Community Association Management Insider®

JUNE 2013

INSIDE THIS ISSUE

Lone Star HOA Legislation Offends "Texas Values"

Several bills being considered by the Texas Legislature this session are posing the question of whether the rights of one individual homeowner should trump the rights of all owners in an HOA. The bills would affect the powers and duties of Texas homeowners associations—some having to do with merely cosmetic issues, such as prohibiting associations from banning flags in front yards, and some substantial, such as giving HOAs more powers of accelerated foreclosure.

The issue of reining in the powers of HOAs by law is highly charged, some lawmakers have noted, because it affects deeply held "southern values" like property, community, family, home, privacy, independence, freedom, and local control. Lawmakers have also said that while they feel HOAs need to

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FEATURE

Compel Members to Take Proper Care of "High-Risk Components" in Units

In any community, the level of care members take in maintaining their units will vary. To some degree, you can control certain aspects of maintenance. For example, members may be required to keep the exterior of their units or freestanding homes in a specific condition or conforming with a certain appearance.

Control over the inside of a member's unit is less clear cut. Things like personal decorating style, unless it interferes with other units or violates an association rule, are entirely up to the member. But what about other items, like hot water heaters, washing machines, some kinds of pipes, or even smoke detectors, which have the potential to malfunction and cause damage to the member's adjoining units?

These so-called "high-risk components" that are located in a member's unit belong to the member, and it's the member's responsibility to maintain, repair, and replace them. It wouldn't be surprising to find out that many members tend to fix something only after it breaks—and with these high-risk components, that can be too late to avoid damage to other units or common areas. But there is a way to ensure that the high-risk components in your members' units are properly maintained. Your board can pass an amendment, like our Model Amendment: Create Policy to Deal with 'High-Risk Components' Before Disaster Strikes, that can be incorporated into the association's governing documents.

Give Board Authority Over Members' Unit Maintenance

Creating a policy to deal with high-risk components before disaster strikes can help to avoid the serious consequences from things like water heater leaks or the possibly fatal outcome of a faulty smoke detector. Giving your association the authority to compel proper care of high-risk components can also minimize problems with the association's insurance.

Even communities of freestanding homes need to make sure that high-risk components within individual units are properly maintained if the community has a master insurance policy. Insurers today often refuse to renew policies for what they consider to be high-risk community associations, says Connecticut attorney Matthew N. Perlstein.

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Community Association Management Insider [ISSN 1537-1093 (PRINT), 1938-3088 (ONLINE)] is published by Vendome Group, LLC, 6 East 32nd Street, New York, NY 10016.

Volume 12, Issue 12

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'High-Risk Components' (continued from p. 1)

Or if they do renew the policy, they do so only in return for much higher premiums, he adds. So if these components falter and lead to claims, your association could lose its insurance or have to pay a lot more to keep it.

To make sure the high-risk components in your members' units don't cause damage or lead to unnecessary insurance claims, give the board the authority to compel members to take proper care of them. To do this, write an amendment either to your bylaws or declaration. Amend whichever of these governing documents addresses the issue of maintenance, recommends Perlstein.

Your amendment, like our Model Amendment, should:

Give board authority to designate high-risk components. Say that the board has the authority, from time to time, to pass resolutions designating certain unit components as high risk [Amend., par. 1].

Allow board to set requirements for care of high-risk components. Say in your amendment that whenever the board passes a resolution designating a component as high risk, it will detail what steps members must take to care for the component [Amend., par. 2]. Then, in the amendment, list the ways the board can require members to care for high-risk components. These listed requirements should be as broad as possible, to give your board the maximum amount of flexibility in setting specific requirements for specific high-risk components in the resolutions, says Perlstein. Since the specific actions will be different for each type of component, don't go into detail about them in the amendment, he says. The requirements you should list in your amendment should allow the board to require the following:

✦ **Inspection at specific intervals by an inspector designated by the association.** The board should be authorized to require inspection of high-risk components at set intervals [Amend., par. 2(a)]. But since the specific intervals may differ for each type of component, don't define the inspection time interval in the amendment, Perlstein says. That should be done in the resolution that designates the high-risk component. The interval the board chooses will depend on the type of high-risk component it is.

For example, you might want to require inspections of chimneys every year, while a smoke detector might require inspection every six months. Also, by remaining flexible, you give the board the ability to recognize technological changes in the future, says Perlstein. For example, if a domestic hot water heater is invented that has a useful life of 20 years, the board can redefine the interval without having to amend the bylaws or declaration.

To determine what inspection intervals to set in the resolution for each component, consult appropriate professionals, suggests Perlstein. For example, the component's manufacturer might have stan-

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MODEL AMENDMENT

Create Policy to Deal with 'High-Risk Components' Before Disaster Strikes

The following Model Amendment—which can amend either your association's bylaws or declaration—sets a policy enabling the board to compel members to take proper care of "high-risk components" in their units. Check with your attorney before using this amendment in your community—in particular, ask your attorney to ensure that you're complying with state law and your governing documents in the process by which you pass the amendment.

HIGH-RISK COMPONENTS:

INSPECTION, MAINTENANCE, REPAIR, & REPLACEMENT

1. **Board Designation of High-Risk Components.** The Board of Directors (the "Board") of Shady Acres Community Association (the "Association") may, from time to time, after notice to all members and an opportunity for member comment, determine that certain portions of the Members' units (the "Units") required to be maintained by the Members, or certain objects or appliances within the Units, pose a particular risk of damage to other Units and to the Common Elements if they are not properly inspected, maintained, repaired, or replaced. By way of example but not limitation, these portions, objects, or appliances might include smoke detectors and water heaters. Those items determined by the Board to pose such a particular risk are referred to as "High-Risk Components."

2. **Requirements for Care of High-Risk Components.** At the same time that it designates a High-Risk Component, or at a later time, the Board may require one or more of the following with regard to the High-Risk Component:
   a. That it be inspected at specified intervals by a representative of the Association or by an inspector or inspectors designated by the Board.
   b. That it be replaced or repaired at specified intervals, or with reference to manufacturers' warranties, whether or not the individual component is deteriorated or defective.
   c. That it be replaced or repaired with items or components meeting particular standards or specifications established by the Board.
   d. That when it is repaired or replaced, the installation include additional components or installations specified by the Board.
   e. That it be replaced or repaired by contractors having the particular licenses, training, or professional certification or by contractors approved by the Board.
   f. If the replacement or repair is completed by a Member, that it be inspected by a person designated by the Board.

3. **Member Responsibility for High-Risk Components.** The imposition of requirements by the Board under Section 2, above, shall not relieve a Member of his or her obligations regarding High-Risk Components, including but not limited to the obligation to perform and pay for all maintenance, repairs, and replacement.

4. **Board Authority to Enforce Member Obligations.** If any Member fails to maintain, repair, or replace a High-Risk Component in accordance with the requirements established by the Board hereunder, the Association may, in addition to any other rights and powers granted to it under the governing documents and state law:
   a. Fine the Member or the occupant of the Unit, or both;
   b. Enter the Unit for the purpose of inspecting, repairing, maintaining, or replacing the High-Risk Component, as the case may be, and charge the cost to the Member as a common expense attributable to the Unit; and
   c. Bring an action against the Member for specific performance of the Member's obligations hereunder.

'High-Risk Components'

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dards for inspection, maintenance, and repair. You can also consult your insurer.

✦ **Replacement or repair of component at specified intervals, even if it's still working.** It's very important to act preemptively with respect to high-risk components because once they falter, it might be too late to avoid serious damage. So give the board the right to require repair or replacement at specified intervals, even if the component isn't demonstrably deteriorated or defective, says Perlstein [Amend., par. 2(b)]. "The key to all of this is acting preemptively," he stresses. As with inspection intervals, to set repair and replacement intervals, consider advice from the component's manufacturer and/or your insurer. You can even link the repair/replace requirement to the manufacturer's warranty on the component.

✦ **Replacement or repair of component with items or components meeting designated standards.** To prevent members from buying cheap replacement parts that are likely to malfunction or wear out quickly, give the board the right, when designating a new high-risk component, to impose standards on the repair or replacement parts, or on an entirely new component [Amend., par. 2(c)]. Again, the exact specifications will be different for each component, so don't try to create a blanket standard. Instead, include the specifications in the resolution.

✦ **Additional components or installations when a high-risk component is replaced or repaired.** Sometimes, a type of component might have been improved since the last time it was repaired or replaced. If an improvement makes the new component safer, the board should require it to be installed [Amend., par. 2(d)]. For example, exhaust fans over stovetops can collect grease and cause fires. When filters that would keep exhaust fans cleaner were developed, Perlstein had his clients require their installation when the exhaust fans were replaced.

✦ **Replacement or repair by qualified contractors.** To avoid shoddy workmanship that could lead to problems later, say that the board can require members who are replacing or repairing a high-risk component to use contractors with appropriate licenses, training, or professional certification [Amend., par. 2(e)]. Also say that the board may require contractors to be approved by the association.

Some associations keep a list of preapproved contractors for each type of high-risk component. Making this list available to your members makes it easier for the members to care for their high-risk components as the association wants them to. It can also save members money, Perlstein points out. "Our associations sometimes work out volume discounts with contractors, like chimney sweeps or plumbers," he says.

✦ **Unit access for association-designated professional to inspect repairs and replacements.** In practice, members will often defer to the association to implement the maintenance, repair, and replacement of high-risk components. But sometimes, a member will take care of it himself. In those cases, it's important for the association to have the right to have the completed work inspected by an inspector chosen by the association, says Perlstein [Amend., par. 2(f)].

Keep responsibility for high-risk components on members. Include in your amendment a statement that even though the association is imposing maintenance, repair, and replacement requirements, it's still the members' responsibility to perform and pay for these things [Amend., par. 3]. Some members might think that the association is assuming that responsibility. Members must know that each high-risk component still belongs to them and that it's their obligation to insure, maintain, repair, and replace it, and to pay for each of these things.

Give association enforcement rights. Give the association a choice of three ways to compel members to care for their high-risk components, says Perlstein [Amend., par. 4]. The amendment should allow the association to:

✦ **Fine member for noncompliance.** If a member ignores the association's notification that it's time to maintain, repair, or replace a high-risk component, then give the association the right to fine the member [Amend., par. 4(a)]. This is too important an issue for the association not to enforce. A fine will make members more aware.

✦ **Enter unit to perform maintenance, repair, or replacement.** It's not enough just to fine a member who ignores the association's notification that it's time to maintain, repair, or replace a high-risk component. "The objective isn't raising revenue; it's safety," says Perlstein. So, in your amendment, give the association the right to enter the unit and do the maintenance, repairs, or replacement itself if the member doesn't do so even after being fined [Amend., par. 4(b)].

This right, however, authorizes the association to enter the member's unit if the member resists. But in situations where the unit occupant is a renter, rather than the member, this tactic will often succeed. Renters typically like to have this work done, especially since they won't have to pay for it, the member will.

✦ **Take legal action to compel compliance.** Finally, if the member doesn't respond to a fine, and the unit is owner-occupied and the member resists entry by the association, give the association the right, in your amendment, to take legal action to compel compliance [Amend., par. 4(c)]. This compliance can either be an order by a court for the member to perform the required maintenance, repairs, or replacement, or it could be an order to grant the association access so it can do so. ♦

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LEGAL COMPLIANCE

Are Politics Improper Use of Owner Email List?

Technological advancements have made it easier than ever for association boards to get messages quickly and effectively to members, and for members to communicate with each other. Email and even an association blog or online newsletter could help you as a manager to keep your community operating efficiently and remind members that you're actively involved and ready to help. But some forms of this communication involve obtaining and using members' personal information.

For example, some communities have compiled owner email lists. If that's the case with the association you manage, you may be wondering exactly how—and how not—you should, or may by law, use that list. Making a determination about whether you can use personal information isn't always easy.

One tricky issue is the use of an owner email list for political purposes. Let's say that your association's annual meeting is coming up, and there are several seats up for election. You discover that the president of the association is emailing the owners and telling them which candidate he thinks they should vote for, and which ones he's *not* going to vote for. Is this legal? It could depend on where you're located. So you should check with your attorney about state-specific issues you should be aware of before taking any action that uses personal information.

For example, the administrative rules under the Florida condominium statute prohibit the election package mailed out by the association to identify incumbent candidates or otherwise attempt to sway the election, says Fort Myers, Fla., attorney Joseph E. Adams. "The inclusion of such materials can render the election void," he warns.

However, the board president, like any other unit owner, has "free speech" rights, including the right to "politic" for the candidates of his or her choice, he adds. Despite those rights, the email addresses of unit owners are considered "protected information" under the Florida condominium statute, and are not available for access by other unit owners unless the owner whose email address has been given out signs a consent form, stresses Adams.

Adams notes that, therefore, if your owners have allowed their email addresses to be made public, the president acted within his rights; if not, and your state's law is like Florida's, this could be an abuse of information that's been held in trust for an improper purpose. "If this is the case, while I doubt it would invalidate the election, the board should inform the president that this action was improper and shouldn't happen again," he says.

Remember that, if the board considers the violation egregious enough, the board *always* has the right to remove a person as the president, with or without cause, at any time. ♦

Insider Source

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RECENT COURT RULINGS

➤ Owners' Statement About Board President's Ethics Not Defamatory

Facts: Two homeowners submitted a bid to buy a foreclosed residential property in their planned community. The president and managing broker of the association also submitted a bid to the same bank to purchase the property on behalf of his clients, a couple who didn't live in the community. The bank accepted the owners' bid.

The property was subject to an association bylaw that gave the association an assignable right of first refusal to purchase property within the community, including this property, which had to be exercised within 15 days. The president sent emails to the homeowners warning them that he would withhold the waiver and assignment letter that was required by the bank from the association in order to finalize the sale. Because of that and other stalling tactics by the president, the bank canceled the owners' contract for purchasing the property. The president's clients' bid was subsequently accepted by the bank, and they purchased the property.

During the time the president was withholding the letter that would enable the owners to buy the property, the owners distributed a letter to board members and owners at an association meeting. The letter asked board members to "not let [the president] convince you that he is trying to preserve property values."

It went on to say that the board members needed to "be aware that [the president], himself, bid on this property for an amount far below what the bank was asking…and his bid was denied by the bank." The owners asserted that the president "needs to recuse himself…because his behavior is unethical, and immoral." The letter also asked board members to "not let [the president] convince you that he has the right to basically steal this contract from us." The owners also distributed the letter to community residents.

The president later sued the owners for defamation—that is, making an intentional false communication, either written or spoken, that harms a person's reputation. The owners asked a trial court for a judgment in their favor without a trial. The trial court decided that there had been no defamation because it said that the owners' statement expressed only an *opinion*. It ruled in favor of the owners. The president appealed.

Decision: An Illinois appeals court upheld the trial court's decision.

Reasoning: On appeal, the president argued that the various statements in the letter: were false; harmed his reputation in the community; would deter the community from associating with him; implied that he was unable to perform or lacked integrity in performing his employment and duties as an attorney and as the association's president, managing agent, and managing broker; and implied that he lacked moral character, integrity, and honesty, and, as such, prejudiced him in his profession as an attorney.

The appeals court pointed out that a statement is defamatory if it "tends to cause such harm to another's reputation that it lowers that person in the community's eyes or deters third persons from associating with him or her." For a claim of defamation, the president had to present facts showing: (1) that the owners made a false statement about him; (2) that they made an unprivileged publication of the statement to a third party; and (3) that as a result, he suffered damages.

The appeals court noted that there are several categories of statements that are considered defamatory under Illinois law, including "words that impute an inability to perform or want of integrity in the discharge of duties of office or employment." Here, it agreed with the trial court that the statement at issue fits within that category because it could be interpreted as a lack of integrity in the president's discharge of his duties in his role as association president and managing broker. But a statement that's defamatory still isn't actionable if it's reasonably capable of an innocent construction, or if it expresses an opinion, said the appeals court. It determined

that the statements made in the letter constituted an opinion.

The court also noted that many of the statements merely restated comments made by association members at an earlier meeting. (Still, the court specified that under some circumstances, the "republisher" of a defamatory statement is also potentially liable for defamation.) The statement that the president didn't have the right to enforce association covenants only when it was profitable for him to do so was a generalized statement that can't be reasonably interpreted as stating actual fact and, therefore, constitutes an opinion.

- Xinos v. O'Brien, April 2013

➤ State Court Was Proper Venue for Fair Housing Lawsuit

Facts: Homeowners purchased a property in a planned community and moved into it several months later. The community association's declaration contained certain terms, rules, and restrictions to which all owners were subject. The owners requested, and were denied permission, to make several changes to their property. The owners ultimately made some unauthorized changes on their own. The association sued in Delaware state court for enforcement of certain restrictions contained in the Declaration of Covenants, Conditions and Restrictions for the association.

The owners filed a Housing Discrimination Complaint (HUD claim), alleging that the association treated them differently from other community residents because of their familial status—that is, the fact that they have children—and because of their child's disability and their race, through the selective enforcement of declaration restrictions and association bylaws. The owners contended that such treatment began even before they moved into their home, when they began to receive notices and handwritten notes regarding alleged violations of the association's bylaws.

The owners claimed that they continued to receive these notices and notes after they moved into their home, and that they related to: (1) a trailer used during their move; (2) their on-street parking; and (3) complaints about their children. When one of the owners asked a representative of the management company why she was being singled out in regard to cars parked on the street (when several other residents are alleged to have done the same), the representative's response was that the family's children were a factor, because many in the community believed that it "should be a 55-and-older community," and that the family's race was a factor as well.

The owners successfully had the lawsuit removed from state court to Delaware district court, asserting that the state court action violated their federal rights under the Fair Housing Act (FHA) and their civil rights. The association requested that the lawsuit be sent back—or remanded—to the state court because it believed that the district court didn't have jurisdiction over the case.

Decision: The association's request was granted; the case was remanded to state court.

Reasoning: A district court determined that the case should be heard in state court and that doing so wouldn't violate the owners' civil rights. The court noted that "the FHA does not confer upon the owners the right to engage in the conduct that is the subject of the state court action—making changes to their property without the association's approval—and neither does the FHA confer upon the owners immunity from having to defend the state court action. "Therefore, there is nothing about the very act of bringing the state court action that can be clearly predicted to deny [defendants] their civil rights," said the court.

The court noted that the owners were free to assert their counterclaims—among them that the association was racially motivated and attempted to unlawfully intimidate them for exercising their FHA rights—in state court, with the state court empowered to address the merits of those claims without interference from the district court. ♦

- Henlopen Landing Homeowners Assn., Inc. v. Vester, April 2013

Lone Star HOA

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be reined in, some HOAs have lobbying power at the Capitol that's too strong for legislators to make much headway.

Potential HOA legislation that's aligned with lawmakers' other concerns may be more likely to succeed. For example, a bill that would prevent HOAs from banning xeriscaping—landscaping that involves native plants that don't require as much watering—is getting some attention because it supports the legislature's efforts to pass water conservation legislation.

It remains to be seen whether the Republican-dominated legislature, still new at reducing the powers of HOAs, will do too much on the issue this session, however, after passing some reforms in 2011 and focusing its attention this year on more pressing issues such as water and transportation. HOA advocacy groups have taken the position that because HOAs are comprised of the very members who are affected by their rules, their power in making and enforcing those rules shouldn't be subject to local government. But supporters of the legislation cite horror stories, such as the foreclosure of a Texas home because the owner was late in paying only slightly more than $800 in HOA charges, as the impetus for change. ♦