

# Community Association Management *Insider*<sup>®</sup>

MARCH 2014

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## HOA's Medical Marijuana Ban Up in Smoke

An Arizona HOA board has succumbed to pressure from owners in the community to reverse its ban on residents smoking medical marijuana in their yards and on their patios. The HOA board had voted to ban the use of medical marijuana in those areas, prompting residents to accuse the board of overstepping its bounds. A petition to rescind the ban had been circulated by several homeowners, many of whom cited their personal freedom as one of many reasons that they were outraged.

The community's property management company stated in a press release that it was the right decision to rescind the ban and that it felt that HOAs all over the country must adapt to changing and evolving laws on medical marijuana. It also commented that it was motivated to change its policy after receiving input from affected residents and the public. It added that it was never the HOA's intent to infringe upon the access and rights of medical-marijuana patients and that it will continue to learn more about this "complex issue." ♦

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## FEATURE

## Ethical Management: Are You Really Doing the Right Thing?

Like association board members, managers are entrusted to work within fiduciary guidelines, exercise sound business judgment, and consistently maintain the duty of care and loyalty they owe to the association. Managers who keep these responsibilities in mind are more likely to preempt member dissatisfaction and even liability.

But there are times when you might be tempted to engage in questionable—or worse, abjectly inappropriate—behavior. Managing an association is labor intensive and can be overwhelming. When carrying out your day-to-day management responsibilities, don't lose perspective and veer into an ethical gray area. You can stay on the right track by setting and living up to high service standards.

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## DEALING WITH MEMBERS

## Don't Let Noncompliant Pet Owners Run Wild in Community

Just because you have pet rules for your community, that doesn't mean that members with pets will always follow them. Noncompliant members can create problems that range from annoying to dangerous. What can you do? Periodically send a letter reminding them of the importance of complying with your pet rules and pointing out how disregarding the rules disturbs other members and your maintenance staff. Your letter, like our Model Letter: Remind Pet Owners of Responsibilities, should include four key points.

### Why Send a Letter?

Unfortunately, no matter what you do, you'll probably occasionally still have to deal with members who don't clean up after their pets, who let their pets roam around the community without a leash, or who have pets that create noise disturbances. Sending a letter reminds pet owners of their responsibilities under your pet rules and how their noncompliance disturbs the entire community. Much of this is common sense, and many members may already realize they should be following the rules, but informing members of how they've been dis-

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*Community Association Management Insider* [ISSN 1537-1093 (PRINT), 1938-3088 (ONLINE)] is published by Vendome Group, LLC, 216 East 45th St., 6th Fl., New York, NY 10017.

**Volume 13, Issue 9**

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## Dealing with Members (continued from p. 1)

ruptive can help motivate them to change their behavior. Sending a letter reminding members with pets of their responsibilities also sends a message to members without pets that you are trying your hardest to make sure their neighbors with pets are following the rules.

### What Letter Should Say

Keep the tone of your letter sympathetic, not confrontational. The letter should make four points:

**Point #1: Expectations.** Let members know that the community values members with pets, but that it expects these members to pitch in and comply with the community's rules [Ltr., par. 1].

## MODEL LETTER

### Remind Pet Owners of Responsibilities

The following letter incorporates four key items that should be included when reminding members that they're obligated to follow the community's pet rules, and why doing so is important. Show this letter to your attorney before adapting it for use in your community.

Dear Member:

The management of Shady Acres Community Association values all of its members, including members with pets. We believe that allowing members to live at Shady Acres with their pets enriches the community and the lives of pet-owning members. While we encourage you to enjoy your pets while living at our community, we also want to ensure that you do not do so at the expense of other members. That is why we feel it is necessary to occasionally remind all members that members with pets are required to adhere to Shady Acres' pet rules.

Shady Acres' pet rules, such as requiring members to dispose of pet waste, to keep their pets on leashes when outside their units, and to keep pet noise levels to a minimum, are for the benefit of all members. Failure to dispose of pet waste creates an unclean and unhealthy environment for everyone. It also forces management to use maintenance staff to clean up the waste, distracting the staff from its number one goal of maintaining and improving your community. Pets that are walked off a leash can be threatening to other members, particularly small children, and can run off, causing damage to the community. Also, excessive barking or howling by dogs and screeching by birds disrupts all members, particularly those who are elderly or sick, or who have small children.

Compliance with our pet rules is needed to keep Shady Acres a pleasant place to live. We know that the vast majority of our members with pets comply with our pet rules. But if you see anyone violating these rules, please help us enforce them. Call our management office at [insert tel. #] to report any violations or to ask any questions.

Thank you for your cooperation.

Yours truly,  
Jane Manager

**Point #2: Negative effects.**

Explain how violating the rules disturbs the community. For example, point out that members who don't properly dispose of their pet's waste create an unclean environment for all members, and force management to use the maintenance staff's time to clean up the waste, distracting the staff from responding to members' maintenance requests. Also point out

that dogs who are walked without a leash can be frightening to other members, especially children, and that noise created by pets disturbs all members [Ltr., par. 2].

**Point #3: Necessity.** Stress that members' compliance with pet rules is needed to keep the community a pleasant place to live [Ltr., par. 3].

**Point #4: Violations.** Encourage both pet owners and members who don't own pets to report any violations of your community's rules that they witness. Give them a phone number to call to report violations [Ltr., par. 3]. By enlisting all members to enforce your rules, you stand a much better chance of getting everyone to comply. ♦

## RECENT COURT RULINGS

### ► Association Not Liable for Damaging Individual Unit Owners

**Facts:** An association sued two members for not paying maintenance fees. The members filed a counterclaim alleging that the association had caused monetary damage to them by "engaging in bad faith conduct" by its involvement in a lawsuit filed by a group of other members in the community who accused the association of withholding financial documents. The members asserted that they had been rejected for a reverse mortgage loan on their unit because of that lawsuit. A trial court ruled in favor of the association without a trial. The members appealed.

**Decision:** A New Jersey appeals court upheld the decision in favor of the association.

**Reasoning:** The appeals court noted that, under state law, subject to the master deed and bylaws, the association was an entity that through its officers could enter into contracts, sue, and be sued. Implied within that statute was the association's authority to defend itself against any suit brought against it as its "business judgment" deemed appropriate, said the appeals court.

At the same time, a condominium association has a fiduciary relationship with each of its unit owners that requires it to act "reasonably and in good faith," it added, pointing out that this relationship requires that the association protect the interests of the group as a whole and the interests of each constituent owner individually.

Under the business judgment rule, the general test for whether an association has acted properly is: (1) whether its action was authorized by statute or its own bylaws; and, if so, (2) whether the action was fraudulent, self-dealing, or unconscionable. But the business judgment rule isn't available as a general defense if the association's fiduciary duty was breached by fraud or acts performed in bad faith. The two members had no evidence of wrongful conduct by the association regarding the other lawsuit that would make it liable to them as individual members of the association. Furthermore, the members had no admissible evidence that the association's actions were the cause of their failure to obtain a reverse mortgage. Without evidence of the kind of wrongful conduct needed to prove the association's liability, and without evidence of causation of their losses, the members couldn't prove their counterclaim.

Moreover, the association and its attorney must have the ability to make decisions regarding disputes and litigation without second-guessing by one or more individual unit owners, said the appeals court. The association cannot be liable for damaging individual unit owners simply because its actions in the course of litigation on behalf of all members may have affected some of the members unfavorably, the appeals court stressed. Here, the litigation strategy the association used was actually quite successful for the membership as a whole, since the lawsuit was dismissed within a year without liability being imposed on the association. ♦

- Apple Ridge Condo. Association, Inc. v. Rodgers, January 2014

## Ethical Management

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### Beware of Gray Areas

Exactly what is ethical management? “Doing the right thing, all the time, in your role is the simplest way to describe what a manager’s mantra should be,” explains association management expert Paul Grucza, who has taught numerous classes on ethical association management and has trained his staff to live up to that standard.

“Of course, the right thing isn’t always obvious,” says Grucza. There can be differing interpretations of what the “right” thing or “wrong” thing to do in a specific situation is, he notes, especially when a manager has lost focus on his role—providing the best service possible for the community, not reaping benefits for himself.

“It’s sometimes hard for managers, and particularly new managers, to recognize an ‘opportunistic benefit’ that they shouldn’t take advantage of,” says Grucza. He explains that opportunistic benefits are tangible and intangible items or accommodations that vendors or members may offer an association’s manager or its staff.

To determine whether something is an opportunistic benefit, ask yourself: Would I have been offered this benefit if I weren’t the association’s manager? It’s not uncommon for vendors and service providers to provide perks, such as complimentary lunches, to managers as a way to thank them for the association’s business. And under many circumstances, it’s fine to accept a small thank you, such as an inexpensive lunch.

But a manager crosses the line when he believes he can take actions that provide a benefit to the association and also enrich himself in some way or otherwise benefit from relationships that have truly been created to foster business, says Grucza. For example, it’s objectively unethical for a manager to build into a request-for-proposal (RFP) from a prospective vendor a so-called kickback that a vendor might offer to entice the manager to steer association business its way, he stresses.

Surprisingly, some managers don’t think ahead about the consequences of taking some type of remuneration when it’s abjectly wrong. “Unfortunately, when they’re put in a compromising situation, some managers find the short-term gain too attractive, and ignore the long-term pain they’ll feel if they’re caught in an unethical situation,” says Grucza.

### Widespread Ramifications Enue

What can seem like a private arrangement between a manager and, say, a vendor to the community, can actually create serious liability and problems for the association. Depending upon the circumstances under which an inappropriate deal was made between the manager and a vendor, the association may share responsibility for any problems arising from that arrangement.

Liability insurance and other types of insurance may protect the association against the actions of a manager who later tries to sweep them into a lawsuit. But the financial disaster caused by an improper arrangement isn’t limited to paying legal fees.

A vendor that has a payoff arrangement with a manager may very well have done an excellent job, but the net cost to that association conceivably could be thousands more because of the payoff, points out Grucza. He warns that the board is at risk for criticism, or worse if members learn that money was lost because of the inappropriateness. A board could be accused of not acting in the members’ best interests and wasting their money by paying for the particular contract that the manager was benefiting from.

A manager and board could have major exposure financially, including problems getting insurance in the future, and goodwill can also be lost. Once a manager’s reputation has been called into question, it’s very difficult for him to be hired anywhere else in the industry. And the board may have a hard time gaining back the trust of the membership after there’s been impropriety, says Grucza.

### Decline Offers Tactfully

Compromising situations can be awkward, especially when they involve inappropriate offers from members themselves, rather than a vendor whom the manager can choose to avoid doing business with. But no matter who offers you a perk that you don’t want to accept, simply follow the “honesty is the best policy” adage, says Grucza. He tells management trainees that the best thing to do is to comment that it’s a generous offer, but they can’t accept it.

Depending upon who is making the offer, you can smooth things over further. For example, when a service provider offers some incentive or kickback, you can say something like, “the fact



that you're able to provide the work we need done in the community and give us a good price for that work is all I need because as a manager my sole interest is in helping the community," says Gruzca. Telling a vendor or service provider that you'd rather it do a good job at a fair price than give you something personally is a tactful way to diffuse that situation and to politely send the message that, if it persists, you'll replace that company.

What about members who offer goods or services in exchange for being given priority over other members? "In the same way that I would talk with a vendor or service provider directly and honestly, I would encourage managers to let that member know that they appreciate what he or she is trying to do for them, but that their satisfaction comes from delivering excellent service to members and the community and that they don't need any type of inducement to do that," advises Gruzca.

If you're unsure whether a kindness that a member is showing or an offer that is being made by a vendor or service provider crosses the line, ask yourself whether any harm would be created by the establishment of the relationship the member or company is offering, says Gruzca. Lunch with a vendor to cultivate a business relationship could be all right—it's the depth, length, and cost of the lunch that could raise members' eyebrows, he notes.

### **Superior Service Keeps Staff, Members in Check**

Managers aren't the only ones who may be tempted to partake of opportunistic benefits—front-line staff, such as concierge and

maintenance staff are even more likely to be approached by a member with an offer for preferential treatment.

"Owners are quick to zero in on personalities and vulnerabilities and try to use them as leverage, which is why routine and consistent training for your staff on how to say no tactfully, how to keep an even keel among all the members they represent, and how to report a member who is putting pressure on them is vital," says Gruzca.

"The issue of ethics really comes back to the proper delivery of customer service—that is, doing things for the customer, in this case, the association, in the appropriate way," says Gruzca. "If you dispense that service in a detailed, thorough, professional, consistent manner, you eliminate the fissures where lapses in ethics can more easily occur," he emphasizes.

It's expected that a doorman in a condo building will open the door and be courteous, and that the concierge will greet members and be accommodating and helpful, because that's the job, not because they'll be tipped or given additional compensation for it. And that's what managers need to consistently deliver in their training messages on what customer service is and what the delivery of service entails, says Gruzca. He feels that training avoids potential breaches of ethics, like taking tips.

Training your staff to discreetly decline inappropriate offers also keeps members in line. "We indirectly train owners through the behavior of our staff and the service that our staff provides, that we're not interested in or willing to accept inappropriate offers.

### **Set Threshold for Offers**

"The reality of doing business today is that it can and will involve the exchange of some level of goods or services," says Gruzca. So to avoid confusion, set a threshold amount of money that an offer from a vendor can't exceed. Gruzca has previously set the threshold in associations he has managed at \$25.

Especially around the holidays, however, vendors may send gifts that are in excess of your threshold. Gruzca has solved this problem by making sure that gifts are shared with the entire staff. That way, there's never an impression that one manager is benefitting from a relationship with the vendor, he explains. In the absence of a strict threshold policy, you open yourself up to arguments that a gift or service was over-the-top.

### **Remember Regulatory Safeguards**

Association managers are subject to regulations, but on a day-to-day basis, you might forget this. "Regulatory safeguards are designed to help modulate behavior within the industry and provide mechanisms that fairly, openly, and equitably evaluate any allegation of ethics violations or complaints based on a manager's action or inaction," says Gruzca.

"It's important for homeowners and board members to understand that we are a regulated group of professionals who abide by a code of ethics, and if anomalies arise, we have specific processes in place to protect the consumers and managers who are involved," he stresses.

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## Ethical Management

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Remind your board and members that there are tight reins on appropriate behavior. And take advantage of periodic ethics train-

ing opportunities available to managers. These measures should help you provide superior service while eliminating as much of the gray area as possible. ♦

### Insider Source

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## RISK MANAGEMENT

# Generating Income with Storage Space Rentals

At some point, you may have considered providing storage rooms or lockers for members. It can work in your favor in two ways because it gives members a great amenity, especially those who are living in smaller units, while providing an opportunity to generate income for the association—if you charge a fee. Using common space storage to generate income also shows members that the association is being proactive in investigating any and all means to generate income without having to unnecessarily raise common charges or impose assessments on its members.

It sounds like a simple exchange, but there are some risks. You can avoid common space storage room hassles with a license agreement, like our Model Agreement: Use License Agreement for Common Area Storage Space Rental.

### License vs. Lease for Space

There are several pitfalls to offering storage space for rent. What if a member's stored property damages another's? What if a flood or other disaster ruins all of the possessions in storage? Or how will you deal with belongings that a member may leave in her storage area after she moves out of the community?

It might seem like putting storage room rules in a lease agreement is a good solution, but a better strategy for protecting yourself and the association against these and other potential problems is to use a license agreement with members who rent space in the designated storage area. A license is different from a lease. A lease grants the member certain rights to occupy property. If the member violates his lease, you'll need to go to court to evict him. But a license gives the member only the right to use the space for certain limited purposes—in this case, storage. If the member breaks any of the rules that you set in the license agreement, you can terminate the agreement, end his right to use the storage space, and remove his property without going to court or providing the notices required for an eviction.

**PRACTICAL POINTER:** Don't worry about whether you have the ability to charge a license fee. The fact that a storage area is common space doesn't prevent the association from assessing a fee for licensing its use to a *limited* extent—unless your bylaws *specifically* prohibit such a fee. If you're unsure, check with the association's attorney before spending time or money preparing for rentals.

### Storage Agreement Protections

A storage agreement can protect property and reduce liability by preventing members from abusing your storage areas and ensuring that you won't be responsible if something happens to a member's stored belongings. What should you say in your license agreement? Just saying that the member can't store any dangerous materials in the storage room and that you're not responsible for any damage isn't good enough. Being vague will leave you open to problems. Instead, make your license agreement as specific as possible by covering these points:

**Illegal or dangerous materials.** One danger of storage spaces is that members may use them to store dangerous materials, such as paints and chemicals, that could create a hazard for your members and property. Members may even store illegal or stolen items there. So make storage of these items a violation of the agreement [Agr., par. 1]. Add catchall language banning anything that would cause your insurance rates to increase.

**Access.** Some storage areas consist of lockers in a large room that's open to the community. In those cases, members should be able to have access to their lockers

at any time. But if you're planning to lock the door to the storage area as an extra security precaution, limit access to regular business hours, when you have someone on duty to unlock the door for the members [Agr., par. 2].

**Losses.** You don't want to guarantee the security of the members' belongings. So it's important to say in the agreement that the member is storing his possessions at his own risk and that you're not liable for any loss or damage [Agr.,

par. 3]. But be careful. If the agreement says that the association won't be liable for any loss or damage to a member's property under any circumstances, this clause may be unenforceable if your commu-

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## MODEL AGREEMENT

### Use License Agreement for Common Area Storage Space Rental

You can avoid common space storage area hassles by using a license agreement like this one. Ask your attorney about adapting it for your own use.

#### STORAGE LICENSE AGREEMENT

Between [insert name of association] (Licensor) and [insert name of member] (Licensee), for storage space number [insert #] (Storage Space) at [insert location of storage space] for a monthly license fee of \$[insert amt.], beginning [insert starting date of license]. Licensee resides at [insert address of licensee]. In consideration of the mutual agreements between the parties, Licensor grants a license to Licensee to use the Storage Space specified above at the license fee specified above, in accordance with the following terms and conditions:

1. **No dangerous or unlawful items.** Licensee certifies that all goods to be stored in the Storage Space are lawfully in Licensee's possession. Licensee shall not use the Storage Space to store any paint, solvents, or other hazardous, flammable, explosive, or dangerous materials; contraband; illegal substances; or any other item that would contravene any laws, regulations, or provisions of Licensor's insurance policies; that would cause Licensor's insurance premiums to increase; or that would cause any nuisance.
2. **Locks and access.** Licensee is responsible for providing his or her own lock for the Storage Space. If the Storage Space is in a room to which only Licensor has access, Licensor will provide Licensee with access only during Licensor's regular business hours.
3. **Liability.** Licensee uses the Storage Space at Licensee's sole risk. Licensor is not responsible for the loss of or damage to member's possessions due to any cause whatsoever, unless that cause is the result of Licensor's negligence. Licensor's insurance may not cover Licensee's possessions, and Licensor strongly urges Licensee to obtain his or her own insurance coverage for them.
4. **Termination.** This license shall terminate upon the happening of any of the following events:
  - a. Upon the failure of Licensee to pay the monthly license fee by the fifth (5th) day of the month;
  - b. Upon the vacation by Licensee of the unit specified above;
  - c. Upon the violation by Licensee of any provision of this License Agreement; or
  - d. Upon the expiration of thirty (30) days after written notice from the first of the month by Licensor or Licensee to the other party that this License Agreement is being terminated.
5. **Removal and disposal of Licensee's possessions.** At the termination of this License Agreement upon any of the events specified in Paragraph 4 above, Licensee must remove his or her possessions from the Storage Space at the time of termination without further notice from Licensor. If Licensee fails to remove his or her possessions immediately upon termination, Licensor shall have the right, and is hereby authorized, to remove Licensee's possessions and dispose of them without liability to Licensor. Licensee shall reimburse Licensor for any costs incurred in removing and disposing of Licensee's possessions in accordance with this agreement.
6. **Nature of license.** Licensee understands that this is a License Agreement only and not a lease, and conveys no interest of any kind, possessory or otherwise, in or to the licensed Storage Space, other than the right to use the Storage Space for the storage of possessions under the terms and conditions of this License Agreement. This License is granted to Licensee only and cannot be transferred or assigned.

## Risk Management

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nity is in a state in which you can't disclaim liability for your own negligence. You need to say that you're not responsible unless the loss or damage is due to your negligence. Ask your attorney what the rule is in your state. It's also a good idea to remind the member that you won't have any insurance coverage for his belongings, so he should get his own.

**Events that trigger agreement's termination.** Specify that the agreement will end under four

circumstances: (1) if the member fails to pay the monthly fee on time; (2) when the member moves out of his unit; (3) if the member violates any of the terms of the agreement; or (4) after 30 days' written notice of termination from either the association or the member [Agr., par. 4].

### Removal of possessions.

Say that as soon as the agreement ends, the member must remove his belongings from the storage area. If he doesn't, give yourself the right to remove and dispose of them as you see fit, without liability for their loss or damage. You

can also require the member to reimburse you for any expenses that you incur in removing his lock and disposing of the storage locker's contents [Agr., par. 5].

**No additional rights in storage space.** It's a good idea to emphasize that the license agreement is different from a lease and gives the member no rights except to store his belongings. You should also say that the license is not transferable, so the member can't rent out his storage space or let other people use it [Agr., par. 6]. ♦

## CommunityAssociationInsider.com

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