Community Association Management Insider®

JULY 2013

INSIDE THIS ISSUE

CAI Steps Up Disaster Relief Fairness Campaign

The Community Associations Institute (CAI) continues to fight for Federal Emergency Management Agency (FEMA) disaster relief equality. Since the beginning of the year, CAI, the organization that provides information and education to community associations and the professionals who support them, has stepped up its efforts to secure access to federal disaster relief funds for community associations across the U.S. It has stressed that the organization's members who were affected by Hurricane Sandy last year continue to face high recovery costs as local governments are being denied FEMA reimbursement for debris removal and other disaster recovery expenses in community associations.

CAI has engaged both federal legislators and regulators in an attempt to secure additional resources and flexibility for FEMA to fully respond to the aftermath of Hurricane Sandy. CAI

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FEATURE

Tailor Recordkeeping to State Law, Association's Specific Needs

You know that organization is one of the keys to association management success, especially if you're in charge of a larger community or one with many members. If you did an annual spring cleaning this year, you might also have realized that you need to cut down on clutter in your office, which might include boxes of association records—which can get sizable if they include accounting records, membership lists, meeting minutes, and other important papers—that the association has accumulated over the years. So, what should an association do with old records? And more important, how long must association records be kept?

Proper association recordkeeping is important not only because accurate records can settle disputes or head off legal trouble from members, but also because it's required by law in many states—such as states that require incorporation for community associations. It can be required for community associations that are nonprofit corporations in some states, too.

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RISK MANAGEMENT

Set Rule Barring Members, Guests from Condo Roofs

As summer begins and temperatures rise, members and their guests may be tempted to go up on the roof and sunbathe, barbecue, or just cool off from their hot units. Unfortunately, allowing people on the roof of your condominium building can create problems for you and the association. For example, if a member or guest gets seriously injured or causes costly property damage, a court may rule that you're liable for the injuries or damage because you let members and guests use the roof. How can you avoid this risk? Consider banning members from using the building in this way.

Risks of Letting Members, Guests Use Roof

If you allow members and their guests to use their roof, you're looking for trouble, cautions New York attorney Daniel W. Morrison. Such use can lead to the following problems for an association:

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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 13

Subscriptions/Customer Service: To subscribe or for assistance with your subscription, call 1-800-519-3692 or go to our Web site, *www.vendomerealestatemedia.com*. Subscription rate: $370 for 12 issues. **To Contact the Editor:** Email *egibney@vendomegrp.com*. Call: Elizabeth Purcell-Gibney at (212) 812-8434. Fax: (212) 228-1308.

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Tailor Recordkeeping (continued from p. 1)

But complying with state law is only one reason to keep records well organized and retain them for appropriate periods of time. Good recordkeeping helps the association defend itself against legal action, and keeps members who need to inspect association records happy.

Take the following tips into consideration when making record retention decisions for your association, and think about recommending to your board that it adopt a record retention policy to simplify the process.

Use Recordkeeping to Your Advantage

Aside from complying with a state's legal requirements (such as Florida's seven-year period for which associations must retain records), proper community association record retention has advantages for community managers. That is, records can provide helpful information that saves time on a day-to-day basis, or even occasionally. "Just like businesses, associations keep records to assist with their operations," says Hawaii attorney Richard S. Ekimoto. "For instance, the records relating to a major repair, replacement, or modification project can be used for warranty claims, insurance claims, and to help determine how to undertake future repairs, replacements, or renovations," he points out.

Find Out State-Specific Timelines

How long should you keep records? Timelines for association recordkeeping vary from state to state. And some states don't mandate incorporation or don't require records to be kept for a specific period of time. But even in that scenario, you still should keep association records. The amount of time will vary with the type of record.

"Governing documents and minutes of board and association meetings should be kept indefinitely," says Ekimoto. That's because

CAI Steps Up (continued from p. 1)

believes affected regions should be granted equal access to federal disaster recovery programs. This is only the first step of a broader campaign to raise awareness with legislators on this issue. So far this year, CAI has met with the offices of several U.S. senators and representatives. CAI also recently sat down with regulators from FEMA's public assistance team to further discuss regulatory solutions to the inequity that it says exists towards community associations.

Some community association professionals feel that associations have been denied equal access to federal disaster recovery assistance for decades, but hope that CAI's initiative will change the situation. CAI's FEMA disaster relief fairness campaign aims to better educate members, legislators, and the public about disaster relief equality. The organization is celebrating its 40th anniversary in 2013. ♦

these documents are the official records of what the association has done. It's also important to keep records relating to any claims that have been threatened or made until the matter is resolved, including time for appeals, he notes. "Failure to do so could result in a claim that evidence was intentionally destroyed to avoid the claim," says Ekimoto. (Ask your association's attorney for guidance on the laws in your state when determining how long you should keep your association's records.)

Recommend Record Retention Policy to Board

You can take the confusion and controversy out of your recordkeeping system by having the board adopt a record retention policy, suggests Ekimoto. Having a policy in place will help ensure that the right documents are kept for the right period of time, he says. "Moreover, it helps eliminate a claim that you've destroyed records because you knew that owners might want to review them," he adds. (The record retention policy should be drafted or reviewed by the association's attorney.)

It's important to make sure that the association's critical records have backups in the event of accidental destruction, Ekimoto stresses—especially the minutes and the governing documents for the association. These documents are proof of the association's actions and should never be destroyed either on purpose or accidentally.

Utilize Resources to Get Records in Order

Sometimes, when there has been a change in management, recordkeeping is neglected. What should you do if you're a new manager and discover poorly kept, incomplete, or legally noncompliant records? Ekimoto recommends that a manager in this position should let the board know about the state of the records and help develop a plan to get as many replacement documents as possible.

There are several sources you can tap to try to piece together a complete set of records. Copies of certain documents may be in the possession of current and former board members. Governing documents can usually be obtained from the recorder's office. Large real estate sales companies often keep copies of minutes of associations since they are used for disclosure purposes. And law firms and accountants may also have copies of association documents.

Even after checking these sources, you may not have all of the association's documents, however, Ekimoto points out. Although the records may still be noncompliant, you may not be able to do anything else. "At that point, I think you should let people who ask about records know that other documents were lost or accidently destroyed and this is what you currently have," he says.

Consider Pros and Cons of Electronic Records

You may feel that the increasingly litigious community association climate has created a double-edged sword for you. On one hand, you may be reticent to destroy older association records even if you technically don't need them. But on the other hand, the association may not be able to afford to store large quantities of them. Is there a solution? Yes, but it's not foolproof.

An electronic recordkeeping system has the *potential* to save a community association and its manager time, money, and storage space—so long as you take the proper precautions when implementing and maintaining it.

Like the rules that apply to associations that save paper records, the form of electronic record retention is also state specific. For example, in Arizona, most associations are nonprofit corporations that are subject to the Arizona Non-Profit Corporations Act, which influences how records may be stored electronically. There, associations that are nonprofit corporations must maintain records in written form *or* in another form capable of conversion into written form within a reasonable time. That is, if an association decides to keep electronic records, it must be able to produce those records in paper form if there's a request for inspection.

If you determine that your association is eligible for electronic recordkeeping, you might be nervous about switching entirely to a digital format. "I don't think it's a mistake to keep only electronic copies of records, but you need to be careful about how the electronic records are created," Ekimoto points out. "Care must be taken that all of the record is copied and retained, and decisions should be made about whether an electronic copy of a document is sufficient," he specifies. For instance, an original document with different colors might provide important information that may be lost with a black and white scan, Ekimoto notes.

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Tailor Recordkeeping

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Keep in mind that you'll still have to follow the proper procedures when a community member wants to inspect association records, and consider whether electronic records could make this more difficult or even easier for you and your management team. For example, when allowing a member to see records, what format should they be provided in—an electronic copy or a paper copy sent directly to the member. Or, should the member be allowed to inspect the records only at a specific location?

"In part, this will be determined by what has been requested by the member—that is, if the member wants to see the original of a record and he's entitled to see it, you'll have to have the member inspect the records in the association's or the manager's office, normally with someone present to insure that the records are not modified, taken, or damaged," says Ekimoto. If the member would be satisfied with electronic copies and you can readily provide them, that may be acceptable," says Ekimoto.

There's no such thing as "one size fits all" when it comes to electronic association record retention, says Florida community association manager and real estate expert Susana G. Murray. "It depends on several factors including the size of the association, the association's policy, the manager's software, and the board's preference," she notes.

She recommends that managers retain the two previous years of relevant records in paper form and scan and save in electronic form the remaining records that they're required to keep, or want to keep even if they're not required to by law. Murray notes that managers should keep in mind that, if the association hasn't implemented a policy regarding this process and the cost isn't part of the contractual agreement with the management company, the manager may have to bill the association for the clerical hours spent to complete the new project of scanning and saving relevant records electronically. ♦

Insider Source

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RECENT COURT RULINGS

➤ Members' Agreement to Pay Dues "Implied in Fact"

Facts: An association sued two of its members to collect outstanding assessment dues and charges required from property owners in the community to maintain the neighborhood, pay for a private police force, and pay management fees. The members hadn't paid dues for nearly four years.

The members had a mortgage on the property. The mortgage contained provisions obligating them as borrowers to pay "Community Association Dues, Fees, and Assessments" and granting the bank the right to do and pay for whatever is reasonable or appropriate to protect the bank's interest in the property—in the event that the owners didn't keep their promises and agreements. Eventually, the bank paid the association from the members' escrow account, which was credited toward the outstanding dues and charges.

The association asked the court for a judgment in its favor without a trial. The court granted the association's request. The members unsuccessfully appealed the decision. They appealed again.

Decision: A New York appeals court upheld the trial court's decision in favor of the association.

Reasoning: On appeal, the owners argued that the association wasn't entitled to collect the dues and charges. They asserted that, when they purchased the property, they were presented with no agreements from the association, or a copy of the association's bylaws stating they had to pay these types of dues. They also contended that no obligation to pay dues and charges appears in the chain of title to the property, while such covenants appear in deeds to other properties in the neighborhood. They claimed that services such as garbage removal and police are provided by the City of New York, and community residents are individually responsible for snow removal from the sidewalks outside their properties. According to the members, the association had no legal standing to collect the dues and charges, and the amount assessed was disproportionate to the reasonable value of the services actually provided by it.

The appeals court noted that where there is knowledge that a private homeowners association provides facilities and services for the benefit of community residents, the purchase of property there may manifest acceptance of conditions of ownership, among them payment for the facilities and services offered. The resulting "implied-in-fact contract" includes the obligation to pay a proportionate share of the full cost of maintaining those facilities and services, not merely the reasonable value of those actually used by any particular resident, said the court.

The appeals court explained that this type of implied agreement is "one implied in fact." That is, it required the members to accept the terms offered by the association, and the purchase of the property constituted such acceptance. Such terms included the obligation to pay a proportionate share of the cost of maintaining the facilities and services and not "merely the reasonable value of such facilities and services to the owners as measured by the use made by them of such facilities and services," said the appeals court. To permit individual property owners to determine precisely what portion of the services or facilities they would be willing to accept and what services and facilities they would reject would make it impossible to run a community such as this and to prepare a budget for the expenses of it, said the appeals court.

The court pointed out that the private character of the neighborhood should have been readily apparent to the members upon their purchase based on the presence of a perimeter fence, ingress only through two manned entrance gates, parking permit requirements, and the presence of community-specific police vehicles. Despite the absence of any statement in the deed concerning the dues and charges, and the perception that the services provided don't justify the amount of their assessment, past cases make it clear that the members became obligated to pay the dues and charges assessed upon taking title to the property, said the appeals court. It also didn't matter that the previous homeowners didn't inform them of an obligation to pay charges, that they didn't receive a copy of the bylaws, or that they never entered into any written agreement directly with the association.

The agreement to pay the dues and charges was "implied in fact by their purchase of property within the association's gated community," concluded the court. The court said that it was significant that the members paid the assessment dues and charges for five years following their purchase of the property without any protest. The court ordered the members to pay the association all outstanding dues and charges.

- Sea Gate Assn. v. Vozny, May 2013

➤ "Hearsay" Not Enough to Invalidate Roof Bylaw

Facts: After an association denied two owners' request to install a new asphalt roof on their home using materials not authorized by the "2006 Roof Specifications" portion of the bylaws of the association, the owners sued the association and 16 individual homeowners in the community. A trial court dismissed the claims against the individual homeowners. The association asked the court for a judgment in its favor without a trial, which was granted.

After two unsuccessful appeals, the owners requested that the court allow them to alter or amend the judgment, asserting that the "2006 Roof Specifications" in the association bylaws may not have been properly adopted by the association and thus were invalid. The owners supported their argument with an affidavit purporting that a former member of the association's board of directors, who had served on the board from 2010–2011, had told them about the potential roof specification adoption mistake. The trial court denied the request, and the owners appealed.

Decision: A Maryland appeals court upheld the trial court's ruling in favor of the association.

Reasoning: The owners' affidavit asserted that the former board member told them that he recalled a meeting of the association's officers and directors during which the officers and directors discussed whether the association's roof specifications, written in 2006 and enumerating the types of acceptable and unacceptable roofing materials, may have been enacted without following due process in 2006, and therefore may be invalid and unenforceable by the association.

The association contended that the affidavit was inadmissible "hearsay" because it recited information that the board member *told the owners;* it was not an affidavit from the board member himself. Additionally, the association argued that the board member's statements about the legal effect of the enactment of the 2006 Roof Specifications constituted an "impermissible opinion on a question of law."

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Recent Court Rulings (continued from p. 5)

The appeals court noted that while there were exceptions to the so-called "hearsay rule," the affidavit didn't fit into any of them. It said that, even assuming the affidavit was otherwise admissible, the trial court didn't abuse its discretion in denying the motion to alter or amend the judgment. That was because the bylaws of the association *expressly prohibited* asphalt roofs—and evidence other than the affidavit presented to the trial court by the owners themselves established the validity of the 2006 Roof Specifications.

The only contradictory "evidence" later presented was an affidavit containing information from a person who wasn't involved with the association until four years after the document in question was adopted, and which stated only that the 2006 Roof Specifications "may not have been properly adopted by [the Association]," said the appeals court. This wasn't sufficient grounds for altering or amending the trial court's decision, the appeals court determined. ♦

- Reiner v. Ehrlich, et al., May 2013

Risk Management (continued from p. 1)

Liability for injuries. If a member or guest gets hurt while on your roof—or falls off your roof—you could be held liable for his injuries, warns Morrison. And a judge may order you to pay a hefty amount to compensate the victim for his injuries and suffering. While an association in this situation sometimes gets lucky and isn't liable for the injuries, it's not worth taking a chance.

In a recent court case, an Illinois association went through protracted litigation defending itself after it was sued by a member's party guest, who was injured at the party thrown by the member on the roof of his unit. The appeals court ultimately ruled in favor of the association, determining that the association owed no duty of care to the injured guest, but only because the injury happened on a separate, unfinished part of the roof from the area where the party was being held. The appeals court said that an "invitee," such as the party guest, whom the association normally would owe a duty of care to, "loses" his status as an invitee and becomes a "trespasser," who isn't owed a duty of care, when, after being invited onto the premises he goes to another area beyond the scope of the *original invitation.*

But you should keep in mind that if the injury had happened in a place on the roof that was covered by the party invitation, the association's duty of care to him might not have ceased, and the outcome could've been very different for the association [Keith Juzwicki v. Board of Managers, 1910–1912 Halsted Condominium Association, February 2013].

Liability for damage or injury caused by roof defects. Letting members and guests use their roof adds unnecessary wear and tear to the roof, which could shorten its life and create defects, says Morrison. As a result, your insurance premiums could increase, he cautions. And if, say, a roof defect leads to a leak that damages members' property in the units below the roof, the association could be held liable for that damage, he warns.

What Rule Should Say

To help avoid such risks, encourage the board to pass a rule barring members and their guests from using your building's roof, Morrison advises. The rule you set should bar members and their guests from using the roof for any reason except an *emergency,* says Morrison. Here's Model Language you can adapt and use:

> ***Model Language***
> Members and their guests are strictly prohibited from accessing, storing personal belongings on, or using the roof for any purpose, except in an emergency.

Notify Members, Enforce Rule

As with any new rule that's been passed, you should send members a letter informing them of the new rule and attach a copy of the rule to your letter, recommends Morrison. But if you know or suspect that members are using your roof, it's a good idea to post a copy of your roof rule in conspicuous places, such as by the entrance to the stairs leading to your roof or on the roof-access doors, he suggests. That way, members and their guests may think twice before going up to the roof. And this extra step may save lives and prevent liability, he says.

Unfortunately, simply having such a rule may not be enough to prevent members from using the roof anyway. So before you spend time and money on a lawsuit, you should know what to do if members violate your no-roof rule, says Morrison. Take these two steps to enforce the rule:

Speak with member. You may find out that a member has used your roof for a reason other than an emergency. For instance, a maintenance staff member may have spotted members sunbathing when he inspected the roof. Or a member in a top-floor unit may have complained to you that someone has been playing loud music on the roof, and further investigation proved it was a member and her guest. As soon as you find out about a member's use of your roof, talk to the member about his actions, suggests Morrison.

Remind the member about the rule that specifically bars members and their guests from using the roof for any reason other than an emergency. And point out that violating this rule could lead to serious consequences, he says.

Send "get-tough" letter. If, after speaking with the member, you learn that he has continued to use the roof, send him a get-tough action letter, advises Morrison. This letter should be stern and, like our Model Letter: Get Tough with Member Who Uses Roof, should: (1) remind the member about your prior conversation with him about his unauthorized use of the roof in which you reminded him that your bylaws specifically bar such activity for any reason other than an emergency; (2) note that despite this conversation, it has come to your attention that the member has continued to use the roof, citing examples of how and when he did so; and (3) warn the member that his continued use of the roof is both a serious safety risk and a material violation of the association's governing documents. Cite the specific portion the member is violating, refer to the specific rule he's violating, and attach a copy of that rule to the letter. And say that if the member continues to use the roof, you'll pursue whatever legal remedies are available to the association.

If a member continues to use the roof after receiving your letter, you may have no choice but to take further action. If you decide to do so, you'll have a strong case, Morrison notes. By speaking with a member informally and then sending a warning letter, you can show that the member was on notice of his violation, and that you took reasonable steps to enforce your no-roof rule, rather than rushing to the drastic step of fining him, suspending his privileges, or suing him. Also, if the member continues to use your roof and injures himself while doing so, the fact that you warned him orally and with a letter will help you defend yourself if the member sues you for his injuries, he adds. ♦

MODEL LETTER

Get Tough with Member Who Uses Roof

Here's a get-tough letter we wrote that you can adapt and send to a member who continues to use the roof of the condo building despite your prior warning not to do so. The letter reminds the member of your conversation with him in which you warned him not to use the roof; notes that you've learned that he has continued to use the roof anyway; warns him that his use of the roof for any reason other than an emergency is a serious safety risk and a material violation of the association's bylaws; and threatens legal action if he doesn't immediately stop using the roof.

[*Insert date*]

Dear [*insert member's name*]:

On [*insert date*], I spoke with you about your unauthorized use of the roof. Despite that conversation, it has come to our attention that you have continued to use the roof in violation of the Association's bylaws. Specifically, [*insert details of violation, e.g., maintenance staff members reported seeing you sunbathing on the roof on weekend afternoons*].

Your continued unauthorized use of the roof is both a serious safety risk and a material violation of the bylaws. Section [*insert #*] of the bylaws requires you to comply with all rules. And as shown in the attached copy of the rules, you are barred from using the roof for any reason other than an emergency.

If we learn that you continue to use the roof, we will pursue any and all legal remedies available to us.

Thank you for your cooperation.

Yours truly,
Jane Manager

Insider Source

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