

Community Association Management *Insider*[®]

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Pool Installation Violation Makes Waves

An above-ground pool that two Pittsburgh-area community members built on their property is making waves after the association filed a lawsuit, alleging that the pool violates the Unity neighborhood development's regulations and should be removed.

The association says in its suit that it notified the members that their pool was being built in violation of the community's restrictive covenants, but they continued to erect the pool anyway. The association says that it has the authority to enforce the restrictive covenants—which state that no above-ground pools can be installed or maintained on any lot, before or after construction—originally imposed by the developer of the property.

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FEATURE

Don't Let Member's Contractor Expose Association to Liability

If you're like most community association managers, you require contractors you've hired to prove that they're licensed and insured and have any other necessary qualifications to work in the community. However, members sometimes want to hire their own contractors to perform work in their units. This can open up the association to liability. That's because an association can be held liable if a member's contractor or one of the contractor's employees is injured or if another member is injured by the contractor's subpar work. You may think that your liability insurance will cover such a loss. Even if it will, the situation will still negatively affect the community. When calculating an association's premium, an insurer takes into account the number of claims that the association has already filed.

You can protect your association from claims, though, by requiring your members to get from any contractor they hire a signed "quality assurance" agreement before that contractor may start work in the unit. It's easier than you think to get this message across if your association requires members to get board approval before doing any significant work in their units. When members ask for approval, it's the perfect time to let them know that the approval is conditioned on first

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RISK MANAGEMENT

Improve Bicycle Safety in Community

Whether it's for fun, exercise, environmental concerns, or in an effort to save on gas prices and car expenses, an increasing number of children and adults have been riding bicycles. Many of your association members or their children may ride their bikes within the community. While bicycling should be encouraged, it can also create liability for the association if you don't set rules to improve safety for not only these cyclists, but also members who walk or drive there. If someone is injured in a bicycling accident at your community, he might sue the association, claiming that it's liable for his injuries. Having a well-thought-out set of rules for all bicyclists to follow at your community can help you avoid liability, particularly if it was caused by someone violating these rules. To manage that risk, consider implementing these bicycle rules:

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Member's Contractor (continued from p. 1)

getting the quality assurance agreement signed. Include the following nine items in your quality assurance contractor, and adapt our Model Agreement: Protect Association with Quality Assurance Agreement, for members' contractors to sign.

Key Items to Cover in Quality Assurance Agreement

Using a quality assurance agreement can save you a lot of money. Let's say that while an independent contractor is removing a bathtub to install a shower stall, the bathtub falls through the floor into the bathroom of the unit below. If you haven't ensured that the independent contractor was licensed and insured, you could've been liable for the damages.

So what should you include in your association's quality assurance agreement with members' contractors? Your agreement, like ours, should cover these nine items:

Item #1: Signatory. You should make sure that any signatory has authority to sign contracts. Be sure that whoever is signing the agreement has the right to so. If the contractor is a corporation, only certain people are authorized to bind it to a contract. Usually, these are offices of the corporation, but not always. So get the name and title of whoever is signing the agreement—and have him state that he's legally authorized to do so [Agr., par. 1].

Item #2: Licenses. Make sure the contractor is licensed to work in your community. Depending on where your community is located, this might require just a city or state license, but it might require a local license, as well. Also make sure the contractor has a license for the specific type of work it plans to do. For example, the contractor might be licensed to do roofing work but not electrical work [Agr., par. 2]. And this can leave you liable for mistakes that are made during electrical work.

Item #3: Permits and approvals. Have the contractor promise to obtain all necessary permits and approvals before beginning work. This includes any approvals it must get from the association. Why? It might help if a member tries to have work done without the association's approval. A legitimate contractor won't agree to start work if it has promised to get the association's approval first [Agr., par. 3].

Item #4: Proof of coverage. It's not enough that the contractor says it has insurance—require it to prove that with a certificate of insurance. This certificate should show how much coverage the contractor has for each type of insurance the association requires.

PRACTICAL POINTER: Don't settle for just the certificate of insurance. Get a copy of the actual policy, also. This is important because insurance policies often have what are called "exclusions to coverage"—that is, items that won't be covered if the contractor encounters them. For example, if you know that a contractor will be removing an old floor that contains asbestos, you wouldn't want its liability policy to exclude coverage for hazardous materials. To be

(continued on p. 4)

MODEL AGREEMENT

Protect Association with Quality Assurance Agreement

You can use this agreement to protect your association from liability when a member hires a contractor to do work in her unit. The agreement requires contractors to be licensed, to have all necessary permits and approvals before starting work, and to be properly insured. It also

says that the contractor’s insurance is primary and that the contractor will indemnify the association against any damage. Show this agreement to your attorney before adapting it for use in your community.

QUALITY ASSURANCE AGREEMENT

CONTRACTOR: _____

ADDRESS: _____

TEL. #: _____ LICENSE #: _____

SCHEDULED WORK DATE(S): _____

In return for the consent of the Board of Directors of *[insert community association name]* (the “Association”) to do work in the community and for one dollar (\$1.00) good and valuable consideration, I hereby state the following:

- 1. Authority.** I am the *[insert title]* of *[insert name of contractor]* and am legally authorized to sign contracts on behalf of *[insert name of contractor]*.
- 2. License.** I warrant and represent that my license, as specified above, is valid and in full force and effect and that it authorizes me to perform the type(s) of work contemplated at *[insert member’s address]*. I further warrant and represent that I will not exceed the limitations of my license, either in time or in scope.
- 3. Permits and Approvals.** I warrant and represent that, prior to commencing work, I will have obtained, and will provide to the Association, any and all necessary permits and approvals required by all governmental agencies having jurisdiction over such work, and by the Association.
- 4. Insurance.** Prior to commencing work, I will furnish to the Association certificates of insurance proving that insurance is in full force and effect from companies rated AAA+ or better, for the types of insurance listed in subparagraphs 4(a) to 4(c), below. Also prior to commencing work, I will furnish to the Association copies of each insurance policy.
 - a. General liability insurance of not less than *[insert amount of coverage]* per occurrence, which policy names the Association and its manager as additional named insureds. The policy shall provide that it may not be terminated or modified without at least thirty (30) days’ prior written notice. The policy shall include personal injury coverage, property damage liability coverage, and completed operations coverage, the last of which shall extend for a period of two years following completion of the work. If the work will involve hazardous materials, the policy shall contain coverage for damage or injury caused by such items, provided same is available.
 - b. Automobile insurance of not less than *[insert amount of coverage]* per occurrence, including all employees and

agents, and including nonownership and hired car coverage, as well as owned vehicles. The policy shall name the Association and its manager as additional named insureds. The policy shall provide that it may not be terminated or modified without at least thirty (30) days’ prior written notice.

- c. Workers’ compensation insurance covering all employees of the contractor and any subcontractor(s), as may be required by applicable law.

5. Contractor’s Insurance Primary. I agree that all insurance policies referred to in paragraph 4, above, are primary to the Association’s insurance.

6. Indemnification/Hold Harmless. I agree to indemnify, defend, save, and hold harmless the Association and manager, as well as their officers, shareholders, directors, agents, and employees from and against any and all loss, liability, and/or damage, including legal fees and costs, due to injury (including death) to any person, or from damage to any property, that may occur or be alleged to have occurred as a result, directly or indirectly, from performance of the work and from any material or equipment furnished in connection therewith, or from the acts, misconduct, or omission by me and/or any party hired by me, or any party furnishing or performing such work or anyone directly or indirectly employed by any one of them or anyone for whose act they may be liable, regardless of whether it is caused in part by the Association, manager, or any of their officers, shareholders, directors, agents, or employees.

[Insert name of contractor]

By: _____

Its: _____

PERMISSION GRANTED:

[Insert community association name]

By: _____

Its: _____

Member's Contractor

(continued from p. 2)

safe, read the policy and make sure that important things aren't excluded. To eliminate any chance of the contractor providing a fraudulent certificate and policy, try calling the insurer directly to request a certificate of insurance and the insurance policy.

Item #5: General liability insurance. Insist that the contractor doing the work have general liability insurance. The amount of coverage will depend on several factors, including the laws of your state. For typical jobs, require \$500,000 of liability insurance, but don't be afraid to try to get at least \$1 million. What should the policy include?

◆ **Coverage for both personal injury and property damage.** Depending on how extensive the work being done is, as well as how big a company the contractor is, ask for the general liability policy to include completed operations coverage. This covers damage occurring after the contractor has completed the project. For instance, if the contractor incorrectly installed a kitchen and it later floods the member's unit, as well as a neighbor's, this would cover the damage. Finally, if the work will involve hazardous materials, require that coverage too, as long as it can be obtained.

◆ **Additional named insureds.** Additionally, tell contractors that they must have their insurer add the association and manager to the policy as "additional named insureds." Finally, say that the policy must provide that it can't be terminated or modified without at least 30 days' prior written notice [Agr., par. 4(a)].

Item #6: Automobile liability insurance. If the contractor will have to drive through your community to get to and from the job, it should also have automobile insurance. The insurance should include nonownership and hired car coverage, so that the association is protected regardless of who's driving the contractor's vehicle or who owns the vehicle. Like the general liability insurance, the automobile insurance should name the association and manager as additional named insureds and should not be able to be terminated or modified without at least 30 days' prior written notice [Agr., par. 4(b)].

Item #7: Workers' compensation. It's essential that the contractor have workers' compensation insurance [Agr., par. 4 (c)]. Otherwise, if one of its employees is hurt on the job, he'll probably sue the association. And even if the contractor has previously promised not to sue the association, that won't stop its employee from doing so. Sometimes a contractor for a very small job is a sole proprietor—that is, he works alone and has no employees. If that's the case, he doesn't need to have workers' compensation insurance. But aside from this one exception, don't allow any contractors to work in your community without workers' compensation insurance.

Sometimes it can be hard to know just who is the employee or the employer. For instance, if the manager or board oversees a job where a worker is injured, a court could later say that, for practical purposes, the association was the employer and therefore liable for any damages. Don't be surprised to see this come up, even with a contractor that previously claimed to be a sole proprietor. If a con-

tractor who claims to be a sole proprietor shows up for work with a helper, don't let him work in the community.

PRACTICAL POINTER: Although in most cases, the three types of coverage described in items #5, #6, and #7, above, will be enough, sometimes additional insurance is a good idea. For example, for jobs that entail the removal of lead paint or other hazardous materials, insist that the contractor have hazardous material transportation liability insurance. This protects the association in case something goes wrong in the transportation of the hazardous materials out of the community. Some of the other possible additional coverages include contractor's liability insurance, blanket contractual liability insurance, and umbrella liability insurance.

Item #8: Primary coverage. It's very important to be clear about whose liability insurance policy—the contractor's or the association's—will pay first if there's a loss. So in your contract, say that the contractor's insurance is primary and the association's is secondary. This way, if something goes wrong, it won't affect the association's insurance unless the contractor's insurance is insufficient to cover the loss [Agr., par. 5].

Item #9: Indemnification. Finally, the contractor should agree that if anyone sues the association, the contractor will pay the damages on the association's behalf [Agr., par. 6]. It's especially important to get this if you allow a sole proprietor without workers' compensation insurance to work in your community.

Insider Sources

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RECENT COURT RULINGS

► HOA Could Sell Owners' Lot to Satisfy Attorney's Fees Lien

Facts: Two owners purchased an unimproved lot in a planned residential community. The recorded Declaration of Covenants, Conditions, and Restrictions (CC&Rs) of the association applied to all properties located within it. Several years later, the association filed a complaint alleging that the owners had breached the CC&Rs when developing their lot, but the owners denied any breach. The association asked the district court for a judgment in its favor, which was granted. The district court ordered the owners to immediately comply with the CC&Rs and to pay for the association's attorney's fees of \$16,354.

Instead, the owners told the association that they had transferred their mortgage on the property to a "development and mortgage" company, which was now responsible for paying the fees. (It was later discovered that the company had been incorporated by the owners themselves and that a valid transaction hadn't taken place.) After a series of unsuccessful appeals by the owners, they were ordered to pay attorney's fees for those claims as well. Ultimately, an appeals court upheld the lower courts' decisions and concluded that the owners' appeals were brought "frivolously, unreasonably, and without foundation."

After the association made unsuccessful attempts to collect the attorney's fees, which totaled more than \$21,000, it sued the owners and the mortgage and development company, asserting that the conveyance of the mortgage by the owners to the company was a fraudulent transfer designed to avoid complying with the CC&Rs and to avoid the lien for attorney's fees that the association had placed on the property. The association asked the court for an order demanding that the owners sell the property to satisfy the attorney's fees lien. The property was sold at a sheriff's sale, and the proceeds were applied to the lien. The owners appealed, arguing that the court erred when it determined that the entire property should be sold.

Decision: An Idaho appeals court upheld the lower court's ruling in favor of the association.

Reasoning: The owners asserted that the entire property wasn't subject to a sale. Specifically, they said that the entire property couldn't be sold because they each owned separate interests in the property as "ten-

ants-in-common." However, the appeals court pointed out that both of the owners had been served with the association's complaint, but neither responded. Thus, the district court was right when it entered a default judgment against them and ordered that they couldn't raise any objection to the property being sold at a sheriff's sale in order to satisfy the association's outstanding liens for attorney's fees on the property.

The owners also argued that because the development and mortgage company—and not the owners who were subject to the lien—held the mortgage to the property, it couldn't be sold to satisfy the lien. But the appeals court noted that the mortgage company had actually been sent a notice to which it hadn't replied. More important, said the appeals court, the company didn't even hold a valid mortgage on the property in the first place.

■ *Island Woods Homeowners Association, Inc. v. McGimpsey and Sterling Development and Mortgage Co.*, October 2012

► Trial Needed to Determine Responsibility for Damage from "Unworkmanlike" Repairs

Facts: A condo owner purchased his unit for use as a vacation property and as a rental unit during those periods when he was at his permanent home in another state. According to the owner, his unit suffered damage during renovations performed by contractors working under the condominium association's direction. Specifically, the owner asserted that substantial renovations to the exterior of the buildings of the units, including his unit, had to be made due to the association's failure to properly maintain the common areas of the units. The renovations included structural renovations and repair and replacement of roofs, siding, walkways, windows, and doors, and required entry of the association's contractors, subcontractors, and other agents into the affected units.

The owner claimed that his unit suffered damages as a result of the renovations because the repairs were performed in an "unworkmanlike" manner, resulting in a severe mold infestation within his unit. According to the owner, his damages included, among other things, out-of-pocket losses, loss of use damages, loss of potential rental income, and damages for the cost

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Recent Court Rulings (continued from p. 5)

of mold removal, mitigation, and reconstruction. The owner sued the association for breach of contract, among other claims. He asked the court for a judgment in his favor without a trial.

Decision: A Florida trial court denied the owner's request and ordered a trial.

Reasoning: The owner said that he entered into a "custodial contract" with the association when he vacated his unit and surrendered it to the association during the ongoing renovations to common elements that required renovations to his unit. The association argued that the owner couldn't establish that he entered into a valid contract with it. The court disagreed.

The declaration of condominium strictly governs the respective duties and responsibilities between an association and the unit owners, said the court. "A declaration of condominium must be strictly construed," it stressed. The court said that it's "fundamental that in construing a contract, the intention of the parties must be determined from examination of the whole contract and not from the separate phrases or paragraphs."

In this case, the association's declaration of condominium provided that the responsibility for the maintenance of the condominium property and restrictions upon the alteration and improvement of it shall be as provided in the declaration itself. And the declaration stated that the association "shall maintain, repair, and replace at the Association's expense" all portions of a unit, except interior surfaces, con-

tributing to the support of the unit, which portions shall include but not be limited to load-bearing columns and load-bearing walls. The association was also responsible for all conduits, ducts, plumbing, wiring, and other facilities for the furnishing of utility services contained in the portions of a unit maintained by the association, and all such facilities contained within a unit that service part or parts of the condominium other than the unit within which they are contained. Importantly, the declaration stated that "all incidental damage caused to a unit by such work shall be repaired promptly at the expense of the Association."

The owner also had statements from the association's representatives acknowledging that he was entitled to certain damages as a result of the renovation project. And there was evidence to believe that lost profits in the form of rents were foreseeable damages. Additionally, the owner had an email sent from the association's former condominium manager to the renovation company stating: "prior to you being in our units these conditions did not exist and witness testimony and comment sheets as to the condition prior to SPS damaging the units is very overwhelming in the association's favor—we couldn't have rented these units in the condition that you left them."

Accordingly, a jury must decide the issue of whether the association breached its contract with the owner to repair the damages flowing from the renovation project, and, if so, what damages the owner is entitled to as a result of the breach, said the court.

■ Hawkins v. Condominium Owners Association of Sand Cay, October 2012

Risk Management (continued from p. 1)

Obey All State, Local Laws

Require bicyclists to obey all state and local laws regarding bicycling. These might include things like using proper hand signals and wearing a helmet while cycling. In your rules, it's a good idea to encourage bicyclists to wear a helmet even though no state requires it for all bicyclists—though some states require a helmet for bicyclists under age 18. An overwhelming number of bicyclists' brain

injuries could have been prevented by wearing a helmet.

Use Designated Areas Only

If the physical configuration of your community allows it, designate separate paths for bicyclists and pedestrians. Tell bicyclists to ride on roads and bike paths only and to avoid riding on pedestrian paths, such as sidewalks. And tell them that if they must use a pedes-

trian path—for example, to cross it—they should get off their bicycle and walk it across the path. They should also obey signage. Require bicyclists to observe all traffic signs, signals, lights, and markings, as they would if they were driving a car.

Ride with Traffic

Require bicyclists to ride on the right and as close to the curb as

possible when they ride on a road that's shared with cars. Also, require them to ride in the same direction as automobile traffic. Because it's impossible to know the specific conditions under which people are cycling, it's a good idea to say that exceptions may be made when specific conditions make it unsafe to abide by this rule. For example, if there's a steep drop-off to the right of the road, bicyclists should have the option to ride farther to the left. To make night bicycling safe, require bicyclists to equip their

bicycles with a light in front and a red reflector in back.

Ride Single File in Groups

Require bicyclists riding in a group to ride single file when they're cycling on a road that's shared with cars. Say that if a group is riding on a designated bicycle path, it's okay to ride two across. Also say that bicyclists may make an exception to this rule when specific conditions make it unsafe to abide by it. You should also ban bicyclists from racing.

Clearly Announce Presence, Intentions

Say that whether passing other bicyclists on a designated path or pedestrians on a shared path, it's essential that bicyclists first clearly announce their intention to pass. Otherwise, people won't know the bicyclist is there and might veer into his path, resulting in an accident. Specify that bicyclists may make exceptions to this rule when specific conditions make it unsafe to abide by it.

DOS & DON'TS

X Don't Allow Parking Spot Rentals

If your community includes mixed-use space, your association may be afraid that members will have to battle customers who are visiting retail stores or entertainment venues for parking spaces. But worse than that is the increased risk of crimes happening at the community if nonmembers have access to parking lots or garages. This can be commonplace if a member regularly rents out his space, creating a steady stream of strangers using that spot. To prevent unwanted visitors' access to the community, many associations restrict the use of parking spaces to members only. How can you do this? Pass a bylaw setting such a restriction.

Your bylaw should say that each parking space must be under the exclusive control of the member who owns the corresponding unit; spaces can't be transferred to nonmembers; and members must sell their parking space along with their unit.

✓ Spell Out Authority to Boot Illegally Parked Cars

If you're tired of sending multiple notices and fines to members who have violated parking rules, you may have considered booting illegally parked cars. Be aware that booting has its drawbacks. Members or renters whose cars get booted may sue the association, claiming that it doesn't have the legal right to take that action. To avoid this, include a clause in the

association's parking contracts with members and renters that provide the explicit authority to boot cars that are parking in violation of your community's parking rules. If your association doesn't use parking contracts, give members and renters a separate authorization to sign.

✓ Completely Remove Snow and Ice

When you clean up snow and ice, be sure to remove all of it and not take halfway measures—like only throwing down salt, which can leave common areas slippery. After the cleanup, designate an employee to check the sidewalks, steps, driveway, and parking lots to make sure they're clear. Pay particular attention to steps because this is the place where members are most likely to injure themselves. If a member falls on leftover ice, you could end up being sued.

X Don't Let Employees on Roof in Winter

When the weather is snowy or icy, don't send an employee up to the roof to clear gutters, inspect for leaks, or remove snow. The employee could injure himself. By winter, it's too late to do your inspections and gutter clearing, but you'll still need to remove any snow that accumulates. To do this, have employees stay on the ground and use a telescopic extension pole to eliminate the buildup.

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