

# Community Association Management Insider®

Helping You Run Your Condo or Homeowners Association Legally and Efficiently

JULY 2016

## FEATURE

*Making an exception to your rules and restrictive covenants doesn't mean you'll automatically lose your right to enforce them. Here's how to make exceptions properly.*

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## Keep Rules Flexible Without Forfeiting Future Rights

Community association boards occasionally want to make an exception to an association rule or restrictive covenant for a member whose unusual circumstance the board feels warrants an exception. Other times, a board may want to make a community-wide exception. Boards worry, though, that if they make an exception to a rule or restrictive covenant, they might be prevented from enforcing it at some time in the future. That's because some courts have ruled that associations had forfeited their right to enforce certain rules or restrictive covenants by allowing violations. But this doesn't mean you'll automatically lose your right to enforce your rules and restrictive covenants—as long as you properly make exceptions.

### Four Rules to Head Off Claims

The good news for associations is that the overwhelming majority of courts agree that for an association to forfeit its right to enforce its rules or restrictive covenants, it must have allowed significant violations. Generally, an association won't lose its rights because of minor violations. But to fully protect yourself, you still should carefully consider how to make an exception to one of your rules or restrictive covenants—either for one member or the entire community. Follow these rules to stay on the safe side:

**Rule #1: Don't make exceptions that change the character of your community.** Make sure that the exceptions you make don't change the character of your community. For example, if your association is for single-family residences, don't allow multifamily homes to be built.

**Rule #2: Don't make exceptions outside the board's authority.** Boards aren't authorized to make exceptions to every rule or restrictive covenant. Some things are mandated by state law or require a member vote. For example, if a board wanted to suspend enforcement of the rule that propane grills be kept at least five feet away from any combustible surface, it could be violating a state fire code. So remember to also check whether the actions you're planning to take are legal in the first place.

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## Keep Rules Flexible

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**Rule #3: Adopt formal board resolution when making an exception.** It's important to be clear about the reasons for making exceptions and to communicate those reasons to the community. One way to do this is to adopt a formal board resolution explaining what the board has decided and why. Your resolution, like our *Model Resolution: Pass Formal Board Resolution When Changing Rules*, should:

- Say that the board has the authority to make and enforce the rule or restrictive covenant in question;
- Explain why it has decided that it would be in the best interests of the community not to enforce the rule;
- Explain why the circumstance compels the board to make an exception, if the exception is being made for one member or group of members. (However, check with your attorney before disclosing information. In certain cases, it could be a violation of privacy.);
- Explain why it's best for the entire community, if it's a community-wide exception. (For example, if the board wants to suspend enforcement during wartime of the rule against hanging flags on units, it might say that the members have overwhelmingly expressed their desire to display their patriotism);
- Spell out all necessary details. (For example, if the resolution is to suspend enforcement of the rule against door decorations during the holiday season, it should specify what kinds of decorations will be allowed and how they may be affixed to the door. It should also state for how long enforcement will be suspended.); and

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**MODEL  
RESOLUTION****Pass Formal Board Resolution When Making  
Exceptions to Rules**

The following resolution would temporarily suspend enforcement, community-wide, of a rule against door decorations during the winter holiday season. The resolution includes a “sunset provision” saying that the exception will expire if it’s not renewed by a specified date. For suspensions for items that are season-specific, carefully think about the time frame within which these decorations will seem festive as opposed to eyesores that have outlasted their purpose. Check with your attorney before adapting this resolution for your community.

**RESOLUTION REGARDING HOLIDAY DECORATIONS****PREAMBLE**

- A. The Declaration of Shady Acres Community Association, Inc., as thereafter amended, was recorded in *[insert name of appropriate place, e.g., county clerk’s office]*.
- B. The Bylaws of the Association were recorded in *[insert name of appropriate place]*.
- C. Article A, Section 1, Paragraph 1 of the Bylaws provides that the Board of Directors of the Association has the authority, in its sole discretion, to make and enforce compliance with such reasonable rules and regulations as the Board may determine necessary or desirable.
- D. Section 2 of the Declaration provides that no member or resident may place any matter or thing upon the Common Elements or Limited Common Elements, including Unit doors, without the approval of the Board.
- E. The Board has determined that although the placement of holiday decorations on the exterior of a Unit, including the Unit doors, requires Board approval, the Board desires to permit holiday decorations during the holiday season, without requiring individual Board approval, provided the terms of this Resolution have been complied with. The Board believes that allowing holiday decorations is in the best interests of the community because it will foster a more pleasant, positive atmosphere.
- F. Accordingly, the Board deems it necessary to establish these guidelines with regard to allowing exterior decorations.
- G. This Resolution was duly introduced and thereafter adopted pursuant to the terms and conditions of the Bylaws.

**NOW, THEREFORE, BE IT RESOLVED** on this *[insert date, e.g. 15th day of August, 2016]* as follows:

*[Insert details about types of decorations permitted, e.g., winter-theme wreaths, garlands, or white light strands, time period for which enforcement of the rule will be suspended, how decorations may be affixed to doors, and any other details you consider necessary for your community.]*

**Revocation:** This exception to association rules is made in the sole and absolute discretion of the Board. The Board may, at any time subsequent to the date hereof, revoke the exception and require all door decorations to be removed. If any decoration is not removed within 30 days of written notice to do so, the Board may cause it/ them to be removed at the Member’s expense and the Member agrees that the Association will have no liability for doing so.

**Sunset Provision:** This resolution shall be effective as of November 1, 2016, and shall expire as of January 1, 2017, unless further extended or re-adopted by the Board.

**Distribution:** The Association’s Managing Agent is authorized and directed to prepare correspondence, in appropriate form and substance, and thereafter circulate same, along with a copy of this Resolution, to all Members. The Association also authorizes and directs its legal counsel to arrange for recordation of a copy of this Resolution with the *[insert name of appropriate place]*.

ATTEST: SHADY ACRES COMMUNITY ASSOCIATION, INC.

SECRETARY’S SIGNATURE \_\_\_\_\_

PRESIDENT’S SIGNATURE \_\_\_\_\_

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## Keep Rules Flexible

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- Say that by making the exception, the board doesn't intend to waive its right to enforce the rule or restrictive covenant in the future. The resolution should always say that if the board later decides for any reason that the suspension was a mistake, it can start enforcing the rule again. This makes it clear that the board isn't intending to change the character of the community.

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**PRACTICAL POINTER:** If the board is suspending a community-wide rule, such as not enforcing a flag ban, the resolution should also include what's called a sunset provision. That is, a provision saying that the exception is only temporary and that if the board doesn't renew it by a stated date, it will expire.

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**Rule #4: Post notice explaining exception and why it was made.** For communities that don't mail their resolutions to their members or publish their minutes (two places where resolutions could be found) it's a good idea to post a notice in the common areas, in the community newsletter, and on the community website, explaining the exception and why it was made.

This works to further the spirit of open government in the community and to let them know what the board is doing, which helps to reduce the concept that it's the result of closed-door meetings and if other owners aren't happy about it, the board should have feedback so they can factor that into the next decision they make when considering an exception. ♦

## IN THE NEWS

### ► **Survey: Association Member Satisfaction Stays Steady**

Although negative or controversial items about homeowners associations tend to make their way into the news more than glowing reviews of planned community living, associations and their managers earned high marks according to recent Community Association Institute polls. The organization's national survey has revealed that homeowners remain overwhelmingly satisfied with their communities, their homeowner leaders, and professional managers.

CAI Chief Executive Officer Thomas Skiba, CAE commented that typically community association surveys and studies show that a large majority of Americans who live in community associations are happy in their communities. "This is a testament to how much the community association model has evolved in recent years. The concept has grown up, become well established, and become an increasingly successful form of community governance and an essential component of the U.S. housing market," said Skiba.

Almost 70 million Americans live in close to 340,000 common-interest communities. Since 2005, pollsters have asked association residents to rate, on a scale of

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***In the News****(continued from p. 4)*

one to five, with one being very bad and five being very good, their experience living in a community association. The answers have been strikingly consistent, according to CAI. In the most recent survey in March, almost 9 in 10 respondents are either satisfied or neutral on the question. Sixty-five percent say they are “very” or “somewhat” satisfied. Twenty-two percent are neutral and just 13 percent expressed dissatisfaction.

And those recent findings reflect the answers from past years. Community association residents were also asked specific questions about community association life. Many said that their association board members serve the best interests of their communities and that they are on friendly terms with these elected homeowner leaders; their community managers provide valuable support to residents and their associations; and they overwhelmingly support community association rules designed to preserve the nature and appearance of the community and protect property values.

Financial issues were also discussed by residents who, by a two-to-one margin, believe they pay about the right amount—some even say too little—in association assessments, which cover services, utilities, and amenities provided to residents by the association.

**► HOA Ruling Puts Voters on Level Playing Field**

A San Diego Superior Court ruling has untangled a messy dispute for a California community association, ruling in favor of the association by confirming that the board’s bylaws and covenants, conditions, restrictions, and reservations must be followed for current and future HOA elections.

The dispute at the center of the case arose because of controversy about the last two elections. In April 2015 the association’s election was deemed invalid when election inspectors wouldn’t certify the election because they determined that election rules that should have been adopted weren’t; a secret ballot double envelope should have been used. The former management company and the previous board members had stated to the membership that there were no election rules leading into the elections. A second election was held several months later because the election wasn’t certified.

According to a group of homeowners, elections should be held in the same manner that was practiced in the past, but a board member argued that community rules were not being followed. The ruling means that the next election must follow the rules set in the governing documents, which don’t allow for certain voting methods, like cumulative voting by owners, that were a source of contention.

The court’s approval of the association’s election rules will prevent one self-serving group of individuals from manipulating the system. A September election to be held in accordance with the judge’s ruling is scheduled for the fall. ♦

## RISK MANAGEMENT

### Ensure You Won't Be on the Hook for Violence in Community

Unfortunately, sometimes annoying behavior by a member in your community can provoke a violent reaction from another member. Badly behaved pets, loud music, or acting inappropriately in common areas can lead to arguments that escalate. You and your staff should act quickly to avoid liability for violent disputes between members. If members take matters into their own hands because you did nothing and someone is injured, you could be held liable. A court might rule that your failure to intervene in the dispute created a dangerous condition.

Usually, “dangerous conditions” refers to structural damage or defects, such as loose steps. But there are other kinds of dangerous conditions. In some states, courts have held that foreseeable violence against members that the association could have prevented qualifies as a dangerous condition. In some cases, associations were charged with negligence. And if the victim is disabled or a member of a minority group, your inaction could lead to charges under the federal Fair Housing Act. For example, your association could be accused of allowing a hostile housing environment.

To avoid this problem, take steps to resolve the dispute before somebody gets hurt, says New Jersey attorney David J. Byrne. You should have a procedure for dealing with nuisance members. Whatever your procedure is—filling out incident reports, writing warning letters, meeting with the members, offering some sort of formal dispute resolution, or getting a court order—don't wait to put it into action. The longer you wait, the more likely it is that tensions will come to a head between members and things will become violent. And that makes it more likely that you'll be held liable for it.

If the problem continues after you meet, warn, and/or fine the offending member, and if arbitration or mediation doesn't work, take steps to get a court order stopping the nuisance behavior. If you don't, your incident reports and warning letters might actually hurt you. “Your records can be used against you if they show that you knew about an increasingly contentious problem but didn't try to stop it through court action,” says Byrne. Even if the judge doesn't think the nuisance is serious enough to warrant a court order and you lose the case, you'll have a defense to a lawsuit claiming you didn't do enough to prevent an attack, says Byrne.

In any event, if a member has threatened violence or you're afraid that violence is imminent, call the police right away. Once the police have ended the immediate threat, you can enforce your procedure.

And, as with any procedure, it's important to enforce your nuisance member procedure consistently. If you take action against one member for threatening violence, but not another, you'll open yourself up for a discrimination claim. ♦

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#### *Insider Source*

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## DEALING WITH MEMBERS

### Minimize Conflicts and Complaints When Adding New Amenity

Amenities have always played a big part in homeowners' attraction to planned communities and condominiums. After all, being able to enjoy a pool, workout room, or clubhouse without the hassle of personally maintaining it is worth the cost of association fees to many people. Ideally, members would have to pay only for the amenities they use, but that's not the case in traditionally run associations. So if you plan to add an amenity, expect some members who will get a lot of use out of the new perk to be happy about it, but prepare for pushback from members who don't want to pay for an item they're not interested in—especially if the fees for amenities is already high at your community.

As the manager, you'll be the one to hear complaints about the fees increase—or possibly an assessment for large projects—when the board of directors wants to add an amenity to the community. You can make the process of attempting to add an amenity at your community much easier by troubleshooting some common issues that arise.

#### Understand Scope of Power to Add Item

Before the board takes any action to add an amenity, you should know what the board can and can't do. You'll want to make sure that the board will not overstep its authority when it votes to add an amenity and increase fees or assessments accordingly. The board's ability to raise fees depends on state laws and the governing documents. And some are very specific about the way fees can be charged. So find out how broad your board's authority is. One of the best ways to make sure that you're right is to seek a legal opinion from the association's attorney to ensure that it's acting within its authority.

#### Put Together the Numbers

You should also advise the board to research the costs of a potential new amenity thoroughly and determine whether the market will bear those costs. Although the members elect the board to govern, the board still should go back to the members with information about the plan and to ask for support. The members must be able to support any increase in fees or assessments. If members can't afford a substantial increase in fees, you'll wind up with more complicated problems on your hands, including late payment—or nonpayment—of fees that leads to fines or foreclosures. So the board needs to consider this before adding an item that will put some owners really in the red.

Presenting a business plan is also important because it avoids the perception that the board is forcing the improvement on the community.

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## ***Dealing with Members***

*(continued from p. 7)*

### **Sell the Idea to the Membership**

Communication and selling the idea of the added amenity to members are keys to success. Most association members complain because they haven't been told what the board is planning. Leaving members in the dark might cause a panic about costs and changes. In many communities, board meetings are open to the members. So the board should put an item on the agenda concerning discussions of the planned fee increases to give the members an opportunity to voice their opinions.

### **Build Consensus Among Members**

Encourage the board to get a consensus among the members in favor of the proposed amenity. If a board wants to have a gym or a pool it needs to strategize to get the homeowners to buy into it. To gain consensus, a board might hold several informational meetings for the whole community. You could consider inviting representatives from other communities to discuss how they have benefitted from adding the same amenity. For example, a playground might attract families to the community.

Or form a task force to survey the members and build consensus. Also, you can help make the case for the amenity by gathering information that demonstrates that an asset like a pool or gym will increase their property values.

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**PRACTICAL POINTER:** You'll be one of the point people during this process, but don't fall into the trap of making the decision appear to be a management decision. You should simply guide the board to research why an amenity is needed, how it will benefit the membership, and how you can work together to get support.

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### **Hold Member Vote**

Many state laws and governing documents require a vote of all community association members, not just the board, when a new amenity is viewed as an "improvement" in the eyes of the law. (In some states, if less than a certain percentage of the community association members vote in favor of the amenity, the board has to scrap the idea.) Beware of a lawsuit stemming from owners if the board doesn't present the matter for a member vote before starting the project.

### **Brace Yourself for Backlash**

Even when your board takes the necessary steps to research, communicate, and get community support for adding an amenity, some members will inevitably balk. Some members may be tempted to sue the association over raised fees, although the costs of litigation will discourage many. If the board has proceeded according to the governing documents and local laws, consulted with its attorney, developed a sound business plan, and gotten a general consensus, the chances of a successful lawsuit drop considerably, and the chances of adding an amenity the benefits every member of the community in some way goes up. ♦



## RECENT COURT RULINGS

### ➤ No Requirement to Produce Records for 'Improper Purpose'

**FACTS:** A homeowner became treasurer of an association board. After looking at the association's finances, he wanted to conduct an independent audit of the association's books and records. The homeowner sent an email with the request for certain documents to the board's president and the association's management company. He claimed that the association refused to give him the documents he needed. The homeowner sued the association and the management company.

The association asserted that the homeowner's written demand for financial and other records didn't "reasonably identify" the records he sought, and pointed out that reasonable identification of records was necessary to trigger an association's duty to provide books and records to members. The association and management company also provided evidence of numerous other vague records requests by the homeowner that had risen to the level of harassment. A Texas trial court ruled in favor of the association. The homeowner appealed.

**DECISION:** A Texas appeals court upheld the lower court's decision.

**REASONING:** The appeals court agreed with the trial court that, overall, the homeowner's requests had not been specific enough as to which records he wanted. His email listed some particular records, and the board had supplied those. But the homeowner's multiple other requests—some of them verbal—were either unclear or sought records that had already been provided to him. The appeals court noted that, additionally, an association wasn't required to produce books and records for inspection by a member if the member had an "improper purpose" for demanding them. The association had provided evidence that the homeowner was angry with and rude to other members of the board of directors, and refused to acknowledge that he had lost his position when another treasurer won that seat on the board after an election.

The appeals court concluded that the homeowner's requests were for an improper purpose—revenge against other board members by trying to prove through an audit that they had mishandled the association's money. ♦

- Lutterodt v. Emily Lane Owners Assn., June 2016