Community Association Management Insider®

Helping You Run Your Condo or Homeowners Association Legally and Efficiently

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FEATURE

You can't prevent angry residents from using social media to air their grievances, but you can respond appropriately, including taking legal action when warranted.

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Protect Association from Negative Online Comments

Regardless of how well you manage a condominium building or planned community, inevitably, some homeowners will complain. Not everyone will agree on decisions that are made. And the way in which associations operate—homeowners live essentially under the rule of elected leaders—can breed resentment. Sometimes, complaints are well founded, but it's not surprising that others are mean-spirited or have no basis in fact.

In the past, disputes or negative comments regarding the association or board members would be somewhat private, perhaps being discussed with only a disgruntled member's friends or family members outside the community. Or, heated arguments that took place at an annual meeting would die there. But, increasingly, the Internet is becoming a forum for members' complaints about their associations. This can be dangerous for associations and board members; prospective homebuyers could be scared away by negativity about the community, and the reputations of board members could be smeared.

You can't prevent angry residents from using publicly accessible websites or social media channels to air their grievances, but you can respond appropriately and possibly take legal action to combat unwarranted vicious comments. Consider the following strategy when you learn that members are posting negative information about your association or are perpetuating disputes online.

Send Warning Letter to Member

Listservs—which distribute messages to subscribers on an electronic mailing list—and websites have been the traditional online conduits of negative information. Now, social media has given people more platforms to speak their minds. And since they can do it behind closed doors without facing the people that they're attacking, comments tend to be much harsher. Online posters may also feel that there is less accountability for untrue statements.

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Negative Online Comments

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When you discover this type of information, don't panic, says Washington, D.C., community association attorney Benny L. Kass. He recommends making a copy of the posting and sending it to all board members and to the association's attorney. Next, a letter should be sent to whomever is posting negative comments. "The letter should come either from the association's attorney or board president, and be drafted by the attorney," Kass notes. The letter should convey that the board is concerned that the person or group is making false, and possibly defamatory statements, and urge them to retract the material within the next seven days, Kass explains. Your letter, like our *Model Letter: Warn Member about Posting Damaging Comments Online,* should be copied to all members in the community.

Determine Whether Defamation Is Actionable

Managers should also take note of whether disgruntled members are using the association's website or their own social media channels to make negative comments. If the negative postings are on the association's website, you can change the format so that only board information can be posted, and owners will not be permitted to respond in any way on that website.

Unfortunately, when a member uses her own social media channels like Facebook or Twitter to blast the association, the situation becomes trickier. There is no way of stopping a member from putting up comments in the first place. However, after a negative comment is posted about the association, you, or a board member, can talk with the association's attorney to ask whether it's action-

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Negative Online Comments

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able—that is, whether there is sufficient reason to take legal action. The attorney should be able to advise the association about whether it should pursue a libel and slander lawsuit.

"Independent websites and listservs are beyond association regulation but not defamation concerns; therefore, if false allegations of dishonesty are made against a community manager or board member, that might be actionable," explains New Jersey community association attorney Ronald L. Perl. "However, fair comment on the performance of the board or manager is permissible and there is not much that can be done to stop it," he notes.

While electronic communication makes it easier to complain, take into consideration whether the online comments would be offensive if a homeowner wanted to send them (at her own cost) in a traditional letter to the membership. There isn't much you can do about it if a member says that the board should be doing a better job of maintaining the building—unless it crosses the line, Perl stresses. He reminds managers that truly offensive communication can sometimes be dealt with by the social media provider as well.

If it does rise to an offensive level, your attorney can determine whether, like many states, your state requires that the person making the defamatory state-

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MODEL LETTER

Warn Member About Posting Damaging Comments Online

When you discover that a member has posted comments of a negative nature about your community or board members online, ask the association's attorney to draft a warning letter that can be sent from the board president to that member. Here is an example of a warning letter that you can adapt.

[*Insert date*]

Dear [*insert name of member*]:

Shady Acres Community Association takes pride in its excellent reputation and strives to maintain that reputation so that we can continue to attract prospective homeowners and recruit quality employees. Negative comments online hurt not only the people at whom they are directed, but also the membership as a whole. If an Internet search of our community reveals negative comments or serious allegations, it could scare away prospective buyers—affecting property values overall. Additionally, publishing defamatory comments about board members can subject you to a lawsuit.

I am concerned that you are making false, and possibly defamatory, statements regarding [*insert specific topic, e.g., the decision the board has made in the last year about a special assessment*] on [*insert name of website, listserv, or social media channel, e.g., Facebook*]. I urge you to retract these statements within the next seven days. If the statements are not retracted, the association will pursue appropriate legal action.

Thank you for your cooperation.

Sincerely,
John Smith
President, Shady Acres Community Association

Negative Online Comments

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ment must be asked first to retract it before legal action can be taken, says Kass. If that's the case, you'll have to decide how to approach the situation.

If you can't force the total removal of critical information about the association on websites or social media, but they incorporate the association's logo or other official information without permission, consult a copyright attorney, who can make suggestions such as registering the logo to protect it from misuse.

But don't waste time trying to find a preventive, long-term solution. Kass says that there's little value in trying to add something to the governing documents prohibiting this type of behavior because enforcement would be a very difficult issue.

Use Management Skills to Diffuse Situation

Don't get flustered when you're faced with public, online attacks. There is an appropriate way to address negative public comments, says Perl, whose point of view is that they shouldn't be ignored. He recommends that, instead, a manager should respond in a controlled, professional manner. "Treat the commenter as a customer, by saying that you respect their concerns and would like to deal with them offline," advises Perl. Be courteous and responsive; your response is public, as well as the original comment. "Trying to engage privately can sometimes avoid a public, online brawl," Perl notes. He points out that managers must face the fact that there are some people who have ill intent and want to stir up controversy, but emphasizes that a manager's response is as much for the greater audience as it is for the dissenter. Ultimately, try to stay cool, calm, and collected —and consult an attorney—before you do anything, says Kass. ♦

Insider Sources

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IN THE NEWS

➤ Tax Measure Could Alleviate Homeowners' Double Taxation Frustration

Homeowners can be optimistic about taxes, thanks to a measure that would create a new deduction. U.S. Representatives Anna G. Eshoo (D-CA) and Mike Thompson (D-CA) have introduced a measure that would allow homeowners in community associations who earn $115,000 or less in annual income to deduct up to $5,000 of their community association fees and assessments from their federal tax liability.

Initiative sparked by rising costs. HOA experts and organizations like the Community Associations Institute (CAI) have expressed support for the bill. Known as the Helping Our Middle-Income Earners (HOME) Act, the bill would

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In the News

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benefit many of the 66 million Americans who live in condominium buildings and other planned communities. The intent behind HOME is to help the millions of middle-class homeowners who are struggling to keep up with rising household expenses like child care, college tuition, health care, mortgage, and community assessments.

"The Home Act can go a long way by providing relief from this tax burden on millions of middle-class families," says Eshoo. Homeowners in community associations face unique tax burdens. "This bill recognizes the financial unfairness facing homeowners in community associations, as they pay their fair share of local property taxes along with their community assessments, and receive many municipal services from their community association, such as street and sidewalk cleaning, trash removal, snow removal and other services, according to Rep. Eshoo and Rep. Thompson.

Support for HOME pledged. In a statement, CAI Chief Executive Officer Thomas M. Skiba applauded Representatives Eshoo and Thompson for their efforts to make homeownership more affordable and for recognizing the "inequity of double-taxation faced by homeowners in America's community associations." Skiba noted that CAI has promised to work with Eshoo and Thompson to ensure this legislation is a net gain for millions of Americans who live in community associations.

While there hasn't been a Senate companion bill introduced, CAI expects members of the House of Representatives in states with a large number of community associations—such as Florida, California, Texas, Illinois, North Carolina, New York, and Massachusetts—to support the legislation and continue a dialogue that leads to inclusion of the tax deduction in comprehensive tax reform legislation.

➤ Noise Disturbance by Club Isn't Fun and Games for HOA

In Florida, a plane club may be grounded as a battle between a handful of homeowners and a RC plane club in Escambia County continues. The recreational club, which attracts model plane enthusiasts, has been called out as a nuisance by homeowners in a community adjacent to the field where they fly planes. Some people feel conflicted as they understand the homeowners' concerns but think that the plane club is a local tradition and has been a great source of fun for more than 14 years.

Nebulous contract to blame. The issue has been contentious for a year while meetings between the club and the association have failed to facilitate a resolution. An official for the plane club has acknowledged that it has a contract with the county to operate in the county-owned park in a manner that doesn't disturb the local residents. In an effort to cut down on complaints, the club members stopped flying their planes over the association homes, but the compromise hasn't helped much. Homeowners say that they are still bothered by the general noise created by flying the planes in the surrounding area.

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In the News

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County needs to provide clarity. Making the issue more complicated was the county's decision that while plane operators couldn't fly over the actual community, the noise issue was a non-HOA issue. And a significant number of people living in the non-HOA part of the community are supporting the club as they want it to continue to operate there. Residents have pointed out that the hobby has been a popular aspect of community life for many years.

As part of the effort to reach an agreement with the HOA, the club is pushing to get more clarity from the county on the phrase "disturb the neighbors." The club's president wants a less subjective lease that would be enforceable, and not up to interpretation by the association. For their part, some association homeowners say that prior to buying their homes, they were unaware of the club's operation in the park. They are exploring their legal options. ♦

RISK MANAGEMENT

Hold Community Events Without Risking Liquor Liability

This spring, you and your association are probably planning summer events that will give members a chance to have fun in the community and get to know their neighbors. Organizing events can also be a team-building experience for your staff and create goodwill between management and residents. It's not all fun and games, however. Community-building events, such as pool parties or cookouts, may feature food and drinks, including alcohol. If the association serves alcoholic beverages at an event, it creates the potential for liability if someone is injured or killed as a result. Although there is no way to ensure that the association won't be sued in a situation like this, it should consider the following tips to help minimize the exposure to such liability.

Avoid Selling Alcohol

Every state has laws that assign liability in cases where an intoxicated guest leaves a social event and causes personal injury or property damage to a third party. Many states will label the person or entity that serves the alcohol as "licensees" or "social hosts," and enforce different standards of care for each category.

Social hosts. If your association is not selling alcoholic beverages, it will be deemed a "social host." A social host is liable for damages suffered because of the intoxication of a person under the age of 21 when the social host or its agent willfully and knowingly served alcohol to the underage person. Based on this principle, if your association controls and furnishes alcohol as a social host, your association could be liable only for injuries resulting from the service of alcohol if an individual acting for the association, such as a board member, knowingly and willfully serves alcohol to someone under the age of 21.

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Risk Management

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Licensees. If an association decides to sell alcohol, however, it will be considered a licensee, and as a result, you will need to get a liquor license from the state. Your association's potential liability also increases. As a licensee, your association will be liable for injuries resulting from the actions of an individual who became intoxicated from the beverages sold at your event if your association served or sold alcohol to a person under the age of 21 or to a person who was visibly intoxicated.

PRACTICAL POINTER: Don't sell drink tickets or charge an entry fee. This way, there is no chance that your association would be considered to be in the business of selling, serving, or providing alcohol, and your insurance should cover you in case there's an accident.

Get the Appropriate Insurance

You can't be 100 percent sure that someone under the age of 21 won't be served alcohol or that a volunteer bartender will always refuse to serve an inebriated member. Therefore, an association should never hold an event with alcohol without liquor liability insurance. This insurance generally will cover your association in the case that any unforeseen tragedies occur.

Your association should first check its general liability policy to see if it includes some type of "host liquor liability" coverage. If host liquor liability coverage is included, the terms of the policy should be carefully reviewed to ensure that the coverage is adequate. This coverage will indemnify and defend the association against third-party liability claims arising out of the serving of alcoholic beverages. This would also cover claims of causing intoxication to another person, serving a minor, or continuing to serve someone already under the influence of alcohol.

If your general liability policy excludes liquor liability, which is likely, your association should get a host liquor liability policy, often known as an "event policy." It is important to note that host liquor liability coverage pertains only to events in which the alcohol is served, not sold.

Hire Professionals to Serve the Alcohol

Your association should also seriously consider hiring licensed professionals to serve the alcohol. Professional companies will carry their own liquor license insurance that will give them and your association protection. However, to ensure that your association will be covered by the insurance of the company that you hire, make sure that you are listed as an additional insured on its insurance policy for your event.

An additional bonus to hiring professionals is that trained bartenders will have experience in identifying minors and those who have had too much to drink, which will help lower the chances that matters may get out of hand. These are skills that your employees most likely have not developed. ♦

RECENT COURT RULINGS

➤ Testimony About HOA's Proper Notice of Delinquency Was Sufficient

FACTS: After the owners of a unit hadn't paid assessments for several months, a condominium association filed a forcible entry and detainer action. At a trial, the association presented testimony from the president of its board of directors and an employee of the management company. They both testified that the unit owners had been given the required notice that the assessments were past due and that, if they weren't paid, the association would take possession of the unit.

A circuit court ruled in favor of the owners on the possession claim. The association appealed.

DECISION: An Illinois appeals court reversed the lower court's decision.

REASONING: The appeals court concluded that the circuit court improperly determined that the association failed to present sufficient evidence to establish a claim for possession of the unit. The circuit court agreed with the owners' argument that, because none of the association's exhibits had been admitted into evidence, the association hadn't proven its case. The circuit court explained that although there was testimony that the requisite notice had been served, the "actual notice was not in evidence" and "the notice itself was required documentary evidence in order to maintain a claim for possession."

But the appeals court determined that, contrary to the circuit court's findings that the association hadn't established the requisite service of notice and demand, it had—through the testimony of the board president and the association manager—established that the notice and demand for possession had been sent to the owners.

The board president testified that the manager would get approval to start collection proceedings when a unit owner's balance exceeds $1,000, which was the chain of events in this case. He noted that the manager gets board approval on all stages of collection proceedings. The appeals court stated that the testimony of the association's witnesses established that the owners were delinquent in the payment of required assessments, a demand had been served on them as required under the forcible statute giving them 30 days to cure, and the delinquency hadn't been cured. This testimony was sufficient to establish the association's right to possession. The appeals court explained that "nothing in the forcible statute requires the association to introduce at trial a copy of the demand, but, in any event, a copy of the demand was attached to the association's verified complaint." The association's failure to introduce the demand itself, the condo declarations, and an itemization of the delinquency into evidence "didn't mandate a finding in the owners' favor on possession," the appeals court pointed out.

- Madison Manor II Condo. Assn. v. Sendorek, March 2016

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Recent Court Rulings

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➤ Covenants Include Hens as 'Recognized' Household Pets

FACTS: Several homeowners in a planned community kept hens on their lots. The association informed them that this violated the association's covenants. The covenants disallow "animals, birds, or poultry" on residents' lots unless kept as "recognized household pets." The owners claimed that their hens met the recognized household pet exception. The association argued that the term "recognized household pets" isn't defined in the covenants, which were, therefore, ambiguous. According to the association, it never intended to include poultry as recognized pets. It wanted the ambiguous terms to be interpreted as not including these animals in the pet category.

The owners refused to get rid of the hens. The association sued the owners. The owners and the association each asked a district court for a judgment in their favor without a trial. The district court agreed with the association; it required the owners to remove their hens. The owners appealed.

DECISION: A New Mexico appeals court reversed the district court's decision.

REASONING: The appeals court determined that the restrictive covenant doesn't disallow the owners from keeping hens. It said that the district court erred in requiring the owners to remove the hens based on the association's assertion that it supposedly never wanted to include hens as recognized pets.

A substantial number of homeowners in the community have disagreed for years about the meaning of the covenants language at issue. While the district court interpreted the ambiguous language to mean that hens weren't classified as recognized household pets and couldn't be kept or maintained on any lot in the subdivision, the appeals court decided that "the notions expressed in the covenants of maintaining the 'pastoral' and 'rural' nature of the area and the historical traditions of the region would appear to lend themselves to allowing animals, birds, and poultry as recognized pets." If the community didn't want poultry to be recognized as household pets, the residents could have removed the language that anticipates and permits poultry under this exception, the appeals court explained. "We do not think that it is reasonable to read the language… to reflect an intent that the only way poultry could be 'recognized' as household pets was if the association (or a large number of lot owners) recognized poultry as such," the appeals court stated.

The appeals court also doubted that to allow hens as household pets creates or opens up any likely circumstances of ruination as expressed by the association. The appeals court wasn't persuaded that in permitting pet chickens "the sky will fall." It noted that "such a Chicken Little-esque view of possible results and calamity is not convincing" in this situation. If the association or the lot owners of the subdivision want a different result, the lot owners must effectuate the change through the required covenant amendment election process set out in the covenants, concluded the appeals court.

- Eldorado Community Improvement Assn. v. Billings, March 2016

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Recent Court Rulings

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➤ Association Must Follow Mortgage Foreclosure Rules

FACTS: A condominium building association attempted to foreclose on two liens against a unit in the building. The liens were for unpaid common area charges. The unit owner asserted that the association was required to comply with a state property law, which requires that this type of action be carried out in the same manner as an action to foreclose on a mortgage. That is, a notice must be served with the summons and complaint.

The association hadn't given such a notice to the unit owner. The unit owner claimed that because he hadn't received the requisite notice from the association, the association's foreclosure action should be dismissed.

The association contended that the mortgage foreclosure notice wasn't required here. However, it asked that, in the event the court finds that service of such notice was required, it be granted leave to serve an amended summons and complaint—with the required notice—to the unit owner.

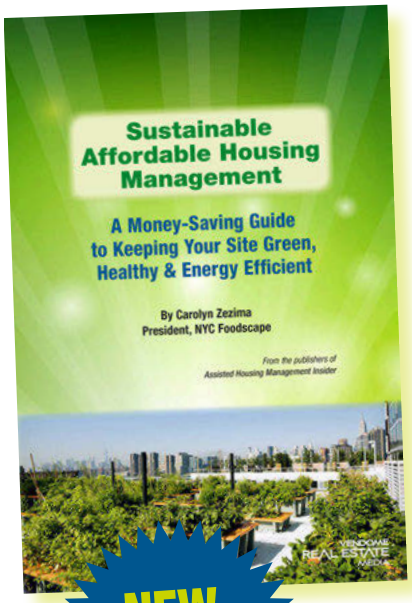
DECISION: A New York district court ruled in favor of the association.

REASONING: The court noted that, by expressly referencing suits for foreclosure of mortgages of real properties, the plain language of the law incorporates the notice requirement that the unit owner claimed he was entitled to. "A foreclosure of common charge liens are to be foreclosed in the manner in which a foreclosure of a mortgage is initiated," said the court. The court pointed out that the requirement for such a notice was part of the Home Equity Theft Protection Act, which was enacted to afford greater protections to homeowners confronted with mortgage foreclosures, but extended to condominium unit owners who are confronted with losing their homes by virtue of failing to pay common area charges.

The unit owner's motion to dismiss the case for the association's failure to serve the notice was warranted, said the court. However, the court granted the association's request to serve the summons and complaint with the required notice. Therefore, the court denied the unit owner's claims and gave the association 20 days to serve the amended summons and complaint with the notice. ♦

- Millenium Tower Residences v. Kaushik, March 2016

Create & Implement Sustainability Plans



SUSTAINABLE AFFORDABLE HOUSING MANAGEMENT

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By Carolyn Zezima, President, NYC Foodscape

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