Community Association Management Insider®

Helping You Run Your Condo or Homeowners Association Legally and Efficiently

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FEATURE

Here's how you can facilitate the ARC process, and protect yourself from liability for unpleasant outcomes.

IN THIS ISSUE

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Keep Architectural Review Committee on the Right Track

A selling point of association living is that the community's or condominium building's appearance will be maintained and uniform. While control over uniformity and aesthetics plays a large role in the attraction to this type of homeownership, from time to time, a member will ask for a variance from the architectural and design rules. It may be a simple request, such as a remodeling exception for changing the style of a screen door to one that hasn't been used in the community in the past; or it may be a request to make major changes or additions to a freestanding home or attached townhome, or alterations to a unit's interior that would affect a condominium building's structure. Under any circumstance, if the governing documents require approval before renovation and construction, an architectural review committee (ARC) will make that decision. It's not as simple as it sounds, though, for the members of the ARC or the manager (if it's a very minor request) to approve ARC requests in a timely manner. Here's how you can facilitate the ARC process, keep things running smoothly when variances are requested, and protect yourself from liability for unpleasant outcomes.

The ABCs of the ARC

In most associations, a request for a variance must be submitted to the ARC for consideration, and approval or denial of the proposed change. There are differences between a condominium ARC and the ARC for a planned community with free-standing homes. "Generally, in a condominium, the building already is there so to speak; the approval, therefore, usually involves remodeling, and the exterior of the building is not involved," explains California association management expert Clifford J. Treese. Condo unit remodeling can be extensive, however, possibly involving walls, plumbing, and electrical changes. Structural issues have to be evaluated.

In a planned community, there can be interior remodeling like that in a condominium, but a variance may affect the exterior features of the home as well. In fact, in a large planned community, the ARC might

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need to approve an entire home or structure, which requires review by an architect and an association staff member. Also, review needs may differ depending on whether the homes in the community are attached or detached, Treese says.

Except in small associations, the ARC review process can require a fee to cover the cost of an architect and/or attorney who is necessary to review the submission by a homeowner asking for a variance. If the submission is very detailed, for example, for a new addition to a home or a new home, the fee can be substantial—up to $25,000 or more. And in some high-end associations, the ARC requires a model of the home or renovated home.

Even in communities where there are clear-cut rules that ARC members stick to, it's not an easy process for the committee or association manager. Members asking for a variance may be disappointed or angry with ARC members if their requests are denied. It's not uncommon for disputes—which can be costly to resolve—to arise. That's why it's crucial for an ARC to operate fairly and efficiently. Managers are a part of the ARC process, but should be aware of their role and how to fulfill it, without getting into trouble.

Seek Expert Opinions

Especially when a variance involves structural changes, additions, or major alterations, it's ideal to have an architect, contractor, or construction professional on the ARC to evaluate the requested change. However, individuals with no building experience may be the only ones available to serve on the committee, Treese points out. He says that, in a case where industry professionals aren't part

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of the ARC, the association should consider working with a general contractor or, preferably, an architect who lives in the community but doesn't want to necessarily be on the committee. "Ask them about home repair, home rehab that is more than just a repair, and home or even garage construction," he suggests, noting that it may be appropriate to pay them for their advice. When it's applicable, also think about asking ARC members if their significant other has those skills, he suggests.

The committee shouldn't hesitate to get and pay for an outside opinion. "The ARC should obtain expert advice if the members are unclear about a submission," Treese stresses. He specifies that this is part of the committee's due diligence and it will definitely be needed to settle future disputes.

Set and Follow Review Protocol

It's important to establish a system for the objective review and documentation of variance requests. Using the same standard for all requests will help avoid claims that the ARC is biased and will prevent owners from interpreting ambiguous rules in a way that supports a request that wasn't intended to be permissible. Make sure that your system is reasonable, and clarify it by doing the following:

Document review. Make sure to evaluate the request at a formal meeting with appropriate minutes. The minutes don't need to be detailed, but the minutes do need to show attendance, deliberation, and that the documents, plus support material from, say, an architect were in fact reviewed, says Treese.

Provide detailed guidance for submissions. Have as detailed as possible architectural standards to use as the basis for the ARC deliberations and as the guidelines for what an owner needs to include in his submission. Without this detail, a court may say a rejection is unreasonable because the owner could not have done any better. In some simple cases, the ARC can have a list of changes that don't need approval, such as exterior painting touch-ups in the existing color, adding standard door knockers or nameplates, and installing standard chimney caps.

Expedite process. Reasonableness is also important with respect to the timelines for submission, decision, and appeal, says Treese.

List requirements. Architectural standards for variances should also include the insurance requirements for contractors, work hours for contractors, safety requirements, and other details. "The owner needs to know the criteria for an acceptable contractor from the association's risk management perspective," Treese notes.

Get necessary guidance. Consult with a professional when an aspect of the proposed variance is confusing to the ARC. It's not fair to deny a request based on an incorrect assumption about the project.

Protect Manager's Interests

There is a risk that managers or employees of association management companies will be drawn into disputes over hotly contested variance requests. This takes time away from typical managerial duties, and can also have liability

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implications. That's why the management contract with the association should specifically spell out that service or involvement with the ARC is part of the manager's duties; but it should also indicate that the duties must be only ministerial or administrative in nature, Treese emphasizes. To avoid the risk of being drawn into disputes, consider the following:

Insurance. Make sure that the management contract provides that the association defend, indemnify, and hold harmless the manager. "This language is necessary, but the contractual promises still need to be funded; the association's commercial general liability (CGL) insurance policy will automatically include the manager," says Treese. He warns that the manager needs to make sure that the association's directors and officers (D&O) insurance includes someone acting as the manager.

Draw boundaries. "The manager needs to avoid becoming a de facto member of the committee," warns Treese. He notes that the manager's role should be ministerial and/or administrative, but with the possibility of giving some restricted advice when the situation calls for it. Anything outside that scope should be noted as being an extra service, he advises. For example, while the manager might attend ARC meetings, she should charge for this.

Map Out Next Steps

If a homeowner's request for a variance is turned down, she may want an explanation or another opportunity to present her case. In addition to having a protocol for initial variance requests, the ARC should have rules for how to handle denials. Homeowners should be able to get a clear explanation of the next steps, including any available recourse regarding the ARC and an appeals process to the board.

The first step when a homeowner questions the initial decision of the ARC is to clearly explain the reasons for the rejection. Then explain the next steps for reconsideration. "ARCs generally do not have 'appeals,' but they will ask for a re-submission correcting the defect in the original submission," explains Treese. He says that if the re-submission is denied, then there is no point in approaching the ARC again.

Treese has seen governing documents drafted both ways—some with an appeal to the board and some without an appeal to the board. "Fairness would suggest permitting an appeal to the board, but that really depends on the association and its complexity," he notes. He says that small associations would be likely to permit an appeal to the board. But that might not necessarily give the homeowner a fresh start for her request.

"For small associations—say fewer than 25 or 30 units—there are not many warm bodies for the board much less for an ARC. In these small associations—unless the unit count is fewer than 12—you have to have some board members on the ARC along with other unit owner volunteers," Treese points out. In that case, some members who already determined that the request shouldn't be granted will be making a determination again. And in small communities where the

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entire board also is the ARC, board members were already part of the hearing process that resulted in a denial of the variance.

But that doesn't mean that the ARC and board are beyond reproach if they aren't objective or operating fairly when making decisions. A board does have the power to remove ARC members, or even dissolve the entire committee if it isn't acting appropriately. "Committees serve at the permission of the board; nevertheless, some governing documents provide for a more structured process in removing ARC members and appointing new ones," says Treese.

Problems typically arise when decisions seem arbitrary. If the ARC says yes to one and no to another similar request, then there is going to be trouble, notes Treese. Everyone submitting a request to the ARC believes that his submission is correct and reasonable," observes Treese. And if the nature of the community—that is, architectural style and so forth—permits a certain amount of variation, then variances may be appropriate, says Treese. That's why it's important for managers to stress to ARC members that they shouldn't base decisions on their own opinions, and to keep in mind that variances should be assessed using the governing documents and the nature of the community. It's helpful to guide homeowners' decisions by giving them some indication of previously acceptable variances. ♦

Insider Source

Clifford J. Treese: Association Data, Inc., 720 N. Marquis Way, Mountain House, CA 95391.

DEALING WITH EMPLOYEES

Get Control Over Employees' Online Activities During Workday

Social media, email, and the Internet have vastly improved some aspects of business. Your association may have a website or use Facebook or Instagram to promote the benefits of living in the community or condominium building you manage or to post pictures of community events. But when employees spend work hours sending personal emails, going online to shop, or checking their social media channels, it leads to a decrease in productivity.

If you've noticed that when you walk into the office, some management employees are rushing to minimize the Internet browser they were looking at, or they seem to be sending more emails than their job would typically require, it should be obvious that you need to clarify with employees your expectations for their use of the Internet while they are at work.

Use Ban to Avoid Two Problems

You have the right to ban employees from using computers for personal use, but on one hand, you may want to be realistic—sometimes an employee needs to go online during business hours for a legitimate purpose, say, to make a doctor's

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Dealing with Employees

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appointment or pay a bill. On the other hand, doing online shopping or perusing gossip websites is purely for entertainment and takes away from focusing on daily tasks.

Using management office computers for personal use creates two problems. The nature of association management requires employees to have a "time is of the essence" attitude about solving problems in the community or condominium building, ranging from maintenance problems, such as leaks, to injuries in common areas, to security issues. Employees who are busy online are most likely not busy enough managing the community.

And, depending upon what employees are doing online, the management office's computers might be susceptible to viruses, or you might be liable for any illegal online activity. Moreover, being able to send messages at a keystroke by email could lead to employees sending confidential or inappropriate material to friends, business associates, and community members. Disclosure of that type could expose a community to liability for violating privacy, fair housing, employment, or sexual harassment law.

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MODEL AGREEMENT

Get Employees' Consent to Monitor Internet and Email Use

Having employees sign an agreement giving you the right to monitor their Internet and email use can help you get control over a growing problem for employers: decreased productivity due to non-work-related online activities during the workday. Consult your attorney about adapting this agreement for your community's use.

INTERNET & EMAIL USE

As an employee of Shady Acres Community Association:

1. I acknowledge that I am aware of rules about use of the Internet and email set forth by ABC Community Management Company, that I understand them, and that I agree to abide by them.
2. I acknowledge that I have no right to privacy in my Internet use, in email messages or images that I send or receive, or in the records of websites that I visit on the Internet. I acknowledge the right of ABC Community Management Company to inspect any and all messages or images that I send or receive via the Internet or email and to monitor records of websites that I have visited.
3. I understand that adherence to the rules of ABC Community Management Company regarding Internet and email use is a condition of my employment and that I may face disciplinary action for violating the rules. This disciplinary action may include dismissal.

[Optional]

4. I understand that I am not permitted to download files or install software or apps that aren't work-related or haven't been approved by a manager.

EMPLOYEE'S SIGNATURE _____ DATE_____

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Dealing with Employees

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Eliminate Unprofessional Use of Management Resources

To get the problem under control, take a two-step approach. First, hold a meeting with staff members explaining what you've noticed and that you feel there is a connection between personal online activities and decreased productivity. Let employees know that while you understand that occasionally they will need to spend a few moments on personal issues that can be handled online, they are not permitted to use work hours to go online for entertainment.

Second, to reinforce the crackdown on unprofessional online behavior, and to get the right to terminate an employee who continues to use work resources for personal entertainment, have employees sign, as a condition of their employment, an agreement providing that you can view the email they send and receive and the history of websites they have visited.

Like our *Model Agreement: Get Consent to Monitor Internet, Email Use,* your agreement should tell employees that by signing it, they are acknowledging that:

- They understand you have rules regarding Internet and email use;
- They are willing to abide by your rules;
- You have the right to monitor the websites they visit and their email messages; and
- They understand the consequences of violating the rules.

You should also consider banning employees from downloading software or apps that serve no legitimate business purpose or that haven't been approved by you. At the very least, it could slow down your computers; at the worst, it could introduce viruses. ♦

RECENT COURT RULINGS

➤ Purpose, Not Style of Structure Determined Declaration Compliance

FACTS: A homeowners association declaration permitted garages that are attached to a home, and accessory structures that are not used for storage and that are deemed acceptable by the design review committee. Two homeowners' request to build a detached "garage" on their property was denied by the association because the declaration allowed only those garages that are attached to a house. The homeowners built the garage without the association's approval. The association sent the homeowners a letter asking them to comply with the declaration. The homeowners asked a trial court for a declaratory judgment that they were not in violation of the declaration.

The homeowners asserted that, because the structure's actual use wasn't as a garage to store vehicles, but rather to host parties and do woodworking projects, it complied with the declaration. The trial court agreed that, because the structure wasn't used as a garage or storage area, it didn't violate the declaration.

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Recent Court Rulings

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Although the structure had two overhead garage-style doors, the exterior of the structure "isn't determinative of what it actually is," the trial court concluded. The association appealed.

DECISION: A Pennsylvania appeals court upheld the trial court's decision.

REASONING: On appeal, the association contended that the structure violates the declaration's: (1) type restriction, which prohibits detached "garages"; and (2) use restriction, because such structures cannot be used for storage.

The association argued that the structure's outward appearance—namely, its two overhead garage doors—establish that it is a detached garage. The appeals court noted that, according to the declaration, the only restriction on the outward appearance of an accessory structure is that it must "exactly match" the design and materials of the house; here, it does, meaning that it doesn't violate the type restriction.

The appeals court said that the structure conforms to the use restrictions because it is used primarily for woodworking and recreational purposes, and any storage in the structure is a byproduct of the woodworking and recreational activities.

- Zimliki v. New Brittany II Homeowners' Association, October 2015

➤ Homeowner's Claim of Retribution Didn't Excuse Late Assessments

FACTS: A townhome owner failed to pay two years' of association assessments due on the property. The association filed a small claims action seeking damages for the unpaid assessments, including late fees and attorney's fees.

The homeowner admitted to the court that he failed to pay the assessments, but argued that the association was just trying to "destroy" him and that it should have let him pay his delinquent assessments in monthly installments of $35. The trial court ruled in favor of the association, awarding it nearly $2,000. The homeowner appealed.

DECISION: An Indiana appeals court upheld the trial court's decision.

REASONING: The appeals court noted that its review of the case was impeded by the homeowner's noncompliance with court rules, as he represented himself in the case. Indiana law requires the homeowner's contentions on appeal "to be supported by cogent reasoning and citations to the authorities, statutes, and lower court record," said the appeals court. It noted that the homeowner's argument "essentially consists of a list of bald assertions, unsupported by cogent reasoning or legal authority, that the association had refused to accept the homeowner's suggested payment plan as 'retribution'." The appeals court noted that the crux of the homeowner's argument is simply a request for the court to reweigh the evidence from the first trial in his favor—a task that wasn't appropriate for an appeals court.

- Partow v. Countryside Homeowners Assn., October 2015

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➤ Covenant Allowed for Home-Based Daycare Businesses

FACTS: An association discovered that two homeowners in the community were operating daycare businesses in their homes. The association asked a trial court for a declaration that this was in violation of the restrictive covenant, and an injunction—that is, an order from the court to shut down the businesses.

The association asserted that "to promote the development of single-family homes, the declaration states that 'all Lots shall be used only for Single Family Dwellings'." However, the trial court pointed out that there were exceptions for so-called "personal businesses." Personal businesses included a home-based business, but only if the business is conducted within the residence, the business is not prohibited by ordinances, and no motor vehicle with business markings is parked overnight.

The association argued that a separate "commercial business" section overrode the personal business section. It barred "commercial activities of any kind whatsoever to be conducted in any building or any portion of the property except as provided in [the personal business section]." It stated that "no such activities shall require or allow customers or the public to frequent the Property for such home occupation."

The homeowners each asked the trial court for a judgment in their favor without a trial. The trial court ruled in favor of the homeowners. The association appealed.

DECISION: An Illinois appeals court upheld the trial court's decision.

REASONING: The appeals court determined that the plain language of both sections of the covenant intended to allow home-based businesses. The commercial business section of the covenant didn't apply to these homeowners. That's because some of the children attending the daycares walked from their homes, and the few additional cars entering and leaving the subdivision due to the daycare businesses did not constitute "frequent commercial traffic" in violation of the covenant. The activity surrounding the daycares wouldn't thwart the intent of a single-family subdivision, said the appeals court.

"A homeowner's association has the authority to interpret the covenants, conditions, and restrictions in its declaration—however, it is not free to ignore the express language of the declaration," the appeals court warned.

- Neufairfield Homeowners Assn. v. Wagner, November 2015

➤ Link to Governing Documents Wasn't 'Notice' of Rule Amendment

FACTS: Two homeowners moved into a planned community in 2009. The association fined them for bringing their dog into the clubhouse. The homeowners contested the fines. The homeowners argued that the fines were wrongly imposed because they hadn't been properly notified of any change in the HOA rules prohibiting dogs.

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Recent Court Rulings

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The dispute was settled through arbitration. The arbitrator found that the homeowners had "constructive notice" of the rule change because when they moved into the community, they received a welcome letter from the association, which contained a link to a webpage containing the governing documents.

The award was confirmed in district court. The homeowners sought to vacate the award, arguing that the award was based on an unsupported, false statement that the association had provided proper notice of the rule amendment. The district court denied the motion to vacate. The homeowners appealed.

DECISION: A Nevada appeals court vacated the arbitration award.

REASONING: The appeals court stated that the "welcome letter" containing a link to the amended rules posted online "does not suffice as statutory notice of any rule amendment." The only hard copy of the rules and regulations provided to the homeowners was the original 2005 version, containing no restrictions on dogs in the clubhouse. Regardless, the webpage link was to the original 2005 rules and regulations, not the 2009 version with the new dog rule.

State law requires associations to notify homeowners of changes to the rules and regulations by mailing or hand delivering "a copy of the change that was made," the appeals court pointed out. "Even if constructive notice through the link, rather than the notice set forth by statute, were acceptable, the link was to the original rules, which contained no restriction on dogs in the clubhouse. ♦

- Sanzaro v. Ardiente Homeowners Assn., October 2015

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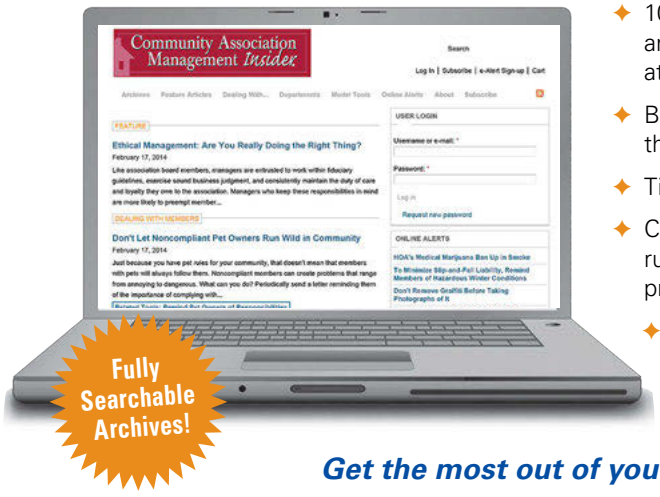

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