



Community Association Management Insider®

Helping You Run Your Condo or Homeowners Association Legally and Efficiently

MAY 2015

FEATURE

Defeat false or exaggerated claims against your association by showing that a crime wasn't reasonably foreseeable.

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PRODUCED IN CONSULTATION WITH



Limit Premises Liability with Comprehensive Criminal Incident Report

Safety for members and staff in a planned community or condominium is one of the most important items on a manager's or management company's agenda. Tight security provides a sense of safety so that members can enjoy day-to-day life in the community without worrying about being victimized. And staff members feel that they are working in a secure environment. Plus, preventing certain types of crimes, like graffiti, saves the association time and money on repairs.

But even the best security sometimes isn't enough to prevent a crime. And if a crime victim sues your association for negligence, claiming that your security precautions are inadequate, you could be on the hook for explaining why certain things, such as lighting in common areas or more security patrols, weren't implemented. The victim's lawyer and expert witnesses will probably argue that you could have prevented the crime. But completing a comprehensive incident report for every crime or attempted crime in the community can save the day by demonstrating that the crime was unforeseeable and, therefore, not preventable by the association. We'll show you how to carefully craft an incident report form for your community.

Form Can Prove 'Reasonable' Efforts Were Made

To justify your security actions or inaction and to ward off a potential damage award, you'll have to prove that your security precautions were "reasonable under the circumstances." Those circumstances include what you knew about previous crimes at the community such as how many, what type, and when they occurred. Incident reports are often the best source of that information, since not all crimes are reported to the police. Based on what you knew about previous crimes, an incident report can prove that you couldn't have reasonably foreseen or prevented the current crime; unfortunately, managers too often keep inadequate reports. Like our Model Form: Use Criminal Incident Report to Limit Premises Liability, yours should be filled out whenever a crime is attempted.

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Criminal Incident Report

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Defeat False and Exaggerated Claims

Thorough incident reports are your defense against false and exaggerated claims—and the trial lawyers, security experts, judges, and especially juries who may second-guess the security decisions you make.

Victims may exaggerate their injuries or change their stories to make you look bad. In such cases an incident report is the single most important piece of evidence in an inadequate security trial.

Thorough incident reports can smoke out flaws, inaccuracies, and distortions in the victim's story. They can also show that lighting, locks, surveillance cameras, and other security equipment were in proper working order when the incident took place.

Include 10 Essential Elements in Report

Here are 10 essential items to consider when putting together an incident report form. You can use the following items to upgrade your current incident report form or draft a new template if your association doesn't already have one.

Date and time. Many incident reports list the date, but leave out the time of the crime. If you know the time of the crime, you can check your records to see which staff members were on duty, and where.

Description of lighting conditions. Demonstrating that the crime scene was well lit can defeat negligence lawsuits for nighttime crimes. Create an entry

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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 14, Issue 11

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Criminal Incident Report

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for listing “measurable facts” regarding lighting at the scene of the incident. It prompts the user to list specifics, such as the type of light source, number of bulbs, wattage, etc. This encourages detailed responses such as “five banks of 400-watt high-pressure sodium floods, four fixtures per bank, one bulb missing, fixture two,” instead of vague judgments or conclusions like “lighting adequate,” “sort of dim,” or “well lit.”

Weather conditions. Rain, snow, fog, and other weather conditions can affect a victim’s vulnerability, a staffer’s reaction time, and the effectiveness of certain security measures like surveillance cameras and lighting.

Photos and videotapes. Photographs and videotapes taken at the time of an incident can be an effective way to quash false claims by victims about physical conditions like broken locks or overgrown shrubs. But you can’t count on your insurer or staff to have the foresight to immediately take pictures. Remind the user to take photos or a videotape of the crime scene and to record the date, time, and name of the photographer.

Victim’s identity. Incident reports typically ask only for the name, address, and phone number of victims. But this won’t help you locate victims who move after crimes occur. It also doesn’t tell you anything about the victim’s vulnerabilities and what he was doing at the community—for example, member, guest, contractor, or trespasser. This information could have a major impact on your association’s liability. For example, trespassers are owed the lowest duty of care.

Victim’s comments. Immediately after an incident, the victim could make a remark that exonerates you—for example, “It was my fault.” Unfortunately, incident reports usually don’t ask for such compromising information. You should set aside two lines for a victim’s remarks. The victim may admit to having left a window open, for example, or a door unlocked. You can use statements like these to settle cases with victims who have changed their stories after consulting a lawyer.

Medical assistance. Incident reports typically indicate if medical assistance was provided. But it’s often far more important to know if such assistance was refused. In some instances, victims will claim to be fine and refuse medical assistance, only to claim later that they have major medical problems.

Extent of injuries and property loss. The extent of injuries and the value of property lost are crucial. Again, victims are most likely to tell the truth right after the crime. It’s important to make an account at that time in case losses are overstated later. You should describe all stolen and damaged property in detail. Ask the victim for the estimated value of each item.

Police information. Incident reports may indicate that police officers were on the scene, but overlook important information about the identity of the responding officers and the police report. Make sure the form identifies the responding officer(s), their badge numbers and department, and the police report number assigned to the case. This information can help you locate witnesses or obtain copies of relevant reports when you need them.

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Criminal Incident Report

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Investigator/reporter. Incident reports typically include the signature of the person who fills out the report, but not the signature of the person who investigated the incident. If these two people are different, the victim’s lawyer may later question the report’s accuracy. The form should ask for the signature and Social Security number of both the person who investigated the incident and the person who filled out the report, if they are different people. To further ensure accuracy, the form should include an affirmation of the report’s accuracy. Finally, ask for the signature of the supervising manager, who has double-checked the report for accuracy. ♦

MODEL FORM

Use Criminal Incident Report to Limit Premises Liability

If the victim of a crime that took place in the community you manage sues the association for negligence, he’ll probably accuse it of taking inadequate security precautions. No matter how diligent your security measures are, an unforeseeable event still could happen. To head off an allegation that security wasn’t as good as it could have been, use a comprehensive criminal incident report. This type of report can help to justify your actions or inaction and to ward off a potential damage award by proving that your security precautions were reasonable under the circumstances and that you couldn’t have reasonably foreseen or prevented the current crime. Ask the association’s attorney to review this form before adapting it for your community.

CRIMINAL INCIDENT REPORT

1: INCIDENT INFORMATION

Date _____ Time _____

Location (list proximity in yards or feet to specific apartment units, common areas, roads, etc.) _____

Lighting conditions (list measurable facts, e.g., number of bulbs, wattage, etc.) _____

Weather conditions _____

Photos/video taken? Yes No Attached? Yes No

If not attached, give location _____

Taken by _____

Date & Time _____

Tel. # _____

Work Address _____

City/State/Zip _____

Tel. # _____

Soc. Sec. # _____

Date of Birth _____

Sex _____

Approx. ht. _____ Approx. wt. _____

Other physical characteristics _____

Status (resident, guest, trespasser) _____

Victim’s comments about the incident: _____

2: VICTIM INFORMATION

(If more than one victim, list information on a separate page and staple it to this form.)

Name (Last, First, MI) _____

Home address _____

City/State/Zip _____

Medical assistance offered? Yes No

Medical assistance accepted? Yes No

If yes, describe medical assistance provided _____

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CRIMINAL INCIDENT REPORT *(continued)*

3: SUSPECT INFORMATION

(If more than one suspect, list information on a separate page and staple it to this form.)

Name (Last, First, MI) _____
 Home Address _____
 City/State/Zip _____
 Tel. # _____
 Work Address _____
 City/State/Zip _____
 Tel. # _____
 Soc. Sec. # _____
 Date of Birth _____
 Sex _____
 Approx. ht. _____ Approx. wt. _____
 Additional physical description _____

6: WITNESS & POLICE INFORMATION

(If more than one witness, list information on a separate page and staple it to this form.)

Name (Last, First, MI) _____
 Home Address _____
 City/State/Zip _____
 Tel. # _____
 Work Address _____
 City/State/Zip _____
 Tel. # _____
 Soc. Sec. # _____
 Date of Birth _____
 Name of responding officer(s) _____
 Badge #(s) _____
 Police dept. _____
 Police report # _____

4: VICTIM'S INJURIES & PROPERTY LOSS OR DAMAGE

Describe the victim's injuries in detail _____

7: NARRATIVE OF INCIDENT

Describe objectively what happened. Tell the truth, and list facts, not opinions or conclusions.

CODE*	ITEM	SERIAL #	AGE	VALUE (\$)

* Code: L=Lost; S=Stolen; R=Recovered; D=Damaged; O=Other

5: VEHICLE INFORMATION

(If more than one vehicle was involved, list information on a separate page and staple it to this form.)

Registered Owner _____
 Make & Model _____
 Color _____ Year _____
 Lic. plate # _____ State _____
 VIN _____
 Identifying characteristics (e.g., dents, decorations, decals)

8: INVESTIGATION INFORMATION

I/we affirm that the foregoing information is true to the best of my/our knowledge.

Investigated by (*print name*) _____
 Position _____
 Signature & Date _____
 Form completed by (*print name*) _____
 Position _____
 Signature & Date _____
 Approving supervisor (*print name*) _____
 Position _____
 Signature & Date _____

IN THE NEWS

Investors Force Out Fla. Condo Owners, Dissolve Associations

A seven-year-old Florida law is forcing condo owners out of their units in favor of investors who want to convert the buildings to rentals. Previously, the Florida Condominium Act required agreement from all owners in a condominium association before a “condominium pact” could be dissolved. Then, in 2007, state lawmakers lowered the requirement to 80 percent of unit owners, despite objections by prominent lawmakers, including the former governor, Jeb Bush.

Reports of real estate investment groups pressuring condo owners to sell their units so that a whole complex can be “flipped” and converted to rentals are now rampant. Many Florida condo owners are lamenting the loss of their rights: Under the new law, investors can take over the condo governing board as they acquire more units. Reports are surfacing that, in many complexes, when an investment group reaches 80 percent ownership, that company ends the condominium and makes offers that are a fraction of the holdouts’ original purchase price. The groups typically start a takeover by buying foreclosures in a complex and then forcing the remaining owners to sell their units.

Pinellas County, Fla., condo owners have been hit particularly hard. State Representative Carl Zimmermann tried to protect owners in his Pinellas County District by introducing a bill in the spring legislative session that would require developers to pay at least 110 percent of the original purchase price or 110 percent of the fair market value of a unit, whichever is greater. But the measure died in committee, and efforts to pursue it in the next session may be fruitless by then, even though Zimmerman aims to refile the bill. ♦

RECENT COURT RULINGS

➤ **Board Had Broad Powers to Adopt Rent Restriction Rules**

FACTS: Several planned community absentee members who rented their homes to short-term vacationers sued the association over an annual fee imposed on owners who rented their homes and a mandatory garbage collection fee adopted by the board of directors. The association filed a cross-claim against the owners. A trial court ruled in favor of the association. The owners appealed.

DECISION: A California appeals court upheld the trial court’s decision in favor of the association.

REASONING: The court held that homeowners associations may adopt reasonable rules and impose fees on their members relating to short-term rentals of condo-

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Recent Court Rulings

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minium units. The association's covenants, conditions, and restrictions gave its board of directors broad powers to adopt rules for the condo development, and nothing prohibited the board from adopting rules governing short-term rentals, including fees to help defray the costs such rentals imposed on all owners. The board's assertion that short-term renters cost the association more than long-term renters or permanent residents was not only supported by the evidence, but "experience and common sense also placed the matter beyond debate," the appeals court noted.

Moreover, the garbage fee was not required to have been adopted by the association under the law. That was because the garbage fee wasn't a regulation; rather, it was simply a cost the association passed through to the owners of the developed lots.

- Watts v. Oak Shores Community Assn., March 2015

➤ Association Discriminated Against Blind Homeowner

FACTS: A homeowner who served on her community association's board of directors sued the association for civil rights violations and violations of the Fair Housing Act Amendments (FHAA) and state laws. The homeowner was legally blind and had requested that the board provide her with versions of the documents that other members received, but in a readable format for blind individuals. The board refused to reasonably accommodate her disability. Eventually, the homeowner resigned from the board.

The association then refused to provide her with readable association documents (including board meeting notices and agenda, notices of community events, association financial documents, and association CC&Rs, bylaws, and articles of incorporation) that were given to all homeowners in the community. The association asserted that the homeowner didn't have a claim, because the board's actions "were not sufficiently related to her 'dwelling.'" The association asked a trial court to dismiss the case.

DECISION: A California trial court denied the association's request.

REASONING: The court determined that the homeowner's allegations were sufficient to proceed to trial. That was because the accommodation the homeowner sought was necessary to ensure equal opportunity to use and enjoy her dwelling. Being excluded from accessing materials and documents provided to all association members limited the homeowner in her "ability to abide by the association's rules and covenants, participate in association meetings, engage in informed discussions of association business, and make informed votes on issues" impacting the community in which she lived. The trial court concluded that the association had discriminated against the homeowner on the basis of her disability, failed to provide a reasonable accommodation, and retaliated against her for requesting accommodation under the FHAA.

The FHAA makes it unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of her having exercised

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Recent Court Rulings

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or enjoyed, or on account of her having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by the FHAA. This protects individuals who were “engaged in a protected activity.” Protected activities include “the request for a reasonable accommodation for handicapped persons,” such as the one that the homeowner made here.

- Donovan v. Woodbridge Maintenance Assn. and FREI Real Estate Services, March 2015

► Asking Renter to Abide by Noise Policy Wasn't 'Harassment'

FACTS: A neighbor of a renter in a condominium building complained about excessive noise coming from the renter's unit. The association neither sided with nor against the renter, but it did attempt to mediate the dispute by informing the renter of the building's noise standards several times.

The renter sued the association for housing discrimination. She claimed that the association had discriminated against her by “harassing” her about the genre of music she played and allowing the neighbor to ask her to turn down the volume of her music. She said that, as a result, she couldn't enjoy the use of her unit. The association asked a trial court for a judgment in its favor without a trial.

DECISION: A Georgia trial court ruled in favor of the association.

REASONING: The court noted that the Fair Housing Act (FHA)—which applied to the renter's claims—makes it unlawful to discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, national origin, religion, sex, disability, or familial status. In order to proceed to trial, the renter would have to establish a “prima facie” case of housing discrimination under the FHA. That is, she had to show direct evidence of housing discrimination.

The elements necessary for a prima facie case of hostile housing environment are: (1) the renter is a member of a protected class; (2) the conduct was unwelcome; (3) the conduct was based on the renter's membership in a protected class; (4) the conduct was sufficiently severe or pervasive to alter the renter's living conditions and create an abusive environment; and (5) the association knew or should have known about the harassment.

Here, although the renter was part of a protected class of people because of her race, she couldn't establish the other four prongs of the test. The court noted that there was no evidence that the complaints about the excessive noise coming from the renter's unit were due to anything other than the fact that the noise created a nuisance for other members in the building. ♦

- Jackson v. Park Place Condos. Assn., March 2015

RISK MANAGEMENT

Remind Members of Summer Safety Rules

If you're like many association managers, you've been getting ready for a busy summer at the community you manage. Many members invite guests into the community and host seasonal parties or activities. There may even be association-sponsored summer fun. But it's important during this time to keep the community operating smoothly by avoiding accidents and liability for the association during the months where there is extra usage of amenities. It's crucial to avoid risks and association liability by making sure that summer safety rules adequately address risks, and members comply with them.

Control Three High-Risk Areas

Setting objective rules about the way members and their guests must act while in the community helps to avoid a gray area where they can argue that things like throwing parties in dangerous areas, roughhousing in the pool or sports courts, or not cleaning up after entertaining in common areas aren't specifically prohibited. Set expectations by passing and enforcing rules barring dangerous behavior in the following areas.

Sports courts, swimming pool. Sports courts, such as basketball, volleyball, and tennis courts, and a swimming pool, are great amenities for a community. But they can also lead to problems—for example, members arguing over how much time should be allotted on a court—or serious injuries or drownings. Creating a set of rules that govern the use of sports courts and the pool is a smart way to avoid liability for injuries and to head off member disputes. Cover the following items in your rules, which you can tailor to your association, and post them at the entrance to amenities:

- Use by children, such as a minimum age to use the amenities;
- Use by members, residents, and guests only;
- Proper attire, such as shirts on sports courts and bathing suits in the pool;
- Hours;
- No food or drinks, except for water in plastic bottles that may be consumed courtside or poolside;
- Bad behavior;
- Banned sports equipment, such as skateboards; and
- No pets.

PRACTICAL POINTER: Make sure to say in the rules that all members, residents, and their guests using sports courts or the pool do so "at their own risk," and that neither the association nor its manager shall be responsible for injuries or accidents.

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Risk Management

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Specify that if a member violates any of these rules, the association and/or manager reserve(s) the right to bar them from using these amenities.

Common areas. Generally, as long as members and their guests are not disturbing other members, it's all right to allow them to do some limited entertaining in common areas. You may even have equipment in a common area that's likely to draw parties, such as barbecue grills or kids' playground equipment. But parties, no matter how small, can still leave a mess that your maintenance staff will have to pick up, and that can prevent other members from using the areas later. A rule that members must clean up after themselves after using a common area can head off this type of nuisance.

Rooftops. A common problem is entertaining on 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.

Letting members and guests use their roof adds unnecessary wear and tear to the roof, which could shorten its life and create defects. As a result, your insurance premiums could increase. 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.

Avoid this risk by encouraging the board to pass a rule barring members and their guests from using your building's roof. The rule you set should bar members and their guests from using the roof for any reason except an emergency. Adapt and use the following Model Language after talking with your association's attorney.

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.

Enforce Rules Fairly, Effectively

Setting rules is fruitless if members don't follow them. Here are the two steps you should take to enforce summer safety rules when a member doesn't take them seriously.

Speak with member first. As soon as you find out about a member's infraction—for example, leaving a mess in a common area after entertaining—talk to the member about her actions. Remind the member about the rule that specifically requires members to leave a common area the way they found it. And point out that violating this rule could lead to serious consequences.

Send "get-tough" letter for continued violations. If, after speaking with the member, you learn that she has continued to use the common area without

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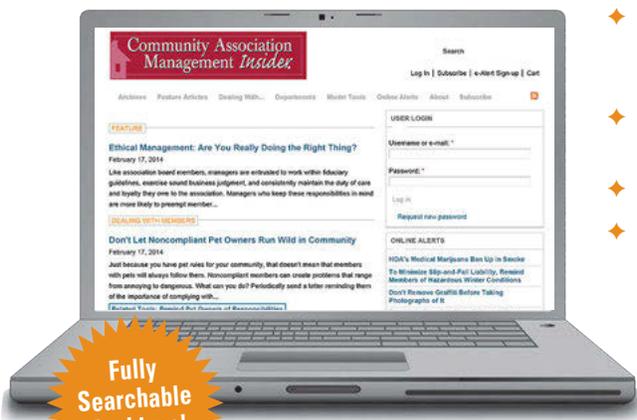
cleaning up messes afterwards, send her a get-tough action letter. This letter should be stern and:

- Remind the member about your prior conversation with her about her unauthorized use of the roof in which you reminded her that your bylaws specifically bar such activity;
- Note that despite this conversation, it has come to your attention that the member has continued to use the common area without cleaning it afterwards, citing examples of when she did so; and
- Warn the member that her continued use of the area is both a serious disregard for other members' enjoyment of the community and an extra maintenance issue, and also a material violation of the association's governing documents. Cite the specific portion the member is violating, refer to the specific rule she's violating, and attach a copy of that rule to the letter. And say that if the member continues to use the common areas without cleaning up afterwards, you'll pursue whatever legal remedies are available to the association. ♦

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