Community Association Management Insider®

Helping You Run Your Condo or Homeowners Association Legally and Efficiently

JULY 2015

FEATURE

*Require members to certify annually that their smoke & CO detectors are operable.*

IN THIS ISSUE

**Feature: Set Smoke & CO Detector Maintenance Policy for Condo Members** . . . . . 1

- **Model Policy:** Protect Condo Community and Members with Smoke/CO Detector Policy (p. 3)
- **Model Form:** Require Members to Certify that Smoke/CO Detectors Are Operable (p. 4)

DEPARTMENTS

**Legal Compliance: Carefully Check What Rights Power of Attorney Bestows on Nonmember** . . . . . 4

**Dealing with Boards: Warn Board About Delaying Response to Fair Housing Request** . . . . . 6

**Recent Court Rulings** . . . . . 9

- Association Not Responsible for Damage to Condo Unit's Interior
- Association Can't Charge Buyer for Seller's Previous Unpaid Assessments

PRODUCED IN CONSULTATION WITH

community ASSOCIATIONS INSTITUTE

# Set Smoke & CO Detector Maintenance Policy for Condo Members

Operable smoke detectors and carbon monoxide (CO) detectors can go a long way toward saving lives in condominium communities. A fire in one unit can damage other units or endanger lives. And CO poisoning can be fatal. Unfortunately, sometimes members don't maintain their detectors or may intentionally disable them. Smoke detectors have long been required by law, and currently 29 states have laws regarding CO detectors. To get members to maintain their smoke and, where applicable, CO detectors, set a policy requiring them to do so and requiring them to certify that their detectors are operable, says New Jersey attorney J. David Ramsey. We'll give you a Model Policy: Protect Condo Community and Members with Smoke/CO Detector Policy, and we'll give you a Model Form: Require Members to Certify that Smoke/CO Detectors Are Operable, which you can adapt for use at your community.

## Check Governing Documents

Before you set the policy, check whether your governing documents give you the right to do so. There are a few ways your governing documents might give you this right, for example, if your governing documents give you the right to set policies as needed to protect the health of members and the safety of your community, or if your state law requires all homes to have operable smoke and CO detectors, and your governing documents say that members must comply with all laws. Check with your attorney if you are not sure whether you have the right to set a smoke detector policy.

## What to Include

A good smoke or CO detector policy should require members to keep all detectors in their units operable at all times and, for battery-operated detectors, to replace batteries as needed. It should also bar members from disabling the detectors.

*(continued on p. 2)*

## Smoke & CO Detectors

(continued from p. 1)

The most important section of the policy would require members, upon moving into their unit, and then once a year afterward, to submit a signed certification. That form confirms that all required detectors are operable and that they have not removed or disabled any required detectors that were in the unit when they bought it, except to replace an old detector with a new one. Note that according to the Consumer Product Safety Commission, smoke detectors generally have a life of 10 years, and CO detectors generally have a life of five to seven years. As a result, your policy should require that detectors that have reached the end of their useful life be replaced.

Some associations' governing documents give them the right to enter members' condos for certain purposes. If your association has this right, you might want to include in your policy that if members do not supply the annual certification, the association can enter the condo for the sole purpose of inspecting the required detectors, and that it can issue a fine if any detectors are found to be inoperable. However, Ramsey warns that entering a member's unit can lead to a variety of problems. Therefore, only take this step after having discussed the matter with your association's attorney, and proceed with her guidance.

If your association's governing documents and state law allows you to fine members for violating association rules, mention in your policy that members who don't maintain their smoke detectors in operable condition or who don't submit an annual certification may be fined, or if a governmental agency has the right to inspect units for compliance with smoke or CO detector requirements and fine the association where units are not in compliance, the policy should also

(continued on p. 3)



**Editor:** Elizabeth Purcell-Gibney, J.D. **Executive Editor:** Heather Ogilvie **Production Director:** Kathryn Homenick **Director of Operations:** Michael Koplin

**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 14**

**SUBSCRIPTIONS/CUSTOMER SERVICE:** To subscribe or for assistance with your subscription, call 1-800-519-3692 or go to our website, *www.CommunityAssociationManagementInsider.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. **TO PLACE AN ADVERTISEMENT:** Please contact Heather Ogilvie at *hogilvie@vendomegrp.com* or call (212) 812-8436.

## Smoke & CO Detectors

(continued from p. 2)

provide that any fine imposed on the association will be charged to the noncompliant unit owner. Also, tell members that if they are fined for not maintaining their smoke detectors or for not submitting an annual certification, they will have a right to a hearing before the board to contest the fine. ♦

***Insider Source***

**J. David Ramsey:** Shareholder, Becker & Poliakoff, 1776 on the Green, 67 Park Pl., Ste. 702, Morristown, NJ 07960; *www.bplegal.com.*

**MODEL POLICY**

# Protect Condo Community and Members with Smoke/CO Detector Policy

This Model Policy requires members to ensure that their required detectors are operable at all times. Also, it contains optional language that you can use if your governing documents allow you to fine members who don't comply with community policies.

### SMOKE & CO DETECTOR POLICY

1. **Importance of smoke and carbon monoxide detectors.** For the safety of everyone at Shady Acres Community Association, it is essential that all members' units be equipped with one or more smoke and carbon monoxide detectors as required by law and that members maintain their smoke and carbon monoxide detectors in operable condition.
2. **Members' responsibility.** Members are responsible for ensuring that all required detectors in their units are operable at all times and that, unless wired to the unit's electrical system, batteries are replaced as needed. Members must never disable a required detector for any reason.
3. **Notify manager.** If a member needs assistance fixing an inoperable detector, the member should notify the manager immediately.
4. **Certification.** Upon moving into a unit, and then at least one time between Jan. 1 and Dec. 31 of each subsequent year, each member must submit to the board or manager a signed certification statement that all required detectors in his or her unit are in operable condition. The certification must also state that the member has neither removed nor disabled any required detectors that existed in the unit at the time he or she purchased it, except to replace an existing detector with a new one. Finally, the certification must set forth the date of manufacture of each required detector and where any smoke detector is 10 or more years old that it be replaced with a new detector [*and where any carbon monoxide detector is more than five years old that it has been replaced with a new detector*]. The board or manager will provide certification forms that members must use for this purpose.

[*5 & 6 Optional: If association's governing documents and state law permit fines*]

5. **Fine for violations.** Members who violate this policy by not maintaining their smoke detectors or by not submitting a signed statement in accordance with the provisions of paragraph 4, above, may be fined [*or if the association receives a fine from a governmental agency for the failure of an owner to maintain the required detectors, the association will charge the owner's account with the amount of the fine*].
6. **Hearing.** Members who are fined for violating this policy shall be entitled to a hearing before the board in order to contest said fine.

➤ ➤ ➤ *Model Form follows* ➤ ➤ ➤

MODEL FORM

## Require Members to Certify that Smoke/CO Detectors Are Operable

This Model Certification must be signed by members and returned to your office to certify that all smoke and CO detectors in their units are operable. Show this certification to your attorney before adapting it for use at your community.

**SMOKE & CO DETECTOR CERTIFICATION**

I certify that on _____, 20_____, I checked each and every smoke and carbon monoxide (CO) detector in my unit, and found them all to be operable. I further certify that I have neither removed nor disabled any smoke or CO detectors that existed in my unit at the time I purchased it, except where I may have replaced an existing detector with a new detector. I further certify that I have inspected the date of manufacture of each required detector, and each smoke detector is less than 10 years old and each CO detector is less than five years old.

Print Name: _____ Unit #:_____

Signature:_____ Date: _____

# LEGAL COMPLIANCE

## Carefully Check What Rights Power of Attorney Bestows on Nonmember

Managing an association can be challenging enough when members are the only parties who can engage in community business like voting, or exercise rights, such as inspecting books and records. Requests for architectural changes to units or homes can get sticky, and so can disputes between members. So imagine dealing with a nonmember who suddenly has a legal right to be involved in the association. You may ask how an outside person or entity can do this; after all, isn't the point of the association that the community is private—operated and enjoyed by the board and members?

A legal instrument known as a "power of attorney" permits a member to give a nonmember the power to engage in association business—in some cases even running for the board. But a power of attorney doesn't give unfettered rights to its holder. To protect the interests of your community, find out what the limits are on the person trying to exercise it within your association.

### Check State Law, Governing Documents

A power of attorney is used to delegate legal authority to another. In the community association context, a member may give a power of attorney to a non-

*(continued on p. 5)*

## Legal Compliance

(continued from p. 4)

member to assert certain membership rights or otherwise act on behalf of the member. The most common types of nonmembers claiming membership rights through a power of attorney are:

- Spouses or relatives of members;
- Attorneys;
- Real estate brokers; and
- Certain financial entities.

As to which rights and privileges may be designated to a nonmember through the use of a power of attorney depends on your state's law and your governing documents. Some states allow nonmembers with the power of attorney to do things like examine financial and other records of the association that are otherwise available to members, or they require that all regular and special meetings of the association's executive board be open to all members or their representatives.

For the specific question of whether a nonmember can run for the board, it depends on your association's governing documents. Many governing documents allow any "member" to run for the board of directors and more often than not, "member" is defined as the "record title owner" of a unit. Thus, an individual who is not the "record title owner" may not serve on the board of directors regardless of whether such individual has a power of attorney.

The most common example occurs when a non-owner spouse wishes to run for the board of directors, but the spouse isn't named on the deed. If the governing documents restrict board membership to "record title owners," then the spouse may not be elected to the board. Crucially, a power of attorney may not be used to contravene the specific language of the governing documents.

Be sure to check carefully because some governing documents don't limit board or committee membership to members. In those cases, a member may give a power of attorney to a nonmember to run for the board or committee. Keep in mind, however, that there may be other "collateral" requirements in the governing documents that prevent nonmembers from being on the board or committee, such as requirements that a board member be a resident in good standing and not in violation of the covenants. Because power of attorney issues differ from association to association and are state-specific, it's critical to talk with the association's attorney when a power of attorney situation presents itself. ♦

DEALING WITH BOARDS

# Warn Board About Delaying Response to Fair Housing Request

Ideally, your association's board would act efficiently regarding every request, activity, and issue it's faced with in the process of serving the best interest of the community you manage. Sometimes, this isn't the case. Board members could be overwhelmed, disorganized, or—unfortunately—acting in their own interests instead of members' interests, leading to disputes with members. There doesn't need to be a sense of urgency for the board to make decisions immediately on all matters; some things can wait. But it still needs to pay attention to all requests and prioritize which ones must be made immediately—or possibly face major consequences, including going to court to defend its actions regarding members' requests under the Fair Housing Amendments Act (FHAA).

Talk with your board about how fair housing requests must be addressed as soon as reasonably possible. And discuss with board members two significant cases that illustrate the point that delay can lead to serious trouble—and legal fees—for an association.

## Silence Can Lead to Discrimination Claim

A dispute over two homeowners' request for a sunroom addition led to a discrimination claim in a Tennessee association last year. It's a good example of how a board's late response to a request for a reasonable accommodation can spiral out of control—and into court. The case serves to warn managers and boards that delay or conditional approval can be classified as discrimination, not just outright denial of a request," says Virginia attorney Robert Diamond.

There, a couple whose children were physically and mentally disabled lived in a community whose covenants, conditions, and restrictions prohibited homeowners from making improvements without approval of the HOA's Architectural Review Committee. Beginning in March 2011, the couple notified the committee of plans to add a sunroom that was "therapeutically designed to stimulate" the development of the two disabled children. The proposal was rejected as incomplete, leading to additional proposals and discord that ended up in court.

In early December, the couple's attorney submitted the fourth proposal to approve the sunroom as a "reasonable modification" under fair housing law—that is, the FHAA, which bans discrimination based on disability, including refusal to permit, at the expense of the disabled person, reasonable modifications of existing property if necessary to afford him full enjoyment of the home.

After reviewing the proposal, the board's attorney prepared an "approval letter," which included a request for consideration of a shingled roof, rather than the proposed metal roof for the sunroom. The couple was asked to review the proposal, and if they agreed, he indicated that approval would be "forthcoming."

*(continued on p. 7)*

## Dealing with Boards

(continued from p. 6)

A week later, the couple's attorney notified the board's attorney that the couple was moving forward with the metal roof, which it preferred in large part because of the sensory stimulation it could provide to the two children. The letter gave a deadline—if the board didn't approve the proposal in six days, the couple would pursue legal action. There was no response until five weeks later.

During ongoing litigation in the couple's lawsuit against the HOA for violating fair housing law by refusing to allow a reasonable modification to their home for their disabled children, the couple sold the home. They argued that they were entitled to monetary damages as a result. The HOA asked the court for judgment without a trial, but a Tennessee federal court denied the request.

The court refused to dismiss the case, ruling that further proceedings were needed to resolve the couple's fair housing claim. The couple had to prove that: (1) the children had a disability; (2) the couple requested a reasonable modification; (3) the HOA refused to permit the modification; and (4) the HOA knew or should have known of the disability at the time of the refusal. The couple also had to prove the requested modification was both reasonable and necessary.

The HOA argued that it hadn't refused the modification request and that its attorney's letter, requesting that the couple consider a shingle roof instead of a metal one, was an approval—or at least, it wasn't a denial of the requested modification.

The court disagreed, noting that the letter itself suggested that the lawyer believed "approval will be forthcoming," if they agreed to the shingled roof. Following that letter, the couple's attorney asked for the board's approval within *six days*—a reasonable deadline—but heard nothing until *five weeks* later.

The HOA also argued that the requested modification was unreasonable because the couple insisted on a metal roof—even though the proposed alternative, the shingled roof, would have accomplished the same goals. The court disagreed, since there was evidence that the couple's proposed modification—with a metal roof—wasn't simply their preference, but had a therapeutic benefit according to their children's physical therapist. The HOA's alternative proposal would not provide that. Since there was a dispute over whether the HOA denied the request, the issue had to be decided by a jury [Hollis v. Chestnut Bend Homeowners Assn., September 2014].

### Determining Whether Association Actually Denied Request

A similar Virginia case is significant because, in addition to the issue of whether the board's lag time in responding to a request for an accommodation for a disability was a denial of the request, the case also addressed an association's defense that granting the accommodation may create a safety issue, Diamond notes. The key aspect of that defense is that it has the potential to show that a constructive denial by delay isn't always a violation of the FHAA.

That case involved several claims, among them two homeowners' complaint that their association's board had constructively denied—in violation of fair housing law—their request for permission to allow their disabled son to ride an all-terrain vehicle (ATV) on the unpaved streets in the community. The homeowners

(continued on p. 8)

## Dealing with Boards

(continued from p. 7)

said that the ATV was necessary because their son's motorized wheelchair didn't adequately work on unpaved surfaces, depriving him the enjoyment of his home. A district court ruled in favor of the association.

The homeowners appealed, but a Virginia appeals court upheld the decision. The appeals court agreed with the trial court's determination that the association had "constructively" denied the request for accommodation by taking up to *15 months* to request additional information from the homeowners to support their ATV request. The appeals court said that the association's failure to take any action for such an extended period operated as a constructive denial, but it also turned to address whether the association's constructive denial of the ATV request actually had violated the FHAA.

A party raising an accommodation claim under the FHAA must establish that the proposed accommodation—here, permission to use an ATV—is: (1) reasonable, and (2) necessary to afford handicapped persons equal opportunity to use and enjoy housing. For purposes of the ATV claim, the appeals court focused its analysis on the "reasonableness" prong of this standard. It noted that in enacting the FHAA, Congress made clear that the health and safety of other people are relevant factors in determining whether a person or entity violated the FHAA. Without question, the homeowners established that the use of an ATV would afford their son the benefit of easier transportation within the community. However, the association produced evidence that the benefit is outweighed *substantially* by the potential danger that use of the ATV could cause to the other residents. Because of the hazards generally posed by riding ATVs, the surrounding terrain, and his physical limitations, the homeowners' son would be a danger to himself, other drivers, and pedestrians if he were allowed to operate an ATV within the community, the appeals court concluded.

The appeals court upheld the district court's award of a judgment in the association's favor without a trial on the ATV request claim, because the homeowners failed to establish that the proposed accommodation is "reasonable" within the meaning of the FHAA. The appeals court noted that, as a result, it didn't need to address the "necessary" prong of the test [Scoggins v. Lee's Crossing Homeowners Association, May 2013].

### Lesson to Learn

In *Hollis* and *Scoggins* the associations' lengthy delay in responding to fair housing requests led to expensive litigation that wouldn't have been necessary if the requests had been prioritized and dealt with in a reasonable period of time. The association in *Scoggins* asked the court for attorney's fees because it had ultimately prevailed on its ATV request claim. But the appeals court wouldn't award attorney's fees, despite the finding that the association hadn't violated the FHAA. When urging the board to respond in a timely manner to requests, remind members that they can't assume that ultimately winning this type of lawsuit won't cost the association anything. Stress to them that it's much easier to deal with requests up front. ♦

***Insider Source***

**Robert M. Diamond, Esq.:** Reed Smith LLP, 3110 Fairview Park Dr., Ste. 1400, Falls Church, VA 22042; *www.reedsmith.com.*

# RECENT COURT RULINGS

## ➤ Association Not Responsible for Damage to Condo Unit's Interior

**FACTS:** Two condominium association members discovered physical damage to their unit. One of the two thermostats within the unit malfunctioned and failed to register a temperature beyond 55 degrees. This caused the heat to run constantly at a high temperature for approximately one month. The continuous heat resulted in cracks in the dry wall, damage to the ceilings and woodwork, and damage to the furniture and floors. The second thermostat, located upstairs, was damaged by the consistently high temperatures in the unit.

The members asserted that the association was liable for the damage caused by the defective thermostat and was obligated to file a claim with its insurance company. The association refused to file a claim, arguing that it was responsible for damage to the common areas in the building, but not damage within members' units. The members sued the association, and a trial court dismissed the lawsuit. The members appealed.

**DECISION:** A New Jersey appeals court upheld the trial court's ruling.

**REASONING:** The members argued that the damage occurred to "common elements" within the meaning of the master deed. To determine who was responsible for the damage in the members' unit, the appeals court reviewed the association's master deed, the organizing document setting forth the rights and responsibilities of the association and unit owners.

The master deed differentiated between common elements, over which the association has responsibility, and units, which are the property and responsibility of individual unit owners. The master deed defined "unit" as "the elements of the condominium not owned in common with the *unit owners* of the other *units,"* up to and including the boundaries of "the interior surfaces of its perimeter walls, floors, ceilings, doors, and door frames" [emphasis added]. It further specified that "units" include: "all appliances, fixtures, interior partitions, and other improvements located within or appurtenant to the *unit* on the interior side of all walls within the unit." All land and all portions of the property such as roofs, foundations, bearing walls, perimeter walls, partition walls, curbs, sidewalks, common stairs, and elevators were also common areas.

The appeals court said that it found no intention on the part of the legislature nor in the language of the association's master deed that would give such an expansive interpretation of common elements. The appeals court also noted that there is nothing in the law or the master deed supporting the members' assertion that the association has a duty to obtain insurance coverage for the "individual units of the condominium."

The damage to the members' unit consisted of "cracks in the dry wall, damage to the ceilings and woodwork, and damage to the furniture and floors, but noth-

*(continued on p. 10)*

## Recent Court Rulings

(continued from p. 9)

nothing in the language of the master deed suggests the affected areas fall within the definition of common elements under the control of the association." The appeals court agreed that the members were not entitled to coverage under the insurance policy and the association did not err in refusing to submit a claim on their behalf.

The appeals court also stated that the definition of a common element doesn't include the interior wall "surfaces" of a condominium unit and that "to permit the same would undo thousands of relationships between condominium unit owners and their associations through the state."

- Buchler v. Club Regatta Condo Association, et al., June 2015

## ➤ Association Can't Charge Buyer for Seller's Previous Unpaid Assessments

**FACTS:** A buyer purchased two properties at foreclosure sales in communities maintained by an association. The association later demanded payment for any and all unpaid association assessments, including those that came due *prior* to the buyer's ownership, under threat of a claims lien foreclosure. The buyer paid the past-due assessments for both properties by check, noting that it "paid under protest and with full reservation of all rights and remedies."

The buyer sued the association, alleging that any liens for past due assessments were extinguished by the foreclosure judgments pursuant to the terms of the association's declaration. The association asked a trial court for a judgment in its favor without a trial. It argued that Section 720.3085, Florida Statutes, "clearly mandates that [the buyer] is jointly and severally liable with the prior owners for all unpaid assessments on the subject properties, thus amending the declaration." The buyer asserted that the statute didn't impose liability because the declaration's express terms weren't invalidated by the statute, and imposition of the statute against the declaration's express terms would "unconstitutionally impair its contractual rights."

The trial court ruled in favor of the association. The buyer appealed.

**DECISION:** A Florida appeals court reversed the trial court's decision and sent the case back to the trial court for further proceedings.

**REASONING:** The appeals court clarified that the issue was whether the trial court's reliance on a Florida statute—rather than the provisions of the homeowners' association declaration governing the buyer and association—unconstitutionally impairs the buyer's right to contract. Because the association didn't amend its declaration to specifically adopt the statute, the statute couldn't be applied to supersede the express terms of the declaration, which provide that a subsequent owner of a property within the association won't be liable for payment of any assessments owed by the prior owner. This absolved the buyer from responsibility for any unpaid assessments incurred prior to the purchase of the properties.

(continued on p. 11)

## Recent Court Rulings

(continued from p. 10)

The appeals court also noted that the association's argument that the legislature's enactment of the statute automatically amended the declaration wasn't correct. A declaration can be amended according to the procedure outlined within the declaration, or according to statute, by two-thirds' approval of the homeowners. ♦

- Pudlit 2 Joint Venture, LLP v. Westwood Gardens Homeowners Association, Inc., May 2015