

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

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### HOA Rents Out Home It Doesn't Own

The owner of a home in a Wesley Chapel, Fla., development was shocked to find out that her tenant had been evicted by the homeowner's association, which changed the locks and moved in its own renter. The owner said that the home hasn't been foreclosed on, but that the association still has taken it over. Now, a legal battle is heating up over whether the eviction is legal. Some HOA legal experts said that it might be, because the owner moved a tenant into her house without paying off a lien the association had imposed. But legally, the association has no right to change the locks and rent to a tenant that it's chosen, they said.

The association imposed the lien in 2009, but the owner said she never learned about it until later, when the association persuaded a court to evict her tenant for nonpayment of the rent. (The association had demanded that

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## FEATURE

### Set Procedure for Making HOA Rule Exceptions

Every planned community has homeowners association rules, tailored specifically to the nature of the community, its members, and its board of directors. For example, an age-restricted community will have different rules than a condo building. It's important that, as the community manager, you strike a balance between making sure that the agreed-upon rules designed to keep the community operating successfully and its members happy are appropriately, but not overzealously, enforced.

This can be tricky, though, when a member either refuses to follow an HOA rule or asks that it not be enforced for him in particular. At the very least, granting this request can be a slippery slope and can

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## RISK MANAGEMENT

### Conduct Five-Point Summer Preparedness Inspection

As the seasons shift at your community, you'll be presented with safety, equipment, and maintenance challenges. Summer is quickly approaching. Are you ready? Follow the *Insider's* step-by-step summer preparedness guide to minimize risks associated with the season and ensure that community members get the most out of this pleasant time of the year.

The best way to prepare your community for summer is by conducting a risk management inspection to take stock of and solve any problems that might have developed over the winter and could potentially injure someone and lead to lawsuits, says property management expert Steve Madre of Illinois residential management company Banner Apartments, LLC. Your five-point inspection should:

#### Address A/C Issues Ahead of Time

There most likely will be an increased use of air conditioners during the hottest months of the year. You and your maintenance staff should inspect A/C units that are susceptible to problems. For example, in multifamily properties, air conditioning is typically supplied

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**HOA Rule Exceptions** (continued from p. 1)

give members the idea that rules can be waived if they only ask for an exception. But it can also have more serious ramifications: Making a rule exception for one member and not another can lead to claims of “selective enforcement,” and that can be used as a basis for a discrimination lawsuit. Avoid this risk by requiring members to formally ask for rule exceptions—and by carefully documenting those requests.

**Two Types of Rule Exceptions**

Associations occasionally make exceptions to enforcing HOA rules, but not all exceptions constitute selective enforcement, points out Hawaii community association attorney and *Insider* board member Richard Ekimoto. Typically, there are two types of exceptions: (1) a legal variance; and (2) failing to enforce a violation without a valid legal reason. Some associations either have an express provision in their governing documents allowing variances or they have a policy that permits variances, says Ekimoto. Usually, variances are granted in situations involving unique circumstances that warrant an exception and where the purpose for the general rule doesn’t apply, he explains.

**Selective Enforcement Liability**

Selective enforcement of HOA rules may create fair housing issues that can result in discrimination claims. But that’s not the only liability selective enforcement can create.

“If there is no valid reason for an exception, selective enforcement can give rise to challenges to the enforceability of the rule in other situations and could potentially give rise to a claim that the association or the board is not acting in accordance with the best interests of the association or its members,” warns Ekimoto. Most rules could be waived in the event of an emergency or under similar special circumstances, but on a regular basis, the greatest risk of liability to the association occurs when rules that exist for safety are waived or not enforced, he notes.

**HOA Rents Out Home** (continued from p. 1)

the tenant stop paying rent to the owner and pay it instead, but the tenant refused.) But there’s no legal requirement in Florida to notify a property owner when a lien has been imposed. The owner missed a \$225 association dues payment, but with late fees and special assessments, the lien amount has ballooned to \$2,565.

The new tenant is paying rent to the association, which has hired a real estate agent to market other homes for rent that it has taken possession of in the development. Meanwhile, the owner said she has hired a lawyer and plans to ask a judge to give her back control of her home.

Check your governing document provisions regarding exceptions. Depending on those provisions, some exceptions may be more permissible than others. For example, exempting members' compliance from recorded covenants may be more difficult than letting go of board-adopted rules.

### **Protect Association with Documentation**

Because exceptions have the potential to create controversy and liability for the association, you should be diligent in documenting members' requests for you to waive rules.

"Most experienced managers will ask that the member make the request in writing and provide an explanation of why the exception is being requested," says Ekimoto. "It's always helpful for the member to provide supporting documents, but the manager should be careful about fair housing issues."

Under the Fair Housing Act, you can't require a person to make a request for an accommodation for a disability in writing. So if a resident who uses a wheelchair, for example, asks for a special parking space or an exception to the parking rules so he can park closer to his unit, you can't require him to fill out a form, says Carol Johnson Perkins, editor of *Fair Housing Coach*. But you should still document the request by filling out whatever form the association has for that purpose yourself.

"Furthermore, if someone's disability is obvious, you can't ask for documentation that the individual has a qualifying disability—for instance, if the person is blind, you shouldn't ask for a doctor's note saying that the person is

blind," Ekimoto stresses. "Similarly, requesting documentation supporting the need for a guide dog for a blind person would not be appropriate," he adds.

"However, you may ask for documentation if the person requesting the accommodation doesn't appear to have a disability," Perkins adds. The law allows you to verify that the person legally qualifies as an individual with a disability—that is, has a physical or mental impairment that substantially limits one or more major life activities.

"In addition, you may ask for documentation if the person's need for the requested accommodation is not obvious or apparent—for example, if an individual who uses a wheelchair for an obvious mobility impairment asks to keep an assistance animal as an exception to the community's no-pet policy," Perkins says. Because the rules relating to reasonable accommodation requests are complicated, you should get legal advice about how to properly respond to such requests when they arise.

Not all request forms look the same. Determine what kind of documentation form would work best for your association. "If the association has a formal process in place for variances or exemptions from the rules, standard forms that ask for the information necessary for the board to make a decision about the variance may be appropriate," recommends Ekimoto. However, in some cases, the association's documents may have provisions that set the standard for when and how the variance can be granted, in which case that information should be included on the request form. Otherwise, a letter

outlining the reasons for the exception would be okay, he says.

### **Proceed with Caution**

After a request for an exception is made, strictly follow association rules and procedures that are in place, and consult with the association's attorney for guidance when legal issues arise. When you receive a request, make sure you:

#### **Don't exceed your authority.**

"The manager should consider whether he has the authority to grant the exemption or whether it must go to the board," Ekimoto recommends. Some associations have procedures that allow the manager to approve certain exemptions or requests that meet certain standards. For instance, the board may have delegated authority to the manager to approve overnight parking in guest parking spots if certain requirements are met.

**Act within deadlines.** Next, determine whether there are any deadlines for responding to a request. Some associations are required to respond to a request within 30 days and the manager will need to find out whether a special meeting of the board or a denial of the request pending further review will be necessary, notes Ekimoto. Then, review the information and determine whether it's sufficient to make a decision on the request. Provide the request to the board members in advance of the meeting along with any other information that's relevant to the request—that is, references to the governing documents' provisions that the member is seeking to be exempt from.

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## HOA Rule Exceptions

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### Seek necessary legal advice.

You should determine whether the board will need expert or legal advice to consider the request. Additionally, consider whether legal documentation will be necessary if the request is granted, Ekimoto points out. If a contract is going to be needed, the manager may wish to get an estimate for the documents since the board may wish to pass this cost on to the member, he says. Keep in mind that some legal documents may need to be recorded in order to bind subsequent owners of the lot or unit.

### Notify Member About Decision

How should you notify a member that his request has been denied or granted? Responses should be in writing, says Ekimoto. Additionally, some associations' governing documents *require* that the reasons for a denial be given to a member. However, to the extent possible, the reasons should be given—even if not expressly required by the governing documents. If the member has a right to appeal the decision, inform the member that he can do so.

It's just as important to give certain information to a member whose request has been approved. Include these specific items in the notice or letter you send to the member:

- The conditions, if any, on the approval of the request;
- Information about how long the variance will last;

- How quickly the member must act to take advantage of the variance. (For instance, if an exception is granted for construction, your letter should make it clear that the exception doesn't necessarily mean that the member can rebuild the improvement when it burns down or needs to be replaced; the process of requesting an exemption would have to be started again since the reasons for the exception may no longer be valid at that time, Ekimoto explains.)

- What events would end the variance or under what circumstances the association has the right to reinstate the waived rule.

### Head Off Violation Beforehand

It's a good idea to keep members informed from time to time about your HOA rule enforcement policy, especially if it changes. When you remind them, you can also let them know that there is a formal procedure for making requests for a variance or exception. That way, you may be able to prevent possible violations because members will be reminded that a violation won't go unnoticed, the board is prepared to take action if one is discovered, and there is a proper channel to go through for exception requests.

You can do this by having the governing documents contain a provision requiring the board to adopt and announce to the community its enforcement policy, including information about whether the board will seek out violations to enforce, or whether it will react only to written complaints filed by members.

If you receive a complaint of a rule violation, but the board thinks that not enforcing the rule is a better choice than enforcing it, then the board should discuss the issue at the next open session or at a special meeting, if the issue is controversial or will affect many members. Although, in many cases, the board can refrain from enforcing a rule under the "business judgment rule," the board does have an obligation to tell the members why the board is not enforcing a rule in a particular instance. Open discussions like this can help shield the board from liability.

Some associations like to include provisions that the member maintain her membership in good standing to be able to continue to keep the variance exception. Think about whether this is an option that you should discuss with the board.

Ultimately, you and the board must make a careful review of a rule exception request and balance the considerations before making the decision to enforce it or not. That way, you'll act in the best interests of the individual member and the community as a whole.

#### Insider Sources

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## RECENT COURT RULINGS

### ► Rental Fee Resolutions Required Owner Vote

**Facts:** A luxury recreational vehicle (RV) park association allowed the owners of lots in the park to rent them to non-owners. To regulate lot renting, the association's board of directors enacted three resolutions that imposed requirements for owners to meet before renting their lots, such as identification requirements and ensuring available liability insurance. The resolutions also imposed rental fees to be paid by owners and penalties for nonpayment of the fees.

Some owners rented their lots but refused to pay the fee. Pursuant to the resolutions, liens were placed against their lots. The owners sued the association. They claimed that the resolutions exceeded the powers of the association's governing documents and required an *owner* vote. A trial court ruled in favor of the association. It determined that the association could impose certain requirements upon lot owners through a vote of the board of directors, rather than a vote of the lot owners. The owners appealed.

**Decision:** The appeals court reversed the lower court's decision and ruled for the owners.

**Reasoning:** The owners contended that the resolutions imposed amendments to the declaration covering the park, which can't occur without an owner vote. The association contended that the resolutions were not amendments, but rather, were valid exercises of already existing powers. The appeals court pointed out that, under the declaration, the association may regulate the use of lots and association property, but not charge lot owners to lease their lots. The declaration addressed only the term of leases and empowered the association to impose reasonable regulations upon the leasing of lots—but not fees.

The association's bylaws allowed the board to pass regulations that related to the general welfare of the members. Here, the challenged resolutions included provisions for insurance, identification of users and tenants, and other requirements consistent with safety and regulatory requirements. Those administrative requirements related to the general welfare of the members, and thus were valid, said the appeals court.

But the fee for rentals wasn't within the association's power to regulate leasing or impose assessments. The fee wasn't a general or annual assessment,

because those who didn't rent their lots were unaffected by it. Rather, said the appeals court, the fee wasn't a regulation or assessment; it was an additional restriction upon leasing or renting. To rent a lot, an owner was required to pay the association—creating a condition to lot rental that wasn't in the declaration, the appeals court concluded. Because the declaration doesn't address fees paid for rentals to non-owners, the resolutions' requirements for payment of fees were beyond the scope of the powers of the board of directors. Such a requirement, which restricted leasing to those who paid the fee, was a material change to the declaration and not a reasonable rule or regulation, the appeals court determined.

■ Clark, et al. v. Bluewater Key RV Ownership Park, April 2012

### ► Association Not 'Debt Collector' When Pursuing Late Assessment

**Facts:** A condo association's manager discovered that it had failed to invoice the correct monthly dues for 10 months to the 36 members of the association. As a result of this billing error, there was an \$8,521.50 shortfall. With the association's permission, the manager divided the total of \$8,521.50 by the number of members, and tried to collect a one-time charge of \$236.71 from each. A certain member had paid her monthly and quarterly assessments and dues in a timely manner until that point but refused to pay the assessment. Over the next two and a half years, the manager charged the member additional late fees, placed a lien for \$751.91 on her residence, and notified her of impending foreclosure on her home to collect the fees. In the meantime, the manager's employee also left voicemails on the member's home phone about the lien and assessment collection.

The association then sued the member. The district court ruled in favor of the association, and the member appealed. A Maryland appeals court later reversed the district court's decision and dismissed the association's lawsuit, finding that it was barred by the state's three-year statute of limitations—the time within which a party can bring claims against another party.

Meanwhile, in a separate lawsuit, the member sued the association and manager, alleging that they violated the federal Fair Debt Collection Practices

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## Recent Court Rulings (continued from p. 5)

Act (FDCPA) and various Maryland debt collection and consumer protection laws for their conduct in attempting to collect her homeowner's assessment, including allegedly harassing phone calls and acting as a collection agency without a license. She also claimed that they were vicariously liable for the collection actions of the law group that tried to collect the assessment on their behalf.

The member, manager, and association each asked the court for a judgment in its favor without a trial.

**Decision:** The appeals court granted the association and manager's request for a judgment in their favor without a trial.

**Reasoning:** The association and manager argued that the member's FDCPA claims were time-barred. The FDCPA allows parties to sue debt collectors for violations of its provisions up to a year after the violation is alleged to have occurred. Here, the alleged harassment occurred in 2008, but the member didn't sue the association until 2010. And the law group attempted to collect the assessment in 2008, so the association and manager couldn't be vicariously liable for those actions, either.

The manager, association, and law group also didn't qualify as "debt collectors" under the FDCPA, a requirement to be liable for FDCPA violations. The appeals court pointed out that an entity that tries to collect a debt on its own behalf is not a debt collec-

tor under the FDCPA. In this case, the association's attempts to collect the assessment were made *on its own behalf* rather than by a third party.

As for the manager, the appeals court noted that a "debt collector" doesn't include any person collecting a debt owed to another—here, the association—to the extent that such activity concerns a debt that wasn't in default at the time it was obtained by such person. That is, when the manager and law group began collecting the assessment from the member, the member hadn't yet defaulted on her mortgage or been foreclosed on because of the debt. As a result, said the appeals court, the association, manager, and law group didn't qualify as debt collectors subject to liability under the FDCPA. For the same reasons, they also weren't liable under the state laws.

The appeals court specifically addressed the member's vicarious liability claim. It pointed out that an employer—here, the association—is vicariously liable for the actions of its employee—here, the law group—when the employee is acting within the scope of a "master-servant relationship." This rule doesn't apply, however, where an employer's independent contractor commits the actions. In this case, the law group was an independent contractor—that is, it contracted to perform law services for the association according to its own methods, with no control by the association as to how it should collect past-due homeowner's assessments.

■ Fontell v. Hassett, April 2012

## Risk Management (continued from p. 1)

to the entire building. To help prevent a breakdown of the air-conditioning system, you should do two things.

First, clean the unit. Change the filters on the central unit and clean the condensing coils. For minor dirt buildup, use a nonacid, self-rinsing coil cleaner. Over the winter, debris, such as leaves, bugs, and bird nests, might have accumulated, so remember to clean out any debris gathered around and inside the unit.

Second, test the system. After inspections and maintenance, ask members to test their air-conditioning units to make sure they're working properly. If there's a problem with the system, you'll be able to order parts and make repairs before weather temperatures rise. This is important especially in age-restricted communities where a heat wave can cause health problems and emergencies for elderly members.

### ❑ Prevent Water Damage

It's important to clean winter debris from roofs, gutters, catch basins, shutters, and downspouts before it has a chance to channel water sideways and under roof shingles, which erodes roofs and causes leaks.

If your association is responsible for maintenance of roofs, your maintenance staff should clean out any debris that has collected in those areas over the winter. Forgetting to maintain roofs like this

can lead to bigger maintenance issues and damage later. Let your maintenance staff know that they should also use a simple hose and nozzle to make sure no part of the storm system is clogged. But don't use strong water pressure, because the downspouts and gutters are not designed to comply with plumbing pipe standards. Be prepared to remove sections of downspouts whose clogs are making it impossible to reach blockages.

### ❑ **Ensure Equipment Is Working Properly**

Your staff and members of the community are susceptible to injuries—and you could be at risk for a lawsuit, if faulty or broken landscaping, swimming pool, and playground equipment causes an accident. Ask your maintenance staff to inspect the following items:

**Landscaping equipment.** Make sure landscaping equipment is working well by directing your staff to:

- Check oil and spark plugs on lawnmowers and any other gas-powered equipment, and change them if necessary;
- Clean out any grass accumulation from equipment;
- Sharpen mowers' blades; and
- Make sure other landscaping equipment, such as pruners, hedge clippers, and weed whackers, are clean and lubricated.

**Swimming pool equipment.** Swimming pools are a popular amenity during the summer, but a lack of proper safety equipment or safety equipment that's not in working order can make them dangerous. If your commu-

nity has a swimming pool, have your maintenance staff make sure that the emergency equipment, which should include a "shepherd's hook," backboards, first-aid kits, and signage, meet your local health department's requirements. Have your maintenance staff power wash the pool deck and pool furniture, and clean and repaint the pool restrooms.

**Playground equipment.** If your community has a playground, make sure all the playground equipment is working properly and that playground surfaces are in good condition, says Matre.

### ➤ **Review Hurricane, Tornado, Flood Preparedness Plan**

Many parts of the country experience violent weather, such as hurricanes, tornados, thunderstorms, and floods, during the summer. Review and update, if necessary, your community's preparedness and emergency procedures. Also, buy any products your community may need for emergencies, such as flashlights and plywood, and make any necessary structural changes. For tips on how you can prepare residents and staff to deal with natural disasters at every stage, see "Prepare Members, Staff for Natural Disasters," in the April 2012 issue of the *Insider* and available at [www.communityassociationinsider.com](http://www.communityassociationinsider.com).

Like community swimming pools, playgrounds are frequently used during the summer months. Worn surfaces or improperly functioning equipment can lead to accidents and expose your community to liability.

**Community's vehicles.** Have your maintenance staff inspect your community's vehicles, such as golf carts or maintenance vans. Instruct them to:

- Change the oil and brake fluid, if necessary;
- Check the belts and hoses; and
- Get the vehicles tuned up, if necessary.

### ❑ **Repair, Prepare Common Areas**

During your summer preparation, inspect the parking lots for winter weather damage that may have caused cracks and potholes in pavement and schedule any necessary repairs, such as repaving, repainting, or cleaning oil spots. Ice and freezing temperatures can also cause parking lot paint, such as striping, "No Parking" notations, and curb markings, to peel.

Also, consider ordering more trash receptacles. Because summer tends to be a busy season for moving, your community might

see lots of extra garbage because of moves and move-outs. It's important to find a way to avoid overflowing garbage cans that can attract vermin and look unsightly. Extra trash receptacles, such as Dumpsters, and, if it's possible, extra garbage pickups can keep common areas trash-free.

### ❑ **Clean and Inspect Maintenance Shop**

If your community has a maintenance shop, have your maintenance staff clean it out and inspect it. Instruct them to make sure all the chemicals are labeled and stored correctly, and that Material Safety Data Sheets are filed in a safe place, says Matre. Federal law requires you to keep those sheets as a record of the potentially dangerous chemicals you store.

#### **Insider Source**

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## DOS & DON'TS

### ✓ **Write Effective Rule Banning Grilling**

Sometimes members in a community that has a ban on barbecue grilling on patios and balconies don't take this ban seriously, especially during the summer months. To combat this, write a rule that effectively bans grilling.

A rule stating "Grilling on balconies is against the fire ordinance" is not enough. A thorough rule should:

- Cover not only "grilling," but also the use of any type of outdoor cooking device;
- Ban members from using this equipment anywhere—in the unit, on patios, balconies, and terraces; and

- Ban the storage as well as use of barbecue equipment both indoors and out.

Consider adapting our Model Rule for your community:

#### **Model Rule**

Due to the danger of fire and smoke disturbances to neighbors, the storage, keeping, or use of gas, charcoal, or open burners of any sort (as well as the fuel that they use) or any other cooking device not designed for indoor use is a violation of the Fire Prevention Code and is not permitted anywhere in the community, including within units or on terraces, patios, or balconies.

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