responded to the mold problem. If the clause in your governing documents states that the association isn't liable to any member for damage or injury—namely, mold-related illness—resulting from a leak *provided the association acted in "good faith" in fixing it*, you could still be in trouble if your good faith efforts are inadequate or fail and you don't pursue remedying the problem. For example, hiring an unlicensed contractor to repair leaking pipes and remove mold from affected walls may not be a "good faith" effort that would protect you from liability.

And if subpar remediation efforts fail and you don't either find a more qualified remediation service or allow the member to pay for her choice of remediation measures and reimburse her for the cost, a court could find that you're responsible for her injuries. That's

MODEL LETTER

Remind Members About Leak and Mold Prevention Tactics

Periodically remind members that they can prevent mold problems using simple maintenance tasks. Send them a letter like this one once a year. If your community is in a part of the country that experiences a rainy season, or a wet season due to melting snow, send the reminder shortly before the season begins.

Dear Members:

ABC Community Association would like to remind you about several simple maintenance tasks that can minimize mold problems in the community. We would like to offer two tips that will help keep your home comfortable and dry. We recommend that you keep window sills clear of dirt and debris. Windows often have a simple drainage, or "weep," system designed right into the product. These water drainage pathways must be kept clear and clean for the window or door to operate correctly. Also, we ask that you check that rainwater will have clear access to unclogged [*insert patio or balcony*] drains. We know that members' [*insert patios or balconies*] sometimes get cluttered. Ensuring that nothing obstructs your exterior drains will help keep your home and your neighbors' homes dry. It's important for us to make sure you are comfortable, that the buildings are well maintained, and that no one's property gets damaged. Please help us by keeping these tasks in mind the next time you clean or organize your home.

Sincerely yours,
Jane Manager

because, at that point, the member's injuries didn't arise directly from the leak—they arose from the association's negligent conduct in remediating and repairing the member's unit. But cooperation from members in preventing mold in their units can help you avoid this situation.

Ask Members to Perform Simple Maintenance Tasks

Members can do their part to ensure that rainwater drains properly from their windows, outdoor balconies, or patios. Because they're in their units on a daily basis, they have the first opportunity to stop a mold problem before it gets out of hand. It's important for them to know that they can prevent mold problems using simple maintenance tasks.

For example, members can periodically vacuum their window tracks, which, like rooftops, have their own drainage systems. In sliding windows, drain holes are located at the bottom corner joints. Debris can obstruct these exits, causing leaks into members' units. Sometimes members or associations assume that leaks from windows indicate a much bigger leak problem, when simply clearing out the bottom window tracks will do.

Also advise members to keep their decks clear of debris. Patio and deck drains are small, and a deck with misplaced plants or stray leaves can obstruct the drains, resulting in leaks into their own or neighboring homes. You can use our Model Letter: Remind Members About Leak and Mold

Prevention Tactics, to give members these maintenance tips.

Minimize Potential for Leaks

Take steps to avoid mold from forming. First, ensure proper drainage, which requires that excess water be correctly carried away or diverted from sensitive areas on roofs. For sloped roofs, sensitive areas are at the valleys where one sloped roof meets another, and other areas where water is channeled during rains. Any debris caught in the valleys essentially creates a dam, which can direct the moisture sideways and under roof shingles.

Sitting water on flat roofs can cause the roofing felt—that is, rolled paper-like material used for waterproofing—to break down. To prevent this from occurring, have a qualified service provider or maintenance worker remove all leaves and debris from rooftops at least twice a year, or more frequently, if there's a lot of greenery above the roofline.

Respond Promptly to Member's Complaint

After a mold problem is discovered, promptly take care of it. You'll have to decide on who should do the cleanup. This depends on a number of factors. One consideration is the size of the mold problem. If the moldy area is less than about 10 square feet, according to the Environmental Protection Agency (EPA), the job can be handled by a maintenance worker. But if the moldy area is larger than 10 square feet or there's a lot of water damage, the EPA recommends hiring a contractor who has experience to do this type of cleanup.

Keep in mind that you shouldn't use your own maintenance workers for larger areas or other cleanup responsibilities that they aren't specifically trained for. For example, take extra caution when water or mold damage was caused by sewage or other contaminated water. Rather than using maintenance workers or a general mold remediation service, the

association should call in a professional who has experience cleaning and fixing buildings damaged by contaminated water.

Finally, if the association has health concerns about any mold issues, it should consult a health professional before starting cleanup.

EDITOR'S NOTE: Most association insurance policies don't cover mold-related damage and claims. To check your association's coverage, look in the "Exclusions" section of the policy to see if mold coverage is capped or excluded. If the association is willing to pay the price, it may be able to buy a special policy—called a "special pollution insurance policy"—that will cover mold.

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Search Our Web Site by Key Words:
liability; mold; maintenance

Mortgage Refinance Plan (continued from p. 1)

facing foreclosures and plunging home values that have left them owing more than their homes are worth. The administration plan would make refinancing easier for borrowers who have been unable to take advantage of lower rates, despite good credit scores, because they're underwater on their loans or because they're seen as high risks by banks.

About one-million homeowners have used the administration's Home Affordable Refinance Pro-

gram, which allows borrowers to refinance mortgage loans at lower rates if they're backed by government-affiliated mortgage companies Fannie Mae and Freddie Mac. The plan was underutilized according to the administration's expectation that at least four-million borrowers would take advantage of the opportunity to get out of trouble—partly because many homeowners couldn't qualify. The new plan would extend the Home Affordable Refinance Program to privately held mortgages and relax

some criteria that discouraged homeowners from using it.

The administration estimates that 3.5 million borrowers with privately held mortgages have high enough interest rates that they would have an incentive to refinance under the new plan. That's in addition to 11 million borrowers who have Fannie- or Freddie-guaranteed loans who could be eligible for refinancing under the administration's proposed changes.

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Mortgage Refinance Plan

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Under the new plan, homeowners with privately held mortgages may refinance their mortgages into loans backed by the Federal Housing Administration (FHA)—

if they've been delinquency free for six months before refinancing. Their loans would also have to fall within the mortgage limits set by the FHA in their home counties. Under the program, banks would have to reduce mortgage balances for those homeowners who owe

more than 140 percent of the value of their homes. Homeowner voters may also be pleased with the Obama administration's forthcoming plans to set new industry standards for mortgage servicers that would protect borrowers taking out home loans.

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