Community Association Management Insider®

Helping You Run Your Condo or Homeowners Association Legally and Efficiently

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FEATURE

If a member complains about a contractor's inappropriate behavior, explaining that he doesn't work for the association might not be enough.

IN THIS ISSUE

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Set Expectations for Outside Contractor's Conduct

If your community is like most, you rely on a variety of outside contractors or vendors to perform services. For example, landscaping, plumbing, or electrical work are commonly farmed out to vendors who send their own choice of workers. This means that individuals will be in your community whom you don't know anything about—and who potentially don't respect the association's members or rules. Unfortunately, it's not uncommon for outside contractors to make unwanted comments towards members, management staff, or guests in the community, or to engage in inappropriate behavior, such as using profanity or lewd language. And that can result in members feeling uncomfortable, and—in a worst-case scenario—violated.

If one of your members complains about a contractor's inappropriate behavior, an apology and an explanation that he doesn't work for the association might not be enough. A member may want to know if steps were taken ahead of time to inform the contractor about community standards and expectations, and could be upset with you and the association if they weren't. Instead, try to eliminate unpleasant incidents from the start. Here's how you can encourage contractors to interact appropriately while working in the community.

Specify Expectations in Contract Provisions

Two particular types of behavior are common in situations involving outside workers: Making lewd or racist comments directly towards members, and making these types of comments while in hearing distance of members.

Although you may have much less authority over the conduct of outside contractors than you do for your own employees, you still can require the contractor to follow your rules prohibiting offensive behavior. To do this, put a clause in your contract with the contractor requiring him to adhere to certain standards while working in the community.

(continued on p. 2)

Outside Contractors

(continued from p. 1)

By including a clause in your contract with a vendor or outside contractor that requires it to follow certain rules, it agrees to do so when it signs the contract. Ask your attorney to draft such a clause and tailor it to your community. At the minimum, it should: (1) specify the manner in which the contractor should conduct himself; (2) specify that comments of a lewd, sexual, discriminatory, harassing, or derogatory nature are unacceptable; and (3) specify the consequences of a violation, including immediate termination of the contract and being required to vacate the premises.

Model Contract Clause

Conduct. At all times, Contractor shall: (1) conduct itself in a workmanlike manner; refrain from making derogatory comments of any kind, including those of a lewd, sexual, racial, or ethnic nature, toward or in front of association members, management staff, or guests in the community. Contractor will not use profanity.

Observe Contractor's Conduct

You should train your staff to take notice of outside contractors while they are working at your community. Since your staff has been trained about how to behave professionally in the community, they will be able to detect—and immediately report to you—any comments or conduct by a contractor that could lead to a complaint.

For example, you may be able to head off a potential complaint if your staff member drops by the worksite and overhears a contractor's work crew exchang-

(continued on p. 3)

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Outside Contractors

(continued from p. 2)

ing racially charged jokes or ethnic slurs, having discussions of a lewd nature, or using offensive language while on the job. You'll be in a position to stop that conduct immediately—by speaking to their supervisor or directly to them—before it leads to a formal complaint from a member.

The level of observation that's necessary from your employees will depend upon the nature of the work and where it is performed. For jobs that don't involve a great deal of interaction with members, it may be enough for a staff member to drop by the worksite intermittently until the job is done.

On the other hand, ensure that a staff member accompanies contractors for any work to be performed in close proximity to members. The likelihood of inappropriate comments or conduct—particularly of a sexual nature—increases when a contractor has direct, unsupervised contact with members.

Respond to Complaints

Establish policies and procedures to ensure a prompt response to any complaints about unacceptable comments or conduct by contractors working at your community. It's crucial to assure the member or any other individual who has been exposed to a contractor's inappropriate behavior that your community will investigate and deal with every complaint it receives.

Always treat complaints about outside contractors seriously, and make sure your staff doesn't ignore complaints or give the impression that the problem is beyond their control because it involves the employees of an outside contractor, and not an association employee.

Take Action ASAP

If your investigation indicates that the complaint is valid, then you have an obligation to do something to stop it. If the complaint involves serious misconduct, take steps to remove the contractor from your community by exercising your rights under the contract he signed. Written documentation of the actions taken should also be part of the association's protocol for such situations.

Be sure to communicate the results of your investigation—and your response—in writing to the member who registered the complaint. Even if the resident is dissatisfied with your response and files a formal complaint, your letter will provide documentary proof to counter any accusation that you knew about a contractor's actions, but failed to do anything about it. Be sure to file these communications along with documentation on how the association investigated the complaint and actions taken, in case there are legal proceedings later that stem from a serious incident. ♦

IN THE NEWS

➤ Association Could Fall Into Debt Over Sinkhole

A homeowners association and its developer are waging a battle with each other over which party is responsible for repairing major damage from a sinkhole in the community. Currently, barriers guard the spot where a creek bank eroded in 2015, a year when North Texas saw extreme storms and flooding.

Now, the community's developer is denying that it should fix the heavily eroded creek bank—even as it gets larger with continued rainfall.

Meanwhile, local city code enforcement has told the association that the erosion problem needs to be fixed; the town has concerns over the structural integrity of neighboring areas. A violation notice threatened the association with heavy daily fines. And a repair quote that totaled more than the association's annual budget would ultimately saddle each association member with a roughly $450 share of the cost, if members had to pay for the repair without help from the developer. The crux of the association's complaint is that, despite the fact that the community is deeded over to the association and that the association is responsible for maintenance, the developer has control over the association through a majority stake. But the association is being told that members should pay for the sinkhole in its entirety. The developer is standing firm in its assertion that the 100 or so residents should shell out for repairs—and any future hazards born out of the sinkhole.

Some residents have attempted a compromise: They've suggested that the association and the developer share the cost. According to residents, because the developer is still involved, it isn't an entirely association-related issue.

Local authorities won't become involved in settling the underlying controversy over repair payment obligations, but have offered to coordinate meetings between the two parties to work things out, before the sinkhole worsens. ♦

RECENT COURT RULINGS

➤ Member Met 'Vexatious' Litigant Threshold

FACTS: An association foreclosed on a lot in its community after the member failed to pay for maintenance fees and other amounts assessed against it. The member sued the association and its management company. She alleged that the association had engaged in fraud for filing an "invalid and inaccurate lien and foreclosure." She asked the court for $2 million in damages.

A circuit court granted the association's request for a judgment in its favor without a trial. It also declared the member a "vexatious litigant." The member appealed.

DECISION: A Hawaii appeals court upheld the circuit court's ruling.

(continued on p. 5)

Recent Court Rulings

(continued from p. 4)

REASONING: The appeals court explained that a vexatious litigant is a plaintiff who does either of the following: (1) in the immediately preceding seven-year period has commenced, prosecuted, or maintained at least five civil actions other than in a small claims court that have been finally determined adversely to the plaintiff; and (2) in any litigation files, in bad faith, unmeritorious motions or pleadings, or conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay.

Of the 25 cases in which the member was a plaintiff within the last seven years, at least five resulted in a final judgment adverse to her, the appeals court noted. It also determined that in this case, the member had filed, in bad faith, unmeritorious motions, pleadings, or other papers, and has engaged in conduct and other tactics that are frivolous or solely intended to cause unnecessary delay to this litigation.

- Minichino v. McKeon, February 2016

➤ Attorney's Fees Must Be 'Reasonable' in Wrongful Foreclosure Action

FACTS: After a homeowner stopped paying his association dues, the association filed a notice of lien and election to sell his home. The homeowner didn't pay the delinquent dues, and the association sold the home at foreclosure, to itself, for a minimal amount. The homeowner sued for wrongful foreclosure, and the district court ultimately ruled in favor of the association without a trial. It also awarded the association attorney's fees. The homeowner appealed.

DECISION: A Nevada appeals court upheld the ruling in part and reversed in part.

REASONING: The homeowner had conceded that all of his claims were based on the premise that the association had improperly foreclosed on his property pursuant to a Nevada law that limits an association's lien amount that is superior to other enumerated liens to nine months of dues.

The appeals court noted that, based on that concession, the district court ruled in favor of the association, concluding that there were no competing priorities of liens, and thus, the association wasn't limited to nine months' dues. But on appeal, rather than address the district court's conclusion regarding that law, the homeowner spoke about the hardships he had endured and difficulties with his attorney. The appeals court said that, while it recognized these adversities, the homeowner hadn't provided any argument supporting his contention that the district court erred in ruling in favor of the association pursuant to that law. It concluded that the homeowner waived any such argument.

However, the appeals court reversed the lower court's determination about attorney's fees, which it had awarded to the association. The appeals court said that the district court had abused its discretion by failing to consider the factors set forth for evaluating the reasonableness of such fees in a seminal case on the topic. Its failure to consider those factors and its inability to provide any reasoning for the amount of fees it awarded meant that the appeals court had to send

(continued on p. 6)

Recent Court Rulings

(continued from p. 5)

that portion of the case back to the lower court for a determination of reasonable fees under the Nevada law that applied to the case.

- Danielson v. Falconcrest Homeowner's Assn., February 2016

➤ Renter Could Benefit from HOA Maintenance Contract

FACTS: A renter in a condominium building slipped and fell on ice, suffering injuries. She sued the condo unit owner, the association, and the management company for breach of contract under the theory of implied warranty of habitability, and negligence. All three parties asked a district court to dismiss the claims.

DECISION: A Pennsylvania district court denied the parties' request and ordered a trial.

REASONING: The district court noted that the renter was arguing that the unit owner's maintenance contract with the association and the management company made her a "third-party beneficiary" to the contract. Specifically, the renter said that, because the parties contracted with each other regarding the maintenance of the properties in the community, she and all other tenants became third-party beneficiaries of the contract. Because the intended purpose of the contract was to keep the premises safe and habitable for residential use, the breach of the contract due to the failure to remove ice entitled her to damages.

However, the parties contended that since the lease agreement clearly provided that the only two parties to that rental contract were the unit owner and the renter, there is no "privity of contract" with the association and maintenance company, so the renter can't sue for a breach of the alleged maintenance contract. And the unit owner stated that the only contract she had with the renter was the residential lease—which did not contain any provisions related to the maintenance of the property.

The district court noted that while the lease didn't list the association and management company, under certain conditions a person could sue as a third-party beneficiary to a contract.

The district court found that, here, the renter had alleged sufficient facts to support a plausible inference that she was a third-party beneficiary of the maintenance contract between the association, management company, and unit owner. But the question remained as to whether the renter was an "intended" third-party beneficiary, as opposed to an "incidental" one, with sufficient rights under the contract to sustain a breach of contract claim.

A jury trial was needed to examine the terms of the maintenance contract and surrounding circumstances to determine whether the facts show that the unit owner, association, and management company intended to confer benefits on the renter under the contract. ♦

- Carlino v. Borusiewicz, February 2016

DEALING WITH CONTRACTORS

Ensure Work Is Up to Par Before Final Payment

Paying a contractor up front to do work for your association isn't a good idea. If it does a shoddy job, your only recourse would be to sue the contractor for not living up to the agreement. But this can be costly. And it's avoidable—if you protect yourself from subpar workmanship or a failure to finish the job. Having the contract state that the association can make "progress payments" as the contractor moves ahead with the work, and including a "retainage" clause, is a way to encourage a contractor to complete the job to your satisfaction.

What Are Progress Payments?

Progress payments are exactly what they sound like: Payments spread out over the course of a job. The association can make a progress payment only after it's satisfied with the work done up to a specified point. Consider three things on which to base your progress payments:

Time period. You can base progress payments on equal chunks of time with payment amounts allocated for each time period. For example, for a two-week job, pay half the contractor's fee after the first week and the other half after the second week.

Percentage. You can also condition payment on the percentage of the job that has been completed. For example, when a job is 25 percent, 50 percent, and 75 percent completed, and upon final completion.

Tasks. You can make payments when specific tasks have been completed. For example, if various parts of the community are being painted, partial payments can be made after the old paint has been stripped, everything has been primed, and when all the painting is finished.

Create Further Incentive

Progress payments alone won't guarantee that the job has been done to your satisfaction. To ensure this, use a retainage clause as a bargaining chip. A retainage clause allows the association to withhold and retain a percentage of each progress payment until the association reviews the entire job and determines it's satisfied. Including such a clause in contracts can prevent lawsuits in many instances. For example, suppose a contract allows an association to retain 10 percent of each progress payment. If the association is dissatisfied with a job and can't get the contractor to satisfactorily finish it, a 10 percent retainage will help cover expenses the association will incur to get the job done right. But, more than likely, it will give the association leverage with its own contractor to finish the job.

(continued on p. 8)

Dealing with Contractors

(continued from p. 7)

How Much Retainage Is Enough?

When negotiating the retainage amount with the contractor, the association should ask for a large enough amount so that the contractor would feel the pinch if the association held back. If the association holds back too small an amount, the contractor will not have an incentive to satisfactorily finish the job. Ten percent is a commonly agreed upon amount to hold back from each progress payment.

Allow yourself some time after the contractor fulfills all the conditions laid out in the clause—such as finishing the work to the association's approval and giving proper documentation—to pay the retainage. The association will need time to make sure it's happy with the job. And you'll need time to review any documents the contractor provides to make sure everything is okay. Try to negotiate 30 days after the contractor has given all the necessary documents and fulfilled all requirements.

What to Include in Clause

Like our model clause below, your retainage clause should spell out the amount to be retained and the date by which the retainage is to be paid. It should also specify exactly what the contractor must do for the job to be declared completed. For example, the retainage may state that:

- The contractor is not entitled to get the retainage until it has certified in writing that the job is complete and the association's board of directors or manager has given its express approval.
- The contractor has given the association final and unconditional lien waivers on behalf of itself and all of its subcontractors and material or equipment suppliers that worked on the job. These waivers will verify that the contractor has paid all its bills in full. That's important because unpaid bills can be a nightmare for an association. In some states, a mechanic's lien based on a subcontractor's unpaid bill can be placed against association-owned property, such as common areas, even if the contractor and not the association owes the money.
- If it's using an architect, the contractor is required to get a certification statement from the architect confirming that all the work is finished. In the statement, the architect should certify that the work was done correctly in accordance with the work described in the original plans.
- The contractor has delivered a certificate of occupancy from the state or local department of buildings certifying that a structure is ready for occupancy. For example, if the association built an addition to its fitness center, it would need a certificate of occupancy for the work that has been done.
- The contractor has provided copies of any necessary permits or licenses before the retainage is released. For example, a contractor may need to get a permit to build a ramp or an addition to a club house.

(continued on p. 9)

Dealing with Contractors

(continued from p. 8)

Show this model clause to your attorney before using it in your contracts.

Model Clause

Retainage. The Association shall retain from each progress payment due to the Contractor 10 percent of the payment as "Retainage." The retainage is to be paid no later than [*insert #, e.g., thirty (30)*] days after Contractor has met all of the following requirements:

a. Contractor has certified that the work has been completed and has received express written approval of all work done from either the Association's Board of Directors or Manager.

b. Contractor has delivered to the Association or Manager:

   i. final, unconditional lien waivers from Contractor, subcontractor(s), and/or material or equipment suppliers covering all amounts of money previously owed;

   ii. a written statement from the Association's architect certifying that Contractor's work has been completed in accordance with Plans;

   iii. a permanent or temporary Certificate of Occupancy for the project; and

   iv. all certificates, permits, and/or licenses required by governmental and quasi-governmental authorities evidencing completion of work in accordance with applicable laws or regulations. ♦

Q&A

Ambivalence Toward Smoking Going Up in Flames

Q Several unit owners in the condominium building I manage are longtime cigarette smokers. I've fielded an increasing number of complaints from nonsmoker unit owners, some of whom are claiming the cigarette smoke is affecting their health. The board has been working with our attorney on whether and how to create a smoking ban inside the building. In the meantime, one of the unit owners has moved out and is planning to sue the association because she can't live in her unit while it's filled with secondhand smoke. What are the odds that she'll prevail on her claim?

A Fair, given recent legal trends. Landlords—including co-op boards—are responsible for maintaining safe, livable, and sanitary conditions, and recently more residents have sued their landlords, claiming that secondhand smoke from neighboring units is neither safe nor sanitary. In New York City in 2006, a judge ruled that secondhand smoke is a "breach of the warrant of habitability" [Poyck v. Bryant, August 2006].

That case helped set the stage for the ruling in a recent, groundbreaking court case in Manhattan that is extinguishing the idea that associations, including co-ops, can ignore secondhand smoke complaints or shirk responsibility to help

(continued on p. 10)

Q&A

(continued from p. 9)

unit owners who are being affected by smokers in the building. A state Supreme Court judge has awarded more than $120,000 in back maintenance, interest, and attorney fees to a co-op shareholder who claimed that smoke from other apartments had permeated her unit and rendered it uninhabitable. The decision put forth the idea that if associations want to be in charge of residences, they must assume the obligation to ensure that the occupants are protected from hazards such as the carcinogenic toxins found in cigarettes, which can be inhaled as secondhand smoke.

The plaintiff in the case never lived in the Manhattan apartment she purchased in 2006, because it smelled of cigarette smoke. During her ongoing dispute with the co-op board, the unit owner was advised by maintenance personnel to re-caulk areas of the apartment, and was told by the managing agent that the situation "wasn't the building's problem." But now the co-op actually is on the hook for the problem. The court's ruling puts increasing pressure on landlords, including co-op boards, to ensure that smoke doesn't pass from one unit to another [Reinhard v. Connaught Tower Corp., March 2016]. ♦