Community Association Management *Insider*®

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INSIDE THIS ISSUE

Association's Flag Removal Request Upsets Veteran

A Reston, Va., couple say they won't remove an American flag flying from their mailbox, despite a request by their community association to take it down. One of the homeowners said that, as a Navy veteran, he believes strongly in the country's flag and is disregarding the "poorly written" letter informing the couple that the flag violated community rules. The letter also asked the couple to trim overgrowth on their property. The Fairfax, Va.-based management company that sent the letter asserted that it was only doing what the board of directors asked it to do. But the president of the board is now backpeddling, saying that the flag-removal notice was a mistake and has been rescinded. He said he plans to send an apology to the couple. Meanwhile, a neighbor who is an Air Force veteran has never been asked to remove the flag posted on his property.

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FEATURE

Implement "Workplace-Improvement" Program to Increase Employee Productivity

Managing your community can be challenging even when things go smoothly and you have the help of competent staff members who are focused on doing their job responsibilities well. Failing to engage employees in activities outside of their day-to-day tasks may, at the very least, leave them unmotivated to do their best work and ambivalent about improving the community; at the worst, it can lead to resentfulness that they're stuck in the same role without feeling like they're part of the association.

This can lead to major problems for you. After all, you rely on your employees to efficiently carry out tasks that you assign to them, use good judgment when an unforeseen situation arises, and do their best to keep operations running smoothly. Unhappy employees may not only do a subpar job, but can also throw a wrench in the works.

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Q & A

Does Your D&O Insurance Offer Enough Protection?

Q The association I manage has a general liability insurance policy. Is this enough to protect the association board members from lawsuits, or should I consider additional insurance?

A Don't assume that because your association's general liability policy covers personal injury lawsuits, such as libel, slander, and invasion of privacy, that you're adequately covered to protect community association board members in case they get sued over actions they take in their capacity as board members. General liability insurance policies have different definitions than Directors & Officers (D&O) policies do for who's insured under the policy. For instance, committee members might not be covered at all under the general liability policy. And general liability insurance policies have many exclusions that can negate coverage for personal injury lawsuits and the defense of such lawsuits. That's why it's wise to also have (D&O) insurance, which will protect community association board members

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"Workplace-Improvement" Program (continued from p. 1)

What can you do? Making your employees feel appreciated and involved in developing work policies and procedures that affect them is essential to boosting morale and productivity. You can achieve this by implementing a "workplace-improvement" program that asks employees for their suggestions on improving the community and their own performance. We'll tell you how to put your program in motion and also give you a Model Memo: Solicit Employee Ideas for Improving Productivity to give your staff the opportunity to utilize the workplace-improvement program.

Program Is Worth Added Effort

Studies about workplace productivity consistently have shown that employees feel that interesting work, recognition of their contributions and accomplishments, and feeling "in on things" are the three most important factors about their jobs—even more important than wages and job security. "If employees feel that they're involved in your decision-making process, they're more likely to stay motivated," says California-based motivational speaker Anne Bruce, who speaks about improving employee morale.

Since your employees know more about what they do than anyone else does, they're often in the best position to spot changes that could make your community more efficient. A single suggestion can save substantial amounts of money for the association, or work for your team. So don't think of implementing a new program as just creating more work for you. Workplace-improvement programs do more than just motivate employees; their results can potentially make major improvements for the association. Employee involvement is also likely to lead to a higher rate of employee retention, greater employee creativity, and reduced waste—all of which will save you time later.

Conduct Meeting Efficiently

To kick off a workplace-improvement program, hold an informational meeting with employees. But that's not enough. Give employees a memo that gets them thinking about how their suggestions can affect efficiency and productivity. At the meeting, tell employees your goal of increasing efficiency and productivity. Let them know that they're an integral part of the community, so that they're motivated to generate ideas to help you reach your goal. Then ask for their suggestions on how to improve their work environment and overall productivity. Make the meeting an opportunity to listen to your employees and discuss their suggestions, not just an occasion to hand out the memo. The memo can help you conduct the meeting efficiently by providing a focus for the conversation. Your memo, like ours, should do two things:

Encourage employees' input. Acknowledge that your employees' involvement and input is critical to your community's success, because that success depends on continuous improvements in efficiency and

productivity. Then acknowledge that they are more familiar than anyone else with what they need in order to do the best possible job. Stress that you want their ideas on how they can do their jobs better and that they can also tell you if anything in their work environment can be improved [Memo, Intro.].

Explain how to give suggestions. Make it as easy as possible. You can use the same method as our memo, which asks specific questions and leaves room for answers. Asking your employees specific questions keeps them focused on how they can do their jobs better and how they can be more productive overall [Memo, pars. 1-6]. It also prevents employees from using the memo as an opportunity to barrage you with their complaints. Instead, they're forced to think about solutions to specific problems, says Bruce. For example, ask them if they need additional support to perform their job at their peak, and give examples, such as additional instructions, to show what you mean. You can also ask for their suggestions about the jobs of other employees whom they depend on or interact with. They may be able to propose changes for those other employees' jobs that will improve their own efficiency.

PRACTICAL POINTER: If you think that some employees won't be comfortable writing their answers, offer alternative methods. One option is to meet face-to-face with their supervisor to share their ideas. If the option is available, you can also give employees the choice to contact a senior executive.

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MODEL MEMO

Solicit Employee Ideas for Improving Productivity

Since your employees know more about what they do than anyone else does, they're often in the best position to spot changes that could make your community more efficient. The Model Memo below was drafted with the help of California-based motivational speaker and management consultant Anne Bruce. In addition to asking employees for their suggestions, it tells them how to report those ideas. You can adapt this memo to suit your community's needs.

WE'D LIKE YOUR IDEAS & INPUT

TO: ALL EMPLOYEES

We recognize that involvement and input from all of our employees is critical to our success. The reason is simple—our success depends upon continuously improving efficiency and productivity, and you, more than anyone else, are familiar with your job and what's required to perform it best. So we're requesting your ideas on how your work and work environment can be improved. Although we appreciate any suggestions you make on how we can improve overall community performance, we're especially interested in feedback on your own department, work environment, and duties.

To tell us about your ideas, please complete this form and return it to your supervisor. Or you can discuss your ideas with your supervisor or send an email to [*insert email address*]. Or you can pass on your suggestions by calling [*insert name*], at [*insert tel. #*] or meeting with [*him/her*] in person.

1. Do you need additional support (such as additional instructions or a partner to work with) to perform your job at your peak? ❑ Yes ❑ No

   If yes, please tell us about the type of support you need: _____

   _____

2. Do you have the tools or the resources (for instance, appropriate software) you need to get your job done correctly? ❑ Yes ❑ No

   If no, please tell us what tools or resources you need: _____

   _____

3. Are there training or educational opportunities you would like us to make available to you? ❑ Yes ❑ No

   If yes, please indicate the specific training or courses you would like to take:

   _____

4. Do you have any suggestions or ideas on how you can better do your job and perform at your best? ❑ Yes ❑ No

   If yes, please specify: _____

   _____

5. Do you have any suggestions or ideas on how other employees or departments can better accomplish their jobs? ❑ Yes ❑ No

   If yes, please specify: _____

   _____

6. Are you aware of any shortcomings in our current procedures? ❑ Yes ❑ No

   If yes, please tell us how you would correct or improve them: _____

   _____

"Workplace-Improvement" Program (continued from p. 3)

That's a good alternative because some employees may be reluctant to approach their supervisor with suggestions about a better way to do something because they're afraid that the supervisor will feel threatened.

Acknowledge Ideas and Give Feedback

Unless you acknowledge and act on the ideas you get, your employees will quickly lose interest in participating in your program. "How you respond to your employees' ideas will tell them more about how you value their ideas than anything else will," says Bruce. You don't need to give prizes or other rewards to motivate your employees, but you should acknowledge people who make valuable suggestions. To ensure that this happens, make someone responsible for tracking and following up on the ideas and suggestions that you get.

You can also give employees feedback through a follow-up memo that lists some of the ideas you've gotten and the actions you've taken or plan to take to implement them. Finally, make sure your efforts to involve your workforce in improving efficiency and productivity are part of a continuous program. Your memo asking for suggestions should be only the first step. Reach out to your employees every few months in other ways to get their input.

Insider Source

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Q&A (continued from p. 1)

in case they get sued over actions they take in their capacity as board members.

It's essential for all community associations to have D&O insurance, says Maryland attorney and *Insider* board member Jeffrey Van Grack. That's because, without D&O insurance, community associations would have a much harder time convincing members who would be afraid of getting sued to serve on the association board. Community associations also need D&O insurance because most governing documents require the association to indemnify its directors and officers against lawsuits, meaning that the association must pay to defend a lawsuit against a director or officer, as well as any damages a court might award against a director or officer, says Van Grack. Because they're nonprofit entities, few community associations have the money to provide this kind of protection. And most governing documents require it.

However, D&O policies vary greatly. Here are the four items that are particularly important for your association's policy to include:

Committee members, manager. When committee members aren't covered, it's very hard to get people to volunteer to serve on committees, Van Grack notes. So it's essential that your association's D&O policy cover committee members, especially those serving on committees that handle complicated tasks, such as finance. Beware that lesser D&O insurance policies protect only the directors and officers, but not committee members or the property manager. You should *insist* on being covered under the association's D&O policy before you agree to work for an association.

Don't forget that other people connected to the community could benefit from being covered. For example, policies are available that cover the spouses of board members and property managers, as well as association employees and the association itself. Talk with your association's insurance professional about what type of coverage would be best for your association. As always, speak with your attorney about what issues you should make sure are covered.

Nonmonetary claims. Be aware that D&O insurance policies cover only lawsuits seeking money damages, but not those seeking nonmonetary relief—for example, a court order invalidating a new community association bylaw. Why is that a big problem? *Most* common D&O claims *are* nonmonetary—for example, challenges to elections or to architectural review board decisions. So check your D&O policy to see whether it covers *both* nonmonetary and monetary claims.

Third-party breach of contract claims. Most D&O policies cover breach of contract claims against directors and officers if a member or the association itself sues the director or officer, but few policies cover directors and officers if a third party—such as a landscaper, roofing contractor, or snow removal contrac-

tor—sues, says Van Grack. Check your association's D&O insurance policy to see whether third-party breach of contract claims are covered. After all, dealing with third-party contractors is one of the primary jobs of directors and officers.

Personal injury, fraud, or dishonesty lawsuits. Most D&O policies don't reimburse directors or officers for court-awarded damages when they've been sued for personal injury, such as libel, slander, invasion of privacy, or certain wrongful acts, such as fraud. But D&O policies differ on whether the insurance company will pay for defending such a lawsuit. "This is a critical distinction because such lawsuits are often frivolous," says Van Grack. If your association's D&O policy doesn't at least pay for defending such a lawsuit, even an honest director or officer who eventually wins the lawsuit could be ruined financially by the costs of defending himself, he explains. Worse, your association's governing documents might prohibit the association from paying the costs of defending a personal injury, fraud, or dishonesty lawsuit. Providing a defense is crucial coverage to get from a D&O policy.

D&O policies also differ on the extent to which they'll defend a personal injury, fraud, or dishonesty lawsuit. Some policies will pay for the cost of defending the suit only until the plaintiff succeeds at the "summary judgment" phase. But all that means is that the court didn't dismiss the lawsuit at the very outset. Choose a D&O policy that pays for the costs of defending a personal injury, fraud, or dishonesty lawsuit *throughout* the lawsuit, and that refuses to pay damages only if the director or officer loses the lawsuit.

Even if your association has D&O coverage, it might not be adequate. "Imbedded coverage" is also tricky. Keep in mind that you should be especially careful if your association has this type of coverage—that is, D&O coverage that's part of your association's property and casualty insurance policy. The problem is that, often, imbedded coverage is very minimal—and in some experts' opinions insurance brokers would be wise to not even write this kind of product.

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RECENT COURT RULINGS

➤ Dwindling Amenities Didn't Abrogate Member's Obligation to Pay Dues

Facts: When a gated retirement community was developed, it had a variety of recreational amenities, such as an Olympic-sized swimming pool, tennis courts, playgrounds, clubhouses, picnic areas, a marina, lakes, beaches, and a campground. The association was organized to collect dues and assessments from property owners to pay for maintenance of the common areas and amenities. An owner based his decision to buy two homes in the community solely on the recreational activities and the availability of a dock for his pontoon boat.

The deed for both of the owner's lots contained a list of covenants stating that every property owner shall be a mandatory member of the association and shall pay his allocated share of the mandatory dues and assessments to the association for the costs to maintain the common areas, streets, lakes, dams, and other improvements and amenities. The covenants further provided that the property owner agreed to pay dues and assessments for community property regardless of whether the privilege of using the property was exercised.

Over several years, numerous investment purchasers bought and rented out lots. As the community shifted from owner-occupied to tenant-occupied, the rental property owners frequently stopped paying the fees and assessments, eventually leaving the association with a $4 million revenue shortfall. As a result of this shortfall, dues and assessments were used on essentials, such as improvement loans and insurance, leaving insufficient funds to maintain the recreational amenities. For example, the pool was empty and needed to be repaired before it could be refilled. The owner had not been able to use his boat dock in six years because the community's lake became contaminated with raw sewage.

Eventually, the owner stopped paying the assessments. He sued the association, asking the trial court to abrogate his obligation to pay fees and assessments to the association because the association had not maintained the community's amenities and common areas.

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Recent Court Rulings (continued from p. 5)

The trial court determined that the changes in the community were so radical that the original purpose of the community and the deed restrictions had "long ago been defeated." It abrogated the owner's obligation to pay dues and assessments and further concluded that the owner could still vote at association meetings even though his obligation to pay dues and assessments had been abrogated. The association appealed.

Decision: An Indiana appeals court reversed the decision of the trial court.

Reasoning: The association argued that the trial court erred in abrogating the owner's obligation to pay dues and assessments as provided by one of the covenants in the deeds to his properties. The appeals court stated that, although the law doesn't favor restrictive covenants, the contractual nature of these restrictions has led courts to enforce them—as long as the restrictions are unambiguous and don't violate public policy. However, public policy requires the invalidation of restrictive covenants when there have been changes in the character of the land in question that are "so radical as practically to destroy the essential objects and purposes of the agreement."

Here, the trial court concluded that because the amenities in the community hadn't been maintained, the changes in the community were so radical that the original purpose of the community and the deed restrictions were destroyed. The trial court therefore abrogated the owner's obligation to pay dues and assessments. The association responded that the trial court's decision conflicted with state contract law. The appeals court pointed out that the covenant regarding the payment of dues and assessments was for the benefit of all property owners in the area, and the property owners were still in a position to benefit from these payments. For example, dues and assessments were used to pay essentials to the community. The appeals court agreed with the association that the "lack of recreational facilities is not the type of 'radical change' that would justify the abrogation of a private contractual property covenant." Further, the bylaws clearly stated that the dues and assessments on the communal property were due regardless of whether the privilege of using the property was exercised.

The appeals court noted that it recognized that the association's financial mismanagement and a change in the demographics of the community had led to a revenue shortfall and an inability to maintain the community's amenities, and that it appreciated the trial court's attempt to provide relief following those untenable circumstances. However, the abrogation of the owner's obligation to pay dues and assessments is not a remedy for these problems, said the appeals court.

- CSL Community Association v. Meador, August 2012

➤ Petition for Swimming Pool Amendment Didn't Change Declaration

Facts: The declaration for a Pennsylvania planned community prohibited swimming pools on individual lots. A homeowner requested that the board consider changing the restriction on swimming pools. The board agreed that the owner could gather additional information regarding applicable city codes, insurance, and liability and present this information to the board. The board directed all correspondence with the owner to go through the community's manager who had the authority to speak on the board's behalf and to inform the owner how to proceed with amending the declaration to allow swimming pools. He emailed a pool petition form approved by the board to the owner, which required the owner to obtain 154 signatures from other owners.

The owner obtained the signatures and gave the petition to the manager, who resigned shortly thereafter. Meanwhile, the owner received a certificate of approval for construction of an in-ground swimming pool from the city. The owner notified the board of this but didn't get a response. He then started the installation. He later received an email from the association's new manager, advising him that he didn't have approval to install a pool and that the signed petition didn't equate to immediate approval, and a letter from the association's attorney.

The owner continued to install the pool. The association filed an emergency petition for injunctive relief—that is, an order from a court demanding that a party do or stop doing something—to halt any further construction. The trial court denied the request. The association appealed.

Decision: The appeals court reversed the trial court's decision and ruled for the association.

Reasoning: The appeals court noted that a declaration of a planned community is equivalent to a contract between a member of a homeowners association and the association itself. It pointed out that injunctive relief is appropriate in order to abate a violation of a planned community's governing documents. The owner argued that he had been led to believe by the association, through the actions of its manager in handing out the petition, that he could install a swimming pool as long as he had the required number of signatures of other owners. He said that, therefore, the association should be "estopped"—that is, prevented—from stopping the pool construction now. The appeals court noted that for "equitable estoppel" to apply, a party must prove: (1) intentional or negligent misrepresentation of some material fact; (2) misrepresentation made with knowledge or reason to know that the other party would rely upon it; and (3) inducement of the other party to act to its detriment because of justifiable reliance on the misrepresentation.

Here, the declaration set forth the use restrictions applicable to all unit owners in the community. It provides that "no Unit Owner may erect or install any swimming pool." In front of the trial court, the owner acknowledged that the declaration prohibited swimming pools, including in-ground pools, and admitted that neither the previous manager nor the board after the manager resigned ever informed the owner that he had permission to install an in-ground pool. While the previous manager provided the owner with a pool petition form approved by the board, this form merely set forth the requirements for amending the declaration and provided a means of gauging the interest of other residents in the community with respect to the proposed amendment. There was no indication from the previous manager, and no language in the pool petition form, that the form itself constituted an amendment to the declaration. Rather, the form explains that the board may propose an amendment and that any proposed amendment would require the affirmative vote of at least 67 percent of unit owners to become effective, said the appeals court. There was no support for the trial court's findings that the owner didn't violate the declaration or that the declaration was properly amended, the appeals court concluded.

The trial court found that the owner had detrimentally and reasonably relied upon the representations and actions by and on behalf of the board in installing a swimming pool. But the appeals court pointed out that the owner had been informed by several different methods—including a letter from the association's attorney and an email from the new manager—that it didn't have approval for a pool installation, that the signed pool petition form didn't grant any such approval, and that an amendment was still required.

- Reserve at Packer Park Homeowners Association v. Baldi, July 2012

DEALING WITH BOARDS

Board Members Must Abide by Term Limits

Sometimes, to comply with the law, association boards must be restructured. If you find yourself in the position of having to deliver the news and help with the restructure, you could be faced with accusations by board members that you're improperly trying to oust them for your own motives. For example, if you've had difficulty working with the current board members, they could assume that you'd like to replace them with members who will be more accommodating.

The laws that apply to condo association and HOA board term limits vary from state to state. So, before talking with the board about the situation, make sure you understand exactly why and how you must comply with the law. It can help head off any arguments that you're pursuing the restructuring for personal or professional gain or ease.

EXAMPLE: Your condo association's board members have three-year terms, according to its bylaws. But you learn that your state's Condominium Act has been amended to outlaw multi-year board terms, including three-year terms. The only exemption contained in the statute is for associations that want to establish staggered terms. In order to establish staggered terms under the law, however, several conditions must be met. First, the terms can't exceed two years. Second, the authority for two-year staggered terms must be contained in the

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Dealing with Boards

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association's bylaws. Finally, the operation with two-year staggered terms must be ratified.

Let's say that, in your case, none of these things ever occurred. Even if someone properly elected in the year that the law was amended, let's say 2009, has been "grandfathered" for a three-year term, his term would expire in 2012—and possibly already. Accordingly, all of your directors are probably serving improperly. The board should be cleaned up at the earliest possible time, such as an upcoming annual meeting. There may be pushback from current board members who say that, rather than resign at this year's annual meeting, they should be allowed to serve out the time as stated in the bylaws. Stress to them that to comply with state law, they're required to resign. Remind them that they may run for re-election if they wish, provided that your bylaws don't contain term limits.

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