Community Association Management Insider®

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INSIDE THIS ISSUE

Associations' Concern Grows Over Legal Pot

A recent meeting of the Rocky Mountain chapter of the Community Associations Institute (CAI) centered on issues arising from the passage of a 2012 Colorado referendum legalizing the smoking of marijuana and possession of as many as six marijuana plants. CAI addressed managers' and associations' fears about pot smoking in communities, including fielding complaints about the smell of marijuana.

Panelists at the meeting said it's common for condominiums that ban smoking to already have provisions in place to warn and penalize residents who create offensive odors in their units, whether from smoke or other activities. So, many of the concerns stemming from marijuana odors are already covered by rules regarding tobacco smoking and other odor-related regulations. The issue is most pressing for residential complexes *without* smoking bans.

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FEATURE

Cover 13 Points When Drafting Lease Restriction Bylaw

Ideally, community association members would occupy their own units, rather than lease them to tenants. That's because associations often feel that renters won't take good care of the units they're renting and that they won't follow community rules. This may seem like a generalization, but you can't be too careful when it comes to protecting your community from problems. So is it allowable to limit the number of units at your community that can be leased at any one time? If so, how can you do this fairly?

You can pass a lease restriction bylaw limiting the number of units at your community that can be leased at any one time, but you shouldn't completely ban leasing. We'll tell you what to include in your lease restriction bylaw, and we'll give you a Model Bylaw that you can adapt and use at your community.

Reasons to Limit Renting

There are four common reasons that community associations list when asked why they want to limit their members' ability to lease

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Q&A

Determining Liability for Dangerous Condition in Community

Q The community association I manage uses a separate maintenance company to plow, remove ice from, and salt the parking areas and common areas in the community during the winter. So far, we've had no complaints from members about slippery conditions. I try to inspect the work done by all of the contractors we use to maintain various parts of the community, but I can't always do this every time work has been done. I'm worried that the association and I might be sued by a member if he slips and falls on snow or ice in a common area even after it's been maintained. How likely is it that a member would prevail in that type of case?

A That depends on whether you had "notice"—either "actual" or "constructive"—of the dangerous condition, whether it's snow or ice or some other condition unrelated to the weather, prior

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Cover 13 Points (continued from p. 1)

units. First, owner-occupants tend to take better care of their units and the common areas than renters do. Second, owner-occupants are more likely to follow community rules than renters are. Additionally, owner-occupants are more likely to pay their monthly assessments on time than are members who rent their units. Finally, lenders are sometimes reluctant to offer mortgages to new buyers buying in a community with a high rental rate. Or if they do offer loans to them—or to existing owners looking to refinance—they often do so at higher interest rates than they offer to people in communities with fewer renters.

Write Effective Bylaw

To limit the number of units in your community that can be leased at any time, pass a lease restriction bylaw. Your bylaw, like our Model Bylaw, should cover these points:

Point #1: State maximum number of leasable units. You can set the limit of how many units can be leased at any one time as either a percentage of the total number of units in the community, or a fixed number. Some associations prefer to set the limit as a percentage because it covers a situation where the total number of units in the community changes over time, such as when additional lots are developed.

Don't set a total ban on leasing, however. Why? Courts might consider that too severe a restriction on members' rights over their property and refuse to enforce it. Also, a total ban doesn't give you any flexibility to accommodate unusual situations, such as a member whose financial hardship forces him to lease his unit, says Massachusetts attorney Stephen M. Marcus. So choose a reasonable restriction. For example, you could allow 20 percent to 25 percent leasing.

Also, give yourself the flexibility to reduce the number of units that can be leased if lenders' underwriting requirements changes. This way, you won't have to endure the cost and efforts of amending your bylaw in the future [Bylaw, par. 1].

You should note that many lenders include community-wide leasing limits in their loan documents. Though it's highly unlikely that any lender would consider a loan in default just because a community has more units leased than the lender allows, such a situation could make it harder for new buyers to get a loan from that lender. Or it could increase the interest rate for new loans to buy or refinance a unit in the community. To be prepared to make exceptions without exceeding lenders' limits, don't set your limit at the maximum percentage allowed by lenders. Consider a cushion of say, 10 percent to 15 percent.

Point #2: Member must submit written request to lease unit. Requiring written requests will help eliminate any confusion and provide you with a record of the order in which requests were made. This can be important if you have to deny a member's request because the set limit has been reached [Bylaw, par. 2].

Point #3: Set requirements for association's response to requests. Say that the association will respond in writing within 30 days of a written lease request [Bylaw, par. 3].

Point #4: Say that members must get association's written consent before leasing units. Say that members may not lease their units until they receive written consent from the association. And take steps to ensure that consent is given in a fair way. Your goal should be to give all members who want to lease their units an equal opportunity to do so, says Marcus. Some associations use a waiting list so that members who haven't yet had a chance to lease their units get to do so before other members get to renew existing leases. Other communities operate on a first-come, first-served system.

You needn't include the details of your system in your lease restriction bylaw. If you do, you'll have to amend the bylaw if you want to modify the system. And amending a bylaw can be a very difficult, expensive process. It's enough to give the association the authority to establish a system and to modify it as circumstances require.

Say in the bylaw that the association may not unreasonably withhold its consent, and that the association will try to ensure that all members who want to lease their units will be given an equal opportunity to do so, suggest Marcus. He also suggests stating that the association will issue rules to accomplish this [Bylaw, par. 4].

Point #5: Set minimum, maximum term. To prevent units in your community from becoming, in essence, hotel rooms, require leases to be for terms of no less than 12 months, suggests Marcus. Also, to give all members an opportunity to lease their units, don't allow members to lease their units for more than two years at a time [Bylaw, par. 5].

Point #6: Say lease must cover entire unit. Letting members subdivide their unit and lease the sections to multiple renters can cause a variety of problems at your community, including increased traffic. So require all leases to cover the entire unit [Bylaw, par. 6].

Point #7: Renters must be bound by association's governing documents. Say that leases must include a provision requiring renters to be bound by the association's governing documents and other rules and regulations, says Marcus. Also, to make sure that renters know what the rules are, say that the association will provide them with a copy of the governing documents, and will charge a reasonable fee for it, he adds [Bylaw, par. 7].

Point #8: Members must appoint association "attorney-in-fact." It doesn't help to require renters to be bound by the association's rules if members aren't willing to force their renters to abide by those rules. That's because, in most situations, courts only let parties to a contract sue to enforce it. But if members appoint the association to be their attorney-in-fact, the association can sue renters on the members' behalf, if necessary, even without the members' consent. So require members to appoint the association to be their attorney-in-fact. Marcus adds that the association should agree to notify members of any rules violations by their renters, and give members a chance to correct the situation on their own before the association can sue renters on their behalf [Bylaw, par. 8].

Point #9: Members must give a copy of rental agreement to association. To make sure the leases between members and their renters include the things you want them to, require members to give the association copies of their leases before renters move in, says Marcus [Bylaw, par. 9].

Point #10: Spell out stance on subletting. Opinions differ on whether it's a good idea to let members' renters sublet units to subtenants. Some managers feel that as long as prior approval is required, there shouldn't be a problem. But others disagree and don't recommend that subletting be permitted. When there's a lease between a member and a renter, the member will have the necessary information to register the renter if required by the association. But in the case of a sublet, the member typically doesn't have a formal contract with the subtenant and thus doesn't have the necessary information to register the subtenant, thereby reducing the amount of control the association has over the unit.

Your association will have to take a stance on the subletting issues. Whatever you decide, make sure to spell it out in your lease restriction bylaw [Bylaw, par. 10].

Point #11: No landlord-tenant relationship exists between association and renters. Landlord-tenant laws can get very complicated and can involve several legal rights and obligations. The last thing any association needs is to be considered a landlord to each member's renter. So state clearly in your lease restriction bylaw that no

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MODEL BYLAW

Limit Renting at Your Community

Here's a lease restriction bylaw drafted with the help of Massachusetts attorney Stephen Marcus. The bylaw sets a limit on the number of units that can be leased at any one time, lists leasing requirements, addresses subletting, sets protections for the association, and says when exceptions can be made. Show this bylaw to your attorney before adapting it for use in your community.

LEASE RESTRICTION BYLAW

1. **Community-wise lease limitation.** At no time may more than [*insert #*] percent of the total number of Units, or such lower number as may be required by any so-called secondary mortgage market source, be leased, rented, licensed, or let (collectively referred to as "leased").
2. **Written requests.** To ensure that this limitation is not exceeded, any Member who intends to lease his/her Unit shall first send a written request to the Association at the following address: [*insert address*].
3. **Response time.** Upon receiving a written request to lease, as referred to in paragraph 2, above, the Association shall, within 30 days thereof, notify the Member if the limitation set forth in paragraph 1, above, has been met and, in either case, if the Member's request has been accepted or declined.
4. **Written consent.** No Member may lease his/her Unit until he/she receives written consent to do so from the Association. As long as the limitation set forth in paragraph 1, above, has not been met, permission shall not be unreasonably withheld. The Association shall try to ensure that all Members who wish to lease their Units are granted an opportunity to do so. To accomplish this, and to otherwise ensure that the opportunity to lease Units is provided in a fair and equitable way, the Association may, from time to time, establish Rules and Regulations as it may see fit.
5. **Minimum and maximum term.** No Unit may be leased for a term of less than twelve (12) months or more than two (2) years.
6. **Lease must cover entire unit.** All Unit leases must be for the entire Unit. No more than one lease may be signed for the same Unit and same lease term.
7. **Occupant bound by governing documents.** No Unit may be leased unless pursuant to a written agreement acceptable to the Association in form and content, including, but not limited to, the inclusion of a clause whereby all occupants agree to be bound by the Association's governing documents, and by Rules and Regulations promulgated pursuant thereto, all of which the Association shall provide the occupants for such reasonable fee as the Association may from time to time determine.
8. **Attorney-in-fact.** No Unit may be leased unless pursuant to a written agreement acceptable to the Association in form and content, including but not limited to, the inclusion of a clause whereby it shall be deemed during the period of such occupancy that the Member has irrevocably appointed and constituted the Association as the Member's attorney-in-fact to seek, at the Member's expense, the eviction, equitable relief, and/or damages of and/or from such occupants upon any breach of said agreement or a violation of the Association's governing documents and/or Rules and Regulations promulgated pursuant thereto, provided that the Association first gives the Member notice of said violation and a reasonable period to affect a cure.
9. **Copy of lease to association.** A copy of the lease agreement must be provided to the Association prior to the occupancy of the Unit pursuant thereto.
10. **Subletting.** [*Option #1: Use if subletting is allowed:* No occupant may sublet a Unit unless he/she receives the prior written consent of the Association. All terms and requirements imposed hereby upon leases and occupants shall be likewise imposed upon subleases and subtenants.]

    [*Option #2: Use if subletting isn't allowed:* Subletting by occupants is not permitted.]
11. **No landlord-tenant relationship exists.** In no event shall it be determined that a landlord/tenant relationship exists between the Association and the occupant.
12. **Extensions.** If during the course of occupancy of any lease, an occupant demonstrates such a disregard for the provisions of the Association's governing documents and/or Rules and Regulations, that the Association determines it to be in its best interests to preclude the Member from extending said lease, the Association shall so notify the Member, in writing, of that determination, and the Member shall thereupon be precluded from extending said lease beyond its original term.
13. **Exceptions.** The provisions and restrictions on leasing as contained in this Section shall not apply to the following:
    a. **Grandfathered units.** Units leased at the time of the recording of this instrument shall be defined as "Grandfathered Units." Such Grandfathered Units shall be exempt from the lease restrictions as set forth in this section subject to such reasonable conditions as the Association may by rule and regulation impose.

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LEASE RESTRICTION BYLAW (continued)

b. Hardship situations. A Member suffering from a financial or personal hardship that renders the Member unable to reside in his/her Unit may apply to the Association to lease the Unit, even if the limitation referred to in paragraph 1, above, has been met. In such situations, the Association in its sole discretion shall be authorized to permit the Member to lease his/her Unit.

c. Lenders' foreclosures. The provisions and restrictions on leasing as contained in this Section shall not apply to foreclosing lenders or impair the right of First Mortgagees to foreclose or take title to a Unit, to accept a deed (or assignment) in lieu of foreclosure in the event of default by a mortgagor, to take possession and lease an acquired Unit even though the limitation referred to in paragraph 1, above, has been met, or to otherwise act upon their mortgages.

d. Immediate family members. Units owned by a Member and occupied by an immediate family member of that Member shall not be considered rental units for purposes of this bylaw.

Cover 13 Points (continued from p. 3)

landlord-tenant relationship exists between the association and members' renters [Bylaw, par. 11].

Point #12: Association has right to ban members from extending leases. There's no way to know in advance how any renter will behave once he's a part of the community. Nor can you know for certain how difficult your state courts will make it to enforce your governing documents against a renter. So to help protect the association, say that it has the authority to ban members from extending their leases to particular renters once the original lease ends [Bylaw, par. 12].

Point #13: When exceptions will be made. There will be times when you won't want to enforce your lease restriction bylaw, even if your community is already leased to its maximum. Say in your bylaw that the association will have the right to make exceptions in the following situations:

➤ *Existing rentals.* Depending on what state your association is located in, you might not be allowed to cover existing rental units under a new lease restriction bylaw. But even if your state law allows your bylaw to cover these units, it's often hard to do for practical reasons. To get enough votes to pass the bylaw, you might need to exempt members who already have renters. Exempting existing rentals is called "grandfathering."

"If you can get the votes either way, you don't have to worry about grandfathering," says Marcus. But if you can't, it's better to grandfather the existing rentals than not get the bylaw passed at all, he adds. Then, depending on your association's specific circumstance, you'll have to decide whether members owning grandfathered units can continue to lease their units after the existing lease ends, or whether they'll be subject to the bylaw after their existing lease ends. Consider exempting grandfathered members only for as long as the original renter remains [Bylaw, par. 13a].

➤ *Hardship situations.* Sometimes members need to lease their units for unforeseen reasons. For example, financial misfortune might leave a member no alternative but to move to a cheaper home and rent his unit until he can sell it. Or an unexpected job relocation or death in the family might lead to a need to lease a unit. In situations like these, associations should be flexible and reasonable when deciding whether to enforce their lease restriction bylaw [Bylaw, par. 13b].

➤ *Lenders' foreclosures.* To help make it easier for people to get mortgages to buy units in the community, many associations give lenders the right to make any proposed leasing restrictions subject to their consent. But lenders won't give their consent to lease restrictions if they're going to be bound by those restrictions in the event they must foreclose on a unit. So to get lenders to give their consent to your bylaw, you may have to exempt their foreclosures from the bylaw [Bylaw, par. 13c].

➤ *Immediate family.* Sometimes parents buy a unit for their children or children buy a unit for their parents. Even though the member isn't living in the unit in such circumstances, these aren't really lease situations and so they should be exempt from your bylaw, says Marcus [Bylaw, par. 13d]. ♦

Insider Source

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to the accident. This can be tricky in situations where a hazard is practically invisible—for example, so-called black ice that isn't visible but still is slippery.

Whether a dangerous condition could easily be seen can complicate the issue of notice. In some cases, courts have decided that if an association has met its duty to maintain the property free from snow or ice but an accident happens on black ice that wasn't visible, the association isn't liable for the injuries. That was the decision in a recent New York case, where a member slipped and fell on a patch of black ice while walking in the parking lot of the townhouse community where he lived.

The association was obligated to maintain the common areas in the community, including the roadways and parking lots. A maintenance company hired by the association performed snow and ice removal services at the community just days before the member's slip-and-fall accident. The member sued the association for negligence, alleging that the association, manager, and the maintenance company failed to properly remove snow and ice from the parking lot, and failed to properly sand or salt the area.

The maintenance company asked a trial court for a judgment in its favor without a trial. It claimed that it couldn't be held liable to the member for negligence because it didn't have a contractual relationship with him nor owed a "duty of care" to him. The trial court granted the maintenance company's request to dismiss the claim against it. It determined that the maintenance company demonstrated that its contractual obligation to clear snow and ice from the premises ran only to the association, that its conduct didn't create or exacerbate a dangerous condition on the premises, and that the member didn't rely upon the performance of its snow removal activities.

The association and manager also asked the court to dismiss the case, arguing they had no notice of the alleged dangerous condition on the surface of the parking lot. The member argued that a trial was needed because the association and manager couldn't prove that they lacked notice of the condition that allegedly caused his fall.

Trial Isn't Necessary

As a general rule, liability for a dangerous condition on property must be based upon "ownership, occupancy, control, or special use of the property" and the property owner has a duty to maintain the property in a reasonably safe condition to prevent the occurrence of foreseeable injuries, said the trial court. Likewise, a property manager, to whom the owner—here, the association—has delegated responsibility for the property, owes a general duty to maintain it in a reasonably safe condition, it added. Property owners and managers, however, are not insurers of the safety of people on the premises, the trial court emphasized.

To establish liability in a slip-and-fall case like this one, the member must show that his injuries were caused by a dangerous or defective condition on the property, and that the owner, possessor, or person in control of such property—the association and manager—either created the condition or had actual or constructive notice of it, explained the trial court. Constructive notice could be proven by showing that the dangerous or defective condition had been "visible and apparent," and had existed for a sufficient length of time before the accident to permit the owner or possessor to discover and remedy it.

The member didn't allege that the association and manager *created* the icy condition in the parking lot. But he did have to show that they had *actual* or *constructive notice* of the condition in order for them to be liable for negligence. The member also asserted that the association and manager had to show the actions, if any, taken to inspect or treat the parking lot for ice and snow during the time between the maintenance company's performance of snow removal activities and the member's accident. The trial court rejected that argument. It said that the association and manager can satisfy their burden if they can prove that such a condition was "not visible and apparent."

Here, both the member and the witness testified they didn't see ice on the parking lot before the member's fall. The trial court stated that that evidence showed that the icy condition wasn't visible and apparent, so the association and manager weren't required to submit proof demonstrating when they cleaned or inspected the parking lot relative to the fall. "A general awareness that black ice may form is legally insufficient to find constructive notice of the alleged dangerous condition that caused this accident," said the trial court.

The association and manager also met their burden of submitting evidence sufficient to prove that they neither created the

alleged dangerous condition nor had actual or constructive notice of its existence for a sufficient period of time to discover and remedy it. That was because: (1) it was undisputed that the maintenance company performed snow removal services on the lot following the substantial snowfall; (2) the member testified that he didn't actually see the ice that allegedly caused him to slip either before or after his fall, rather only that he felt ice under his back when he was lying on the surface of the parking lot after his fall, and that the ice "was not very thick"; and (3) a witness to the accident who was in the parking lot with the member testified she saw "black ice"—which wasn't visible and apparent—in the parking lot when she helped him stand up after his fall [Calabro v. Harbour at Blue Point Home Owners Assn., Inc., et al., March 2013].

As always, if you're unsure about a certain responsibility or your duty to members, consult your association's attorney. ♦

RECENT COURT RULINGS

➤ Was Board's Water Supply Agreement "Ultra Vires"?

Facts: A condo association on the island of St. Thomas was initially sponsored by a resort corporation. The declaration required the corporation to provide fresh water and wastewater treatment services to the association at a reasonable rate to be determined by several factors. The declaration also made all of the water facilities common property of the association.

The corporation hired a general contractor to fulfill its water obligations. Eventually, the corporation became delinquent in its obligations to its creditors, including the general contractor and the association. The parties agreed that the corporation would assign its water supply rights to the general contractor, which was permitted to charge an *increased* rate. The association's board consented to the assignment of water rights through the "water supply agreement," which contained an arbitration clause.

The association sued the board for coercion, claiming that the water supply agreement wasn't valid, and for entering into the agreement without the authorization to do so. The District Court for the Virgin Islands ordered the parties to arbitrate the dispute. The association argued that the matter wasn't arbitrable and should be decided by a court. The district court disagreed. The association appealed.

Decision: The appeals court reversed the district court's decision in part, and upheld it in part.

Reasoning: The appeals court noted that if a contract contains an arbitration clause, challenges to the validity of the contract as a whole are for the arbitrator to decide. But challenges to the formation of a contract are generally for courts to decide. "A challenge to a contract on the grounds that the signatory was unauthorized to sign it must be decided by a court, even if the contract contains an arbitration clause, because it is a challenge to a contract's formation rather than its validity," the appeals court specified. "The court must adjudicate any claim that a contract was beyond a signatory's authority or 'ultra vires,' even if that contract contains an arbitration clause," it explained.

The appeals court found that the association's claim that the board lacked authority to enter into the water supply agreement was an ultra vires argument that was not arbitrable, as it was a challenge to the "formation rather than the validity" of the water supply agreement. The appeals court reversed the judgment of the district court with respect to the order compelling arbitration on that matter. The appeals court noted that the association raised a bona fide question as to whether its board possessed the authority to enter into the agreement. "Because that question goes to the formation of the contract rather than its validity, it requires a judicial determination," said the appeals court. Therefore, it sent that portion of the case back to the lower court for further proceedings.

However, the appeals court found that the association's coercion claims were arbitrable because they challenged the validity of the water supply agreement itself. The appeals court upheld the district court's judgment as to the arbitrability of the coercion claims. ♦

- Sbrmcoa, LLC v. Bayside Resort, Inc., et al., February 2013

Associations' Concern Grows

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Amendment 64 and Colorado's Indoor Clean Air Act prohibit smoking marijuana in public areas such as a condo's lobby, clubhouse, and pool. Interpretations aren't so clear about smoking pot in a unit, from which smoke can spread into common areas. While associations can be more restrictive than local laws, attorneys at the event indicated that they don't anticipate communities will be interested in regulating marijuana or banning it altogether, because complaints could be handled in the same manner as tobacco complaints—for instance, by asking members to install door thresholds to prevent smoke from escaping into hallways. Some manager-attendees noted that complaints about pot smoking haven't risen in their communities since Colorado fully legalized pot in November. ♦