



Community Association Management Insider®

Helping You Run Your Condo or Homeowners Association Legally and Efficiently

AUGUST 2016

FEATURE

It's not enough to have a basic records-management policy that includes just a record-retention schedule.

IN THIS ISSUE

Feature: Craft Detailed Records-Management Policy to Shield Association from Liability 1

- ▶ **Model Policy:** Streamline Association's System for Records Storage, Retention, and Destruction (p. 4)
- ▶ **Model Form:** Make Records Coordinator Attest to Records Destruction (p. 5)

DEPARTMENTS

Risk Management: Keep Conference Call Meetings Efficient and Confidential 6

Dealing with Contractors: Ensure Right to Collect Legal Expenses from Contractor 7

Recent Court Rulings 8

- ▶ Association Had Authority to Fine Member for CC&R Violations
- ▶ Association Didn't Have Right to Assess Litigation Costs Against Members
- ▶ Manager Had Duty to Enforce Pet Rules, Not Make Them

Craft Detailed Records-Management Policy to Shield Association from Liability

Record keeping is an essential part of running an association. Not only does the law require associations to keep certain types of records for specified periods of time, but records also can prove that the association acted as it was required to in certain situations, like making necessary repairs—which in turn can relieve it from liability for wrongdoing and avoid lawsuits. Records can also help you keep track of things like association spending, complaints and requests by members, and board decisions.

However, it's not enough to have a basic records-management policy that includes just a record-retention schedule. A good records-management policy should include additional details, such as who's in charge of implementing the policy, where records should be stored, and the proper way to dispose of records that are no longer needed.

Take time to review your records-management policy to make sure that it's detailed enough. Like our *Model Policy: Streamline Association's System for Records Storage, Retention, and Destruction*, yours should include the following information that can help the association operate smoothly.

Designate Point Person by Name

Your policy should designate one person to be responsible for implementing it. This is important because, otherwise, the somewhat tedious nature of the task may lead to its being given short shrift. But records are far too critical to an association's financial and legal well-being to be treated casually. Identify this point person in the policy so that everyone is on the same page about whom to contact if there are records-management issues.

So who should serve as the records-management point person? The best person for the job is usually the association manager, or key personnel on the manager's staff, rather than volunteer board members. Board members should focus on setting policy rather than hands-on

AUGUST 2016

Records Management Policy

(continued from p. 1)

operations such as records management. Also, because board members serve for just a limited time, they may lack the familiarity and continuity needed for efficient records management. Managers, on the other hand, understand the importance of records and the need to be able to locate them when necessary.

Classify Paper, Electronic Records According to Three Categories

Whether a record has been kept electronically or on paper, its life cycle has three phases: active, inactive, and obsolete. Your policy should explain each phase and specify where records in each phase should be kept. Doing so will help keep the files organized and make them easier to find when you need them. Here's what your policy should say about these types of records:

#1: Active records. These are records that are currently serving the purpose for which they were created. They include documents like existing contracts, open accounts receivable, and open insurance claims. Active records should be kept in a convenient place, such as the management office, for easy reference.

#2: Inactive records. These are records that are no longer needed for frequent reference, but still need to be kept available for occasional reference. They include documents like completed contracts and settled insurance claims. Inactive records don't need to be kept at your fingertips, but they should be kept in a safe place that's relatively easy to access.

(continued on p. 3)

BOARD OF ADVISORS

Joseph E. Adams, Esq.

Becker & Poliakoff LLP
Naples & Fort Myers, FL

David J. Byrne, Esq.

Ansell Grimm & Aaron, PC
Princeton, NJ

Richard S. Ekimoto, Esq.

Ekimoto & Morris, LLLC
Honolulu, HI

Robert M. Diamond, Esq.

Reed Smith LLP
Falls Church, VA

V. Douglas Errico, Esq.

Marcus, Errico, Emmer
& Brooks, PC
Braintree, MA

Paul D. Grucza, CMCA, AMS, PCAM

The CWD Group, Inc. AAMC
Seattle, WA

Ellen Hirsch de Haan, Esq.

Wetherington Hamilton, PA
Tampa, FL

Benny L. Kass, Esq.

Kass, Mitek & Kass, PLLC
Washington, DC

Tammy McAdory, CMCA, AMS, PCAM

Kiawah Island Community Assn.
Kiawah Island, SC

P. Michael Nagle, Esq.

Nagle & Zaller, PC
Columbia, MD

Ronald L. Perl, Esq.

Hill Wallack LLP
Princeton, NJ

Tom Skiba

Community Associations Institute
Alexandria, VA

Clifford J. Treese

Association Data, Inc.
Mountain House, CA

Editor: **Elizabeth Purcell-Gibney, J.D.** Executive Editor: **Heather L. Stone** Director of Marketing: **Peggy Mullaney** Cust. Serv./Fulfillment Mgr.: **Darlene S. Cruse**

COMMUNITY ASSOCIATION MANAGEMENT INSIDER [ISSN 1537-1093 (PRINT), 1938-3088 (ONLINE)]
is published by Vendome Group, LLC, 216 East 45th St., 6th Fl., New York, NY 10017.

Volume 16, Issue 1

SUBSCRIPTIONS/CUSTOMER SERVICE: To subscribe or for assistance with your subscription, call 1-800-519-3692 or go to our website, www.CommunityAssociationManagementInsider.com. Subscription rate: \$370 for 12 issues. **TO CONTACT THE EDITOR:** Email: egibney@vendomegrp.com. Call: Elizabeth Purcell-Gibney at (212) 812-8434. Fax: (212) 228-1308. **TO PLACE AN ADVERTISEMENT:** Please contact Heather Ogilvie Stone at hstone@vendomegrp.com or call (212) 812-8436.

DISCLAIMER: This publication provides general coverage of its subject area. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional advice or services. If legal advice or other expert assistance is required, the services of a competent professional should be sought. The publisher shall not be responsible for any damages resulting from any error, inaccuracy, or omission contained in this publication.

© 2016 BY VENDOME GROUP, LLC. All rights reserved. No part of *Community Association Management Insider* may be reproduced, distributed, transmitted, displayed, published, or broadcast in any form or in any media without prior written permission of the publisher. To request permission to reuse this content in any form, including distribution in educational, professional, or promotional contexts, or to reproduce material in new works, please contact the Copyright Clearance Center at info@copyright.com or (978) 750-8400. For custom reprints, e-prints, or logo licensing, please contact Heather Stone at (212) 812-8436 or hstone@vendomegrp.com.

AUGUST 2016

Records Management Policy

(continued from p. 2)

#3: Obsolete records. These are records that can be disposed of because they've been kept for the full amount of time required by your policy's record-retention schedule and have no relevance to an impending or ongoing lawsuit. Records can be disposed of after they've been kept for the full amount of time required by your policy's retention schedule only if it's clear that they're not needed for a current or expected lawsuit.

Increasingly, associations have turned to using electronic records and documenting important conversations or correspondence using email threads, rather than using snail mail to communicate with vendors, members, or staff. Just like your paper files, your policy should specify which electronic files are active, inactive, or obsolete and point out where they can be found. Electronic records take up valuable space on your computer's hard drive just as paper records take up space in your office, but you have several options, such as using an external hard drive for files or using a service that will store your electronic files for a fee. It's always a good idea to consult an IT expert, if you're not sure how to set up a good electronic records system.

Explain How to Dispose of Paper, Electronic Records

Your policy should explain the proper ways to dispose of obsolete paper and electronic records.

Paper records. You can't just toss confidential records into the Dumpster. They should be destroyed, either by shredding or incineration. Those are the only ways to ensure they don't fall into the hands of someone you don't want seeing them.

So say in your policy that confidential paper records must be destroyed by shredding or incineration by the person in charge of implementing your policy, or under her direct supervision. And say that paper records that aren't confidential can be recycled. It's important to protect the people involved in records management for the association. So specify that as long as the person in charge of implementing your policy destroys the records according to the association's records-management policy, neither she nor any board member nor the association can be held liable for doing so.

Finally, note that if the association knows or anticipates that it's going to be involved in a lawsuit, all records destruction should immediately cease. Destroying records in this case could raise suspicion that you did so because their contents would be harmful to you had they been available. Also, if you destroy records that are needed for a lawsuit, you could be held liable for what's called "spoilage of evidence," which could lead to your having to pay damages.

Electronic records. Merely deleting or overwriting confidential electronic records isn't good enough. Computer experts can retrieve files from your computer even after you've deleted or overwritten them. So say in your policy that confidential electronic records must be destroyed by a qualified IT professional under the supervision of the person in charge of implementing your policy. However, it's best not to specify the exact methods such professionals may use, because they'll change as new technology becomes available.

(continued on p. 5)

MODEL
POLICY**Streamline Association's System for Records Storage, Retention, and Destruction**

Ask your attorney about improving your association's records-management policy by adapting the following five points for your specific needs.

RECORDS STORAGE, RETENTION & DESTRUCTION

- 1. Policy implementation.** Authority for the implementation and maintenance of this records-management policy (the Policy) is delegated to the community association manager. The community association manager is directed to work in conjunction with legal and financial counsel and the association's board of directors to ensure that the Policy is updated as necessary, and that the retention schedule is applied to the association's records as required.
- 2. Active, inactive, and obsolete records.**
 - a. Active records.** Active records are those records that serve the immediate operational, legal or fiscal purpose for which they were created. Active records shall be kept in the management office or in such other active office area as the Board of Directors of the Association may, from time to time, determine.
 - b. Inactive records.** Inactive records are those records that are no longer needed for frequent reference, but need to be kept for operational, legal, fiscal, or historical purposes. Inactive records shall not take up valuable office space, but instead shall be moved according to the retention schedule to an appropriate form of storage depending on whether the records are paper or electronic, as the Board of Directors of the Association may, from time to time, determine.
 - c. Obsolete records.** Obsolete records are those records that are scheduled by the Policy to be disposed of because they no longer have operational, legal, fiscal, or historic value. Obsolete records shall be disposed of according to the retention schedule and pursuant to the applicable paragraph of the Policy entitled "Destruction of obsolete records."
- 3. Destruction of obsolete records (paper).** Upon expiration of the time frames set forth in the retention schedule, confidential paper shall be destroyed by means of shredding or incineration, which results in complete destruction of the records. Such destruction shall be done by the person in charge of implementing the Policy, or under his/her direct supervision. Records that are not confidential or proprietary may be recycled. Neither the person in charge of implementing the Policy, the individual board members, nor the Association shall have liability for the destruction of any paper records of the Association so long as such destruction is performed in compliance with the Policy. However, if the Association has notice of, or reasonable anticipation that it will be involved in a lawsuit, all records destruction under this paragraph shall immediately cease.
- 4. Destruction of obsolete records (electronic).** Upon expiration of the time frames set forth in the retention schedule, confidential electronic records shall be destroyed by a qualified IT professional under the supervision of the person in charge of implementing the Policy.

Neither the person in charge of implementing the Policy, the individual board members, nor the Association shall have liability for the destruction of any paper records of the Association so long as such destruction is performed in compliance with the Policy. However, if the Association has notice of, or reasonable anticipation that it will be involved in a lawsuit, all records destruction under this paragraph shall immediately cease.
- 5. Documentation of records-management actions.** The person in charge of implementing the Policy shall document all records-management actions, including storage and destruction of records. Such person shall also sign and date a "Certificate of Destruction" substantially the same in form and content as the sample form attached hereto and made a part hereof. Such person shall attach to such Certificate of Destruction any documentation for destruction services received from an outside contractor retained for this purpose.

AUGUST 2016

Records Management Policy

(continued from p. 3)

As with destroying obsolete paper records, say that as long as the person in charge of implementing your policy destroys the records according to the policy, neither she, nor any board member nor the association can be held liable for doing so. And reiterate that if the association knows or anticipates that it's going to be involved in a lawsuit, all destruction of electronic records should immediately cease.

Require Documentation of Record's Life Cycle

Documenting the way you've destroyed records is as important as the way you keep them. Your policy should require the person in charge of implementing it to document all records-management actions, including storage and disposal of records. Keep a list showing what's in storage, what's in the main office, and

(continued on p. 6)

MODEL FORM

Make Records Coordinator Attest to Records Destruction

Your records coordinator should complete the following form each time association records are destroyed. Ask your attorney if it's wise to include any additional information that would further protect the association.

CERTIFICATE OF DESTRUCTION

COMMUNITY ASSOCIATION'S NAME _____

RECORDS COORDINATOR'S NAME _____

TEL.# _____ FAX # _____

EMAIL _____

Records Disposed of: List Title & Format (electronic or hard copy)

Destruction Date: _____

The above records were destroyed by: Incineration Shredding Other

Total # of boxes/files destroyed _____ **Documentation attached:** Yes No

RECORD COORDINATOR'S SIGNATURE _____ DATE _____

AUGUST 2016

Records Management Policy

(continued from p. 5)

what has been destroyed. This will help ensure that you can find records you need. You don't have to keep a complete list of each individual document; it's enough to refer to certain types of documents collectively. For example, your list could say "2010 payroll records were destroyed on May 1, 2016."

When either paper or electronic documents are destroyed, the person in charge of implementing your policy should sign a Certificate of Destruction form, attesting to the fact that records destruction took place on a certain date. Like our *Model Form: Attest to Records Destruction*, your form should explain how records destruction was done, for example, incineration, and should attach any documentation for destruction services received from an outside vendor. ♦

RISK MANAGEMENT

Keep Conference Call Meetings Efficient and Confidential

If your community association has a hard time getting enough board members to attend monthly board meetings to form a quorum, consider meeting by telephone conference call. Meeting by conference call makes it easier for directors to attend, increasing the likelihood that they will. This is especially true for vacation communities, whose board members often live far away from one another and are rarely all present at the community at the same time.

But meeting by conference call is different from meeting in person, so you need to think about certain practical issues before going forward. Use the following four tips when you hold board meetings by conference call. Also, ask your association's attorney whether your state law requires your association to pass a bylaw amendment allowing board meetings to be held by conference call.

Sign Up for Conference Call Service

Generally, the sound quality of conference calls placed directly from your own phone isn't good enough for something as important as a board meeting. Poor sound quality could lead to miscommunications and wasted time. You can ensure better sound quality by using a conference call service. Just remember to provide each person who should participate with the call-in number and access PIN number they will need to participate in the call.

Use Speaker Phone Under Certain Circumstance

You should use speaker phone when more than one board member participates from any one location. This is common when board members who are present at the community when the board meeting is held are in one room but fellow board members participate from other locations. Most states' laws require everyone at a board meeting to be able to hear everyone else. Even if your state doesn't require this, communication is best when everyone can hear everything first-

(continued on p. 7)

AUGUST 2016

Risk Management

(continued from p. 6)

hand, so a speakerphone should be used. Having one person participate directly on the call and relay to others in the room what's being said isn't effective or appropriate.

Tell Board Members to Participate in Private

If you hold a conference call board meeting that isn't open to other members—such as an executive session of the board—remind board members that the meeting is confidential. And tell them that, because of that, anyone participating by conference call must do so in private, without non-board members in the room. Then, before discussing any substantive issues, confirm with each board member that non-board members aren't in the room from which he's participating.

Recognize Board Members Who Wish to Speak

The person running the board meeting should recognize—that is, officially identify—board members who wish to speak before allowing them to do so. Otherwise, participants of the conference call won't know who's speaking at any given time. It's preferable for each board member to preface her comments by stating her name. ♦

DEALING WITH CONTRACTORS

Ensure Right to Collect Legal Expenses from Contractor

Resorting to litigation if a contractor violates your agreement with it is an unfortunate situation for many reasons. Lawsuits take up valuable time that the association could be using in a positive way to better the community. And a lawsuit might ultimately end up costing even more than the amount that the contractor owed the association anyway. Even if you've agreed that a claim must be resolved by arbitration, those costs can skyrocket too. Some shady contractors rely on high legal expenses to discourage associations from suing or arbitrating a payment dispute, using it as leverage and then negotiating a favorable settlement for themselves.

Most standard construction contract forms don't give you any help if a contractor tries this maneuver. They say nothing about who pays legal fees and costs if there's a dispute. Without a contract clause, you can't expect a judge or arbitrator to order the contractor to pay the legal fees you incur in pursuing your claim. But you can include language in your contract that will allow you to collect legal expenses if the contractor violates the contract. Here's how.

Draft Contract Clause

To avoid a situation in which a contractor owes you money but it will cost more than that amount to actually collect it, insist on a contract clause that addresses legal fees. It's best to use a strong clause that requires the contractor to pay the

(continued on p. 8)

AUGUST 2016

Dealing with Contractors

(continued from p. 7)

legal fees you incur in suing or arbitrating any claim to enforce the contract's terms. Ask your attorney about adding the following language:

Model Contract Clause

Legal Expenses. Contractor shall pay to the Association all costs and expenses, including, but not limited to, court or arbitration costs, attorney's fees, and expert witness and investigation fees, incurred by the Association in enforcing the terms of this Contract.

With a clause like this, the threat of having to pay your legal fees may be enough to prevent a contractor from skipping out on a job before it's finished, or doing substandard work. And if you must go to court or arbitration, the clause improves your chances of getting reimbursed for your legal fees.

Be Prepared for Pushback

Some contractors may balk at this strong contract language. If that happens, you can suggest that the losing party pay the winning party's legal fees. This compromise gives both the association and the contractor an incentive to act reasonably. The party that wins on the most significant issues, not necessarily the party that gets the largest dollar award, is usually considered to be the winning party—in legal terms, the “prevailing party”—for purposes of legal fees.

A contractor operating in good faith shouldn't object to this type of arrangement. Suggest that you and the contractor use this language to accomplish that goal:

Model Contract Clause

In any arbitration or litigation brought to enforce the terms of this Contract, the losing party shall pay to the prevailing party all costs and expenses, including but not limited to, court or arbitration costs, attorney's fees, and expert witness and investigation fees, incurred by the prevailing party.

RECENT COURT RULINGS

➤ **Association Had Authority to Fine Member for CC&R Violations**

FACTS: A homeowner who violated the rules in an association's governing documents was fined. He sued the association, claiming that it couldn't lawfully impose fines on its members. He argued that: (1) only a government can impose fines; (2) the restrictive covenants do not authorize the imposition of fines; (3) the bylaws' provisions concerning fines are not the equivalent of a liquidated damages provision in a contract but rather constitute unenforceable contractual penalties; and (4) the association's imposition of fines violates public policy. The association asked the trial court for a judgment in its favor without a trial. The court ruled in favor of the association. The homeowner appealed.

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

(continued on p. 9)

AUGUST 2016

Recent Court Rulings

(continued from p. 8)

REASONING: The homeowner argued that there is no statute authorizing the association to impose fines on its members and “at common law, the power to fine is vested solely in the government.” The appeals court disagreed, noting that the association was incorporated as a nonprofit corporation and it has been subject to the South Carolina Nonprofit Corporation Act, which requires nonprofit corporations to adopt bylaws and provides that the bylaws “may contain any provision for regulating and managing the affairs of the corporation that is not inconsistent with law or the articles of incorporation.” Currently, there are no South Carolina statutes or appellate opinions prohibiting nonprofit corporations from fining their members, said the appeals court.

Further, the imposition of fines does not conflict with the association’s governing documents. The appeals court stated that an association may “provide penalties by way of fines for the derelictions of its members, however, such penalties must be determined according to some method to which the member has agreed, at least impliedly, by joining the association, not only as to the imposition of the fine but also as to the maximum amount thereof.” Here, the homeowner’s deed to his property was made subject to any recorded restrictions, such as the association’s restrictive covenants appearing in the 1979 deed conveying the property to the homeowner’s predecessor in title. The 1979 deed states, “This conveyance is made subject to the following conditions, covenants and restrictions: (1) By acceptance of this deed, the grantee covenants and agrees that he will become a member of the association and will abide by its duly enacted rules, regulations and by-laws.” Therefore, determined the appeals court, the homeowner entered into a contractual relationship with the association when he executed and accepted the deed to his property in 2007. By accepting his deed, the homeowner agreed to be bound by the association’s “duly enacted rules, regulations and by-laws.”

- Brown v. Spring Valley Homeowners Assn., June 2016

➤ Association Didn’t Have Right to Assess Litigation Costs Against Members

FACTS: Two condominium unit owners sued the association for claims associated with alleged mold contamination in their unit and common area. A trial court ruled in favor of the association. The association also asked the trial court to allow it to collect as an assessment against the owners the litigation fees and costs. The trial court dismissed the claim. The association appealed.

DECISION: A Georgia appeals court upheld the trial court’s decision.

REASONING: The unit owners had entered into a contract with the association that empowered the association to assess the unit owners for common expenses. Although the default form of assessment was to assess all owners in accordance with the unit’s interest in the community’s common property areas, when common expenses were “occasioned by the conduct of less than all” the unit owners, the declaration empowered the association to assess those expenses against only the units responsible.

(continued on p. 10)

AUGUST 2016

Recent Court Rulings

(continued from p. 9)

The association asserted that because it had prevailed on the mold claim, it could rely on the declaration's special assessment provision in the contract to assess against the unit owners who sued it any expenses incurred in the defense of that lawsuit.

The appeals court noted that to agree with the association's viewpoint would mean that the assessment for defense costs was proper in the first instance. But the appeals court didn't think it was.

The unit owners' lawsuit wasn't conduct that "occasioned common expenses" that could be assessed. While the declaration allowed the association to recapture costs—in the form of a special assessment—resulting from conduct of less than all of the unit owners, that necessarily meant that the conduct of the unit owner against whom the assessment is imposed must be the cause of the common expense, and that no conduct of the association itself or any other owners also caused the expense. But the appeals court said that the lawsuit didn't result solely from the unit owners' conduct; the claims were based on the conduct of the association with respect to its response to and management of various mold and moisture issues.

- City Heights Condominium Association, Inc. v. Bombara, June 2016

➤ **Manager Had Duty to Enforce Pet Rules, Not Make Them**

FACTS: A condominium unit owner was attacked by another resident's dog in a common area. The owner sued the association and manager. She claimed that the association and the manager of the condominium were negligent because the condominium association failed to enact and/or enforce rules relating to dogs, failed to enforce the regulations that were in place, and failed "to perform regular inspections of all buildings to ensure compliance" with the rules and regulations. The association and manager asked a trial court for a judgment in their favor because they did not owe a duty to the unit owner. The trial court ruled in favor of the association and manager. The unit owner appealed.

DECISION: A Missouri appeals court reversed the trial court's decision.

REASONING: The appeals court determined that, although the association and the manager did not have a duty to create reasonable rules and regulations, once they exercised the power to create rules and regulations and undertook to render services to residents, they had a duty to enforce the rules by the language of the rules as written.

In this case, the bylaws provided a pet policy with guidelines for pet ownership. Specifically, the bylaws stated that residents may have only "one dog and not over 25 pounds." The document also states that unit owners "must have a pet permit filed with the Management Company." Other pet regulations require that pets be on a leash in common areas, owners must immediately pick up pet waste, and pets should not be left unattended. Because rules had been created, but the manager and association hadn't reasonably enforced them, they could be held liable for the owner's injury. ♦

- Taticek v. Homefield Gardens Condo Assn., June 2016