

Community Association Management *Insider*[®]

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HOA Tells Phoenix Owners to Assume Nothing

A couple of homeowners in a Phoenix planned community feel they've been painted into a corner by their homeowner's association. The couple was informed after repainting their home the same color it had been for 10 years, that painting—even if it's not a new color scheme—requires a special application to the association to be made two weeks before the project.

Failing to get the HOA's approval could end up costing the owners, who said they were unaware of the permit requirement, thousands of dollars if they're required to repaint the home a different color, despite the fact that they say it's a desert-theme color that blends in with other homes in the neighborhood.

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FEATURE

Cut Monthly Assessment Delinquencies with Tough Acceleration Policy

Every community association relies on its members to make monthly payments so that it can pay for the services and amenities its members expect. So when a community member doesn't make his monthly payment of assessments, he harms the entire community. What can you do to cut assessment delinquencies? One strategy is to set a late fee policy (see "Enforce Late Fee Policy Consistently to Avoid Fair Housing Claims," in this issue).

Another strategy is to set an "acceleration" policy, says Colorado attorney Laura K. Sanchez. If a member hasn't paid his assessment—typically for at least 30 days—the association may have the right to declare all of that fiscal year's monthly assessments due immediately. Although some may consider this a tough measure, its effectiveness has been proven.

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RISK MANAGEMENT

Set Rules for Postings on Community Bulletin Board

Even in the age of Facebook and other social media, many communities still feature bulletin boards in their lobbies or common areas. Since not every member will be tech savvy or want to go online to check the association's Web site, a bulletin board can be an effective way for an association to inform members about upcoming events and renovations, and other noteworthy information. A bulletin board can also be a good way for members to share information or ask for help. But letting members post on bulletin boards can cause problems. For example, what if the material a member chooses to post is objectionable to others? Or what if members remove other members' postings or the association's to put up their own?

Follow these tips to avoid bulletin board controversy. And to keep your community's bulletin board a source of news and information, rather than stress, incorporate these tips in a set of rules like our Model Rules: Prevent Bulletin Board Controversy.

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Tough Acceleration Policy (continued from p. 1)

“Our association clients have had a lot of success using acceleration,” says Sanchez. “It sends a strong message that there are repercussions for not making payments, and it reduces the number of times the association’s attorneys have to get involved,” she notes.

We’ll tell you how to implement an acceleration policy at your community. And we’ll give you Model Language that you can adapt and add to your governing documents to do so.

Check Your Declaration

Before you adopt an acceleration policy, check the language of your declaration to see if your association has the right to accelerate assessment payments. For your association to be able to accelerate assessments, the declaration must structure assessments as an annual expense that’s paid in increments (for practical purposes, usually monthly increments). This is because what you’re accelerating is the time frame within which the annual assessment is due.

Some community associations designate the assessments as monthly dues or monthly maintenance fees, which limits the association’s flexibility. Since an association can’t legally force a member to pay a monthly expense months before it’s due, assessments structured this way can’t be accelerated unless you amend your declaration. The ideal language that would give the association the right to accelerate assessment payments would read: “The board shall levy an annual common expense assessment, which members shall be obligated to pay in such increments as the board shall determine.”

If your declaration structures assessments as a monthly fee, you can still adopt an acceleration policy, but first you’ll have to amend the declaration to structure assessments as an annual fee, Sanchez says.

PRACTICAL POINTER: If your declaration says nothing about whether assessments are an annual or monthly expense, it’s not clear whether you can adopt an acceleration policy without amending the declaration. Sanchez has never seen a policy challenged that had been adopted under such circumstances, but check your own state law and speak with your association’s attorney for more guidance.

How to Implement Acceleration Policy

It’s best to include your acceleration policy in your association’s declaration, advises Sanchez. A community association’s declaration is the governing document with the most authority, and because declarations are recorded in the real estate records, anyone buying a unit in the community will know that acceleration might result if he fails to make the required payments, she notes. She says it’s advisable to provide new members with notice of the acceleration policy, since acceleration is a severe step to take.

If you think your members won't support a vote to amend the declaration to include an acceleration policy, you can put the policy into your policies or rules, as long as it doesn't contradict the declaration. Sanchez recommends putting the policy into the bylaws in states where bylaws are recorded.

The language of your policy, like our Model Policy: Get Right to Accelerate Monthly Assessments if Member Is Delinquent, should:

Explain what triggers acceleration. Your acceleration policy should explain what events will trigger acceleration. For most associations, the trigger will be the failure to make a monthly payment after a period of time—typically, at least 30 days.

Give board discretion in deciding whether or not to accelerate. Though you should establish clear guidelines for what triggers acceleration, it's also smart to give the board discretion to decide whether to actually accelerate in each individual case. Just because a member has been chronically late with payments shouldn't compel the board to accelerate his debt. For example, if the member is on the verge of bankruptcy, the association might not decide to push him over the brink by accelerating payments. That wouldn't necessarily help either the association or the member.

Another time the association might choose not to accelerate assessments is toward the end of a fiscal year. If acceleration will make only a month or two of assessments immediately due, it might not be worth it.

MODEL POLICY

Get Right to Accelerate Monthly Assessments if Member Is Delinquent

An acceleration policy can be very effective for cutting assessment delinquencies, but it should be drafted carefully. Keep in mind that your governing documents and state law will influence what you can and can't put in your policy. Ask your attorney about adapting this policy for use at your community.

ACCELERATION

In the event that any Member's assessment, charge, or fee provided for in the declaration, or any monthly or other installment thereof, remains unpaid for more than thirty (30) days of the due date thereof, the Board of *[insert community association name]* may, in its discretion, and in addition to any other remedies that may exist with respect to such delinquency, declare the entire remaining balance of such Member's annual assessment for that fiscal year immediately due and payable upon *[insert #, e.g., 30]* days' written notice to the Member to that effect. The Board may, in its sole discretion, by providing *[insert #, e.g., 30]* days' written notice of the same to the Member, unilaterally reverse its prior action under this section, thereby returning to the original payment schedule, at which point the Member's annual assessment for that fiscal year shall no longer be immediately due and payable.

Your board should have discretion in this matter for another reason: Acceleration is a severe step to take against a delinquent member. "We see acceleration as appropriate only for extreme cases," says Sanchez. However, the more time that elapses and the greater the amount of money owed grows, the harder it becomes for the member to come up with the money in some cases.

PRACTICAL POINTER: It's a good idea to document your reasons for not enforcing the policy (such as the member's bankruptcy or its being the fiscal year-end), to defend yourself from accusations that you selectively enforce your policy for illegally discriminatory reasons—for example by enforcing it against Hispanic members but not white members.

Set notice requirements.

Your association should give the delinquent member notice before accelerating his monthly payments. Some states' laws require

associations to give members notice before accelerating assessments. Other states' laws might not include a notice requirement, but the association's governing documents might. Check with your attorney to see if your state law or governing documents set a notice requirement—such as 30 days—and if they do, make sure your association policy mirrors that requirement.

Even if neither your state's laws nor your governing documents include a notice requirement, consider giving it. Giving reasonable notice is fair. And if the dispute with the member leads to a lawsuit, you'll be able to show the court that the association gave him fair notice and an opportunity to make his payments before it accelerated his debt.

Give association right to "decelerate" debt. One of the most important things to include

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Tough Acceleration Policy

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in your acceleration policy is the association's right to "decelerate" the debt after it has been accelerated, says Sanchez. To decelerate the debt means to return to the original payment schedule.

This right is important because if the member declares bankrupt-

cy, he might be able to have all of his existing debts eliminated. This is called discharging the debt. But the court will discharge only existing debts. So an assessment not yet due wouldn't be discharged. But if the association had accelerated the entire fiscal year's assessments, that whole amount becomes a current debt, and the member could eliminate his entire year of assess-

ments by filing for bankruptcy, Sanchez warns. By reserving the right to decelerate the assessment payments, you can avoid this costly mistake. ♦

Insider Source

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DEALING WITH MEMBERS

Enforce Late Fee Policy Consistently to Avoid Fair Housing Claims

Unfortunately, sometimes you have to charge your members late fees if they don't pay their common expenses on time (unless you've established an acceleration policy, as discussed in "Cut Monthly Assessment Delinquencies with Tough Acceleration Policy," in this issue). You probably don't want to charge late fees to members who occasionally pay late. But you might also feel that members who chronically pay late deserve the late charges. Don't be tempted to apply your late fee policy selectively, however. You must do so consistently, based on predetermined procedures contained in your community's written collection policy. If you apply different policies to different members, you're creating problems for yourself.

Federal Law Comes into Play

If word gets out that you don't always enforce your late fee policy, members who usually pay on time may feel penalized. This can erode the sense of community you're trying to create. What's more, says

community association attorney P. Michael Nagle, experience shows that inconsistency in applying the late fee policy or other collection policies and procedures can lead to worse delinquency problems.

Also, the federal Fair Housing Act applies to this situation. Inconsistent enforcement of any rule can get you into fair housing trouble, says Nagle. "Applying different late fee policies to different members opens a can of worms," he says. A member who's charged a late fee may claim that you're discriminating against her if she belongs to a protected group, warns Nagle.

Suppose a white resident who usually pays her common expense assessment on time is a day late one month, and you don't charge her a late fee. The next month, an African-American resident pays late, and you charge her a late fee. If the African-American resident learns that you're not enforcing your late fee policy consistently, she may think you're discriminating against her based on her race and file a complaint with HUD or

the state antidiscrimination agency, says Nagle. And you'll have a difficult time proving you didn't discriminate—even if that wasn't your intent—both because the difference in your treatment of the two residents looks bad on its face and because it's difficult to prove a negative, he adds.

Consider Relaxed Policy

There is a solution. If you really want to put a sense of community back into your community, you may want to set up a more forgiving late fee policy, suggests Nagle. For example, if state law—and the association's governing documents—allow this approach, you can write your policy so there's no late charge on the first delinquency in a 12-month period. As long as you consistently enforce the more forgiving policy, it won't become a fair housing problem, he points out. ♦

Insider Source

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Risk Management

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Ban Three Types of Material

There are three types of material that are sure to create problems when posted on your community's bulletin board. Ban these items:

Material that may violate fair housing law. Ban all material that may be perceived as discriminating against people based on their religion, nationality, mental or physical disability, race, color, sex, or family status. If you don't, you could face a fair housing complaint. You'll have to use your discretion with this rule. While a flier advertising a church tag sale is probably okay to post because it won't offend anyone, an invitation to convert to the teachings of a certain religious leader isn't okay because it probably will [Rules, #1].

Postings related to illegal or illegitimate activity. Ban any postings related to illegal or illegitimate activity—such as solicitations for an escort service, or sales of illegal weapons or other contraband—or any other postings that the board of directors concludes are for illegal or illegitimate purposes. If a member uses the board for an illegal purpose and is arrested, the association may be perceived as sponsoring the illegal activity by allowing her to advertise on its board [Rules, #2].

Profane material. A community is a place for families. The last thing you need is a member complaining that you allowed something profane to be posted on the community bulletin board. So ban any material containing profane language or pornographic images. Also, give the board of

directors the right to determine what's acceptable and what's not. In making these determinations, the board should always err on the side of caution. What's art to one person may be offensive to another. But if something seems questionable, it shouldn't be allowed [Rules, #3].

Require Approval

Consider requiring postings to be approved by the board. To ensure that nothing objectionable is posted on the bulletin board, require members to bring the item they want to post to the

MODEL RULES

Prevent Bulletin Board Controversy

Set rules that members must follow to be able to hang postings on your community bulletin board. Ask your attorney about adapting the following rules for use at your community.

BULLETIN BOARD RULES

Shady Acres Community Association is pleased to have a community bulletin board for members to use. Members who wish to post material on the bulletin board must adhere to the following rules:

- 1. No Discriminatory Material.** Material that can be perceived as violating fair housing law cannot be posted on the community bulletin board. This includes material that can be perceived as discriminating against people based on their religion, nationality, color, disability, race, sex, or family status.
- 2. No Illegal or Illegitimate Activities.** Postings related to any illegal or illegitimate activities cannot be posted on the community bulletin board. This includes postings for solicitations of illegal activities, postings for sales of illegal weapons or other contraband, or any other postings that the board of directors determines, in its sole discretion, are for illegal or illegitimate purposes.
- 3. No Profanity or Pornography.** Material containing profane language or pornographic images cannot be posted on the community bulletin board. The board of directors reserves the right to determine, in its sole discretion, what is profane or pornographic for purposes of the community bulletin board.
- 4. Approval Required.** All postings must be submitted to the association manager for review and approval by the board of directors before being put up on the bulletin board. Only postings bearing the association's stamp of approval will be allowed on the bulletin board. Items on the bulletin board will be checked periodically. Unstamped or unapproved items will be removed from the bulletin board.
- 5. Time Limitations.** All postings approved by the board of directors will be stamped with the date the posting was approved. All postings that have been hanging for longer than [insert #, e.g., thirty (30)] days are subject to removal by the association.
- 6. Placing and Removing Postings.** Only the association manager may put up or remove postings from the community bulletin board. Members who remove or put up postings on the board will be denied the privilege of using the board in the future.
- 7. Size Limitations.** All postings on the community bulletin board must be [insert size, e.g., 3x5] inches or smaller.

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Risk Management

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management office, so that it can be reviewed. It's also a good idea to put the association's stamp of approval on all permitted postings. In your rule, say that only items with the association's stamp of approval can be posted. Also, say that the board of directors has the right to remove any unapproved postings from the bulletin board [Rules, #4].

Limit Posting Time

A time limit serves several purposes. It controls the clutter that can amass if postings are left up indefinitely, and it prevents members from complaining that

there's no room for their postings because others have kept theirs up for too long.

A good rule of thumb is to allow a posting to hang for 30 days. To keep track of how long postings have been up, make sure the association's stamp of approval has the date the posting was approved. That way, when you check the board, you'll know which postings have expired [Rules, #5].

You should also specify *who* may put up and remove postings. You can eliminate a lot of problems by putting yourself in charge of posting. Say in the rules that members who are caught putting up or removing postings will be banned from posting material on

the community bulletin board in the future [Rules, #6].

Restrict Size of Postings

To save room on the bulletin board, restrict the size of any posting. That will give as many members as possible the opportunity to post a message on the bulletin board. Some communities restrict postings to the size of a 3×5" index card. But, depending on the size of your bulletin board, you might want to set a larger size limit—say, 8×11"—to allow fliers to be posted [Rules, #7]. ♦

RECENT COURT RULINGS

► Association Lacked Authority to Impose Additional Assessments

Facts: Despite the fact that assessments were limited to the annual maintenance charges specified in the amended declaration of covenants and restrictions, an association charged lot owners additional assessments over the course of several years. The association based its authority to do so on its bylaws. These charges were used for the planned community's common expenses.

Several lot owners sought a declaratory judgment—that is, a binding judgment from a court—that they were charged dues and assessments exceeding the applicable declaration amount of \$25 for the first lot and \$5 for each additional lot and were due a refund of overpayments made to the association.

The trial court ruled in favor of the owners, entering a judgment declaring that under Ohio law the association could not increase any assessment for common expenses beyond the amounts specified in the amended declaration of covenants and restrictions. The trial court ruled in favor of the owners. The association appealed.

Decision: An Ohio appeals court upheld the lower court's ruling.

Reasoning: The association claimed that the trial court erred in ruling that it could charge members fees only pursuant to the declaration of covenants and restrictions and not pursuant to the bylaws. But the appeals court pointed out that Ohio law forbids assessments for a planned community's common expenses unless the declaration provides for or contemplates the charging of these assessments, and it prohibits the board of directors of the association from increasing an assessment unless the owners properly amend the declaration.

Here, the declaration didn't provide for or contemplate the charging of assessments in addition to the annual maintenance charges specified. Nor did the required percentage of lot owners approve an amendment to authorize the association to charge such additional dues and assessments.

The declaration specified only one assessment for common expenses—the annual maintenance charge of \$25 for the first lot owned and \$5 for each additional lot owned. And although the original and

amended declarations also authorized the creation of the association and enabled it to “promulgate rules for the betterment of the community,” they contained no language authorizing or even suggesting that the association was empowered to charge additional assessments.

The appeals court stressed that a board may not increase any assessment for common expenses when the declaration limits the amount of such assessments unless the owners amend the declaration to allow the increased amount. The declaration of covenants and restrictions required a written instrument signed by the owners of 60 percent of the lots in the planned community to amend the declaration to increase the maintenance fee. After an amended declaration in 1972 that increased the maintenance fee from \$15 for the first lot to \$25, no further attempt by the association to increase the maintenance fee or impose other assessments or dues was adopted by the requisite number of lot owners. Absent a valid amendment to the planned community’s declaration of covenants and restrictions, the association lacked authority to impose dues and assessments beyond those listed in the amended declaration.

- Keltz v. Enchanted Hills Cmty. Assn., February 2014

► Individual Member Could Sue Over Condo’s Common Element

Facts: A member purchased a condo unit in a building. After he moved in, he noticed that the floor produced unusually loud noises and flexed abnormally when he walked on it. It was determined that structural problems with the second story unit’s subfloor were causing the problems.

Under the association’s declaration, the subfloor is defined as a “common element” and the association is required to “maintain and keep in a good state of repair the common elements.” The member reported the problem to the association, but it didn’t make any repairs.

The member sued the association, claiming that it breached the declaration by failing to repair the floor of his unit. A trial court agreed. It awarded him the costs to repair his unit and additional damages for the loss of use of the unit. The association appealed.

Decision: A Texas appeals court upheld the lower court’s decision.

Reasoning: On appeal, the association claimed that the member “lacked standing” to bring such a lawsuit. It argued that the member didn’t have a cause of action individually because the claimed damages were for the subfloor—a common element—being faulty. Therefore, the damages were its own and not the member’s, asserted the association.

The issue presented to the trial court jury was not for damages to the common elements; it was for the cost of repair to the member’s unit and the loss of use of his unit, the appeals court noted. The member did have standing to bring the lawsuit and recover damages. That was because a co-tenant in a condominium building can file suit alone to seek damages for the misuse of common property, “absent an objection by the condominium association that the other co-tenants must be joined.” The association didn’t object at trial to the member’s suit without bringing in other co-tenants, so he had standing to sue, said the appeals court.

Additionally, even assuming the association had objected to the member’s proceeding alone, he still had standing because as a co-tenant he could file suit for equitable relief to protect and preserve the common property without joining other co-tenants, the appeals court noted.

Finally, the member, as a unit owner, had standing to sue on his own behalf because even though the harm he suffered was “related to the common elements”—that is, the disrepair of the subfloor that caused his unit’s floor to have problems—he suffered harm specific to his own property and could recover damages related to that. ♦

- Canyon Vista Prop. Owners Assn. v. Laubach, January 2014

Phoenix HOA

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The HOA said that the rules are in place for a reason and that members are expected to follow them. It also said that just because the paint color the homeowners used was the same, that doesn’t mean it’s automatically approved. Homeowners should read the rules very carefully and assume nothing. The association added that paint colors can be trends, and the fact that something was approved 10 years ago doesn’t mean it would be approved today. ♦

FACT: The number of housing discrimination cases filed each year keeps rising.

FACT: Housing providers like you are paying higher penalties and settlements — sometimes over \$1 million!

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