Community Association Management Insider®

Helping You Run Your Condo or Homeowners Association Legally and Efficiently

MARCH 2017

FEATURE

Here's how you can cut costs without cutting the benefits of association living.

IN THIS ISSUE

PRODUCED IN CONSULTATION WITH

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Rein in Association Expenditures to Keep Costs Low, Members Happy

Finances are a huge consideration for community association boards and managers. It takes money—and sometimes lots of it—to keep a community or condominium building up to high standards and running smoothly. If you manage an association or serve on your association's board of directors, you already know that almost everything you do depends to some degree on whether you have a budget that you can work with realistically. Amenities, such as a pool or clubhouse, need maintenance and repair; common areas must have a manicured appearance; and, from an administrative standpoint, you need to have an adequate staff for day-to-day management tasks. This comes with a price tag.

Reining in costs and keeping them as low as possible without compromising quality can be tough, especially if your association is operating on a shoestring budget. Here's how you can cut costs without cutting the benefits of association living that members expect from this type of lifestyle.

Identify, Rectify Overspending

Efficiency and making sure that expenditures aren't unnecessarily high is key for saving money for community associations. There are some signs that the board of directors of an association and its manager should watch out for that indicate overspending within the community. And there are steps you can take to address this. But it requires communication to solve this problem.

So how can you identify this problem? "The monthly financial package is the best place to look, especially the budget variance report," says certified public accountant Neal Bach, whose accounting firm regularly evaluates the financial health of associations. "That's why it's so important to have an accurate budget, and for at least one board member—usually the treasurer—to review the reporting package each month," he stresses.

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Rein in Expenditures

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Bach also emphasizes that the variance report can help boards and managers identify a variety of potential issues, including overspending, collections, and accounting mistakes. "The earlier the issue is identified, the better the chance of correcting problems or mistakes before they become catastrophic," Bach notes.

Reduce Major Costs

One of the best things a manager can do to help cut costs is to identify the main, "big ticket" items that are cause for financial concern. Bach always recommends that associations and their managers start at the top of the expense list. Look at the largest contracts first, which may include landscaping, building maintenance, pool management, and insurance. Then confirm that all contracts are current, and the fees (including any automated increases) are accurately reflected in the budget and on vendor invoices. If a contract has expired, or it's older than three to five years, consider taking that service out to bid, Bach suggests. There may be technologies or approaches that allow companies to provide more services for the same cost, or even at a reduced cost, he adds.

Boards Should Prepare Before Proposals

When association boards are hiring a management company, they should try to determine what level of services they need, and for associations operating on a tight budget, how they could negotiate the cost of management services so that everybody wins. Bach recommends asking at least three property management companies for proposals. But before you contact them, take the time

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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 9

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.

Rein in Expenditures

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to clearly identify the specific services and service levels that your community requires, he says.

Document all requirements on a spreadsheet, so prospective vendors can mark whether or not the particular service is offered along with applicable cost, Bach says. For example, do you need concierge-level service with someone on-site 40 hours per week, or would a portfolio manager, who manages multiple properties, work for a lower cost?

"This will help you do an apples-to-apples comparison between management companies," notes Bach. It will also show prospective companies that you operate your community like the business that it really is, which may reduce their workload, which they can reflect in lower fees, he explains. When negotiating, try to include as many services as possible in the flat monthly fee, or at least agree on the specific costs. Transactional fees, like copies, mailings, major project management, and maintenance, can add up quickly and blow your budget if you're not careful. Finally, consider negotiating on services that you can provide through neighborhood volunteers. If the clubhouse committee rented the clubhouse, would that lower the monthly property management fee?

Don't Automatically Run to Attorney

Every association should have an attorney on standby in case a legal issue arises. But running to a legal professional for everything that is remotely related to the law can really add up. So if asking the association's attorney a question would be convenient but isn't truly necessary and won't create liability for you, think about handling it on your own, with other members of the management staff, or the board. "Associations with professional management shouldn't need legal counsel to help with the ordinary day-to-day governance matters, like elections, board meetings, and owner access to records and minutes," notes New Jersey community association attorney David J. Byrne.

PRACTICAL POINTER: Association boards should remember that property management companies are for-profit organizations. They are in this field to provide great service, but also to make money. If you squeeze too hard neither your community nor the management company will be happy with the results. Also, remember that you're normally buying a team (accounting, HR, training, leadership, and administrative professionals) to support your community, not just a property manager. ♦

Insider Source

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IN THE NEWS

Study: HOA Satisfaction Lower Than Expected

The Coalition for Community Housing Policy in the Public Interests most recent national survey has uncovered higher dissatisfaction with associations from their members. A whopping 81 percent of community association residents cited a lack of transparency and poor communication as the top concerns among those who live in planned communities and condominiums.

Numbers Paint a Picture

Respondents that are "very dissatisfied" made up 65.9 percent of residents surveyed; 15.1 percent are "dissatisfied" because of transparency and communication issues.

Studies from other community association organizations touted association lifestyles as being very satisfying for members, but CHPPI said in a press release that the statistics from its studies are overwhelmingly negative. Association professionals and board members shouldn't rest on their laurels based on high-satisfaction studies. In fact, 72.6 percent of condo and association homeowners surveyed said they were generally "very dissatisfied" (51.2 percent) or "dissatisfied" (21.4 percent) with the whole concept of community association living, not just transparency and communication issues. And, 60.8 percent of survey respondents urged that community associations should have more government oversight and regulation.

The CHPPI survey, which rates the level of concern on more than 50 commonly reported topics and issues, found that a broad spectrum—from voting and election procedures to the power of the board to fine owners—were viewed as major problems within condo associations and HOAs by respondents.

Failure to Discuss Foreclosure

Regarding transparency, a shocking 67.4 percent of community association residents say that prior to closing on their home they were not told that an association or condo association has a legal right to foreclose on the property if the owner becomes delinquent on assessments, fees, dues, and fines. Some of this blame is being shifted to state laws, though. No states require associations to disclose to a buyer that an association has the power to foreclose on a homeowner to collect alleged money due.

However, association experts and members alike have noted that consumers should be told before they complete the sale of an association-run property. The survey reflects this—59.1 percent of survey respondents reported that they didn't even know prior to closing that their condo or association board had the power to issue fines.

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In the News

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The survey's preliminary results were gathered from more than 500 owners residing in condominium and HOA communities in Arizona, California, Florida, Illinois, Kansas, Missouri, Nevada, and Texas, among other states.

Double-Edged Sword for Some Owners

Some homeowners lamented that they hadn't realized that one of the attractions of condo and association living—the hefty tax breaks in the form of federal and state tax deductions for mortgage interest and property taxes for owners—really are "subject to double taxation" because they not only pay real estate taxes to local municipalities, but also are required to pay monthly assessments for common areas. For example, owners in a private community association must pay for snow plowing and upkeep of private roads, maintenance of private streets and lighting, upkeep of storm-water retention basins, and other common-area amenities within the association's jurisdiction. ♦

RECENT COURT RULINGS

➤ Court Didn't Find Pervasive Pattern of Discrimination

FACTS: A woman moved into a condominium with her mother, who was handicapped, to help with her daily activities. The woman asked the condominium association to provide an unobstructed path between the member's front door and driveway.

The member and her mother claimed that the requests were met with hostility from the association, the management company, and the president of the board of directors. They refused to create a path to accommodate the member. Additionally, they claimed, an association employee ridiculed people with disabilities. The association demanded medical proof showing why the member couldn't use a different route; told the member she couldn't speak at association meetings or communicate with it directly; issued parking tickets to the member after she began advocating even though other residents used the guest parking without repercussion; and, under the direction of the board president, installed a lamppost that shined light into the windows of the member's home.

The member sued the association, management company, and president, alleging violations of the Fair Housing Act (FHA). The defendants asked a trial court for a judgment in their favor without a trial.

DECISION: An Illinois trial court ruled in favor of the association, management company, and board president in part and in favor of the member in part.

REASONING: The court noted that the purpose of the FHA is to "provide, within constitutional limitations, for fair housing throughout the United States." The FHA's protections include prohibiting housing discrimination

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Recent Court Rulings

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based on disability. The member alleged that the defendants violated the FHA by "failing to make and enforce rules to keep walkways accessible to people with disabilities, rendering the premises inaccessible to the member and other people with disabilities in violation of the FHA." The court ruled in favor of the member on that issue. However, the court determined that the member hadn't provided enough evidence to show that the association's actions were part of a pervasive pattern of discrimination. ♦

- Godbole v. Ries, January 2017

Q&A

Shielding Board Members from Individual Liability

Q A weather disaster has severely damaged many of the homes in the planned community I manage. The local government is determining whether the community should be demolished. Several board members want to do this, but homeowners are protesting. The board members are worried that if they take action, they'll be held legally responsible. What are the chances of this, and are there any recent cases that address this issue?

A A recent Texas appeals court ruling dealt with a similar situation. A court determined that the board members, who were being sued by homeowners in a community that had been demolished, weren't liable. As always, check with your association's attorney, but the case is a good example of what can happen in a scenario where there are disagreements about rebuilding versus demolishing structures after extreme weather.

Case on Point

In the Texas scenario, a hurricane and a fire caused significant damage to many homes in a planned community. The city where it was located found that the community was "substantially damaged," which required that it could be repaired only if it were brought into compliance with the city's then-current building codes. However, the community wasn't repaired and the city declared that the buildings constituted substandard housing and a public nuisance. The city ordered the association to obtain either a permit to repair to code or a permit to demolish the community. A fire caused additional damage, and the association obtained a demolition permit from the city. The community was demolished.

Prior to the actual demolition, a group of six current or former unit owners who wanted the community restored to its pre-hurricane condition sued the association and several current and former members of the board in their individual capacities. The individual board members asked a trial court for a ruling in their favor without a trial. They argued that the unit owners had not asserted claims

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Q&A
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that would support personal liability. Additionally, the board members asserted that they were immune from personal liability under the Texas Charitable Immunity and Liability Act.

Appeals Court Agrees About Immunity Assertion

The trial court dismissed all claims against the individual board members. The owners appealed.

The owners contended that the trial court erred when it granted a traditional summary judgment in favor of the board members for two reasons: (1) the trial court mistakenly concluded that each board member was entitled to statutory immunity; and (2) there were genuine issues as to the existence and breach of certain applicable standards of care governing the actions and omissions of each board member.

The owners asserted that the law doesn't apply, because the claims at issue are brought by members of the association against its board, and the act "does not limit or modify the duties or liabilities of a member of the board of directors or an officer to the organization or its members and shareholders."

The appeals court explained that the law was enacted to limit the liability of charitable organizations and immunize volunteers who meet certain conditions. Under the law, and subject to exceptions, "a volunteer of a charitable organization is immune from civil liability for any act or omission resulting in death, damage, or injury, if the volunteer was acting in the course and scope of the volunteer's duties or functions, including as an officer, director, or trustee within the organization." The law defines "charitable organization" to include a homeowners association and "volunteer" to mean "a person rendering service for or on behalf of a charitable organization who does not receive compensation in excess of reimbursement for expenses incurred."

The board members asserted that they were immune from liability because they were volunteers rendering services for the association when the incidents—that is, the hurricane and fire—giving rise to the owners' lawsuit occurred. There's no dispute that the homeowners association qualified as a charitable organization and that the board members were volunteers serving either as current or former directors on the board of the association, determined the appeals court. Therefore, it upheld the decision of the lower court [Brown v. Hensley, January 2017].

Importance of Using Counsel

This particular decision ended well for the association's board members, in large part because the state of Texas provides statutory immunity for these type of organizations and volunteers. As always, check with your association's attorney before taking any actions involving property in the community you manage to make sure that a similar type of immunity would apply to your board members in the event that the city of your planned community determines that structures in it must be demolished. ♦

LEGAL COMPLIANCE

Protect Association from Document Discovery Pitfalls

Legal problems for associations have evolved along with technology that while helpful, can also hurt board members and managers. With the help of technology, you might be able to conduct business more efficiently, but you also need to understand that a lawsuit will potentially require handing over electronically stored information (ESI)—such as email, documents, voice messages, and digital images.

If you think that you can't possibly have a large enough amount of ESI to motivate your association to come up with a game plan in case litigation arises, think again. There is no corner of your office where you won't find a potential source of ESI. And your office's ESI could be subject to "discovery" during legal proceedings. Discovery happens before the trial occurs. It's the process by which relevant information and documents from the opposing side are gathered to obtain pertinent facts related to the lawsuit. Generally, discovery devices include witness statements, questionnaires, and document production requests. While there are limits of what's discoverable, you still need a solid strategy to avoid e-discovery problems.

Exceptions to General Rule

If your management company or your association is sued, you may be required to hand over anything that records a thought and is kept in virtual form that relates to the lawsuit. Email messages are no different from letters you may write. You shouldn't assume that because the communications are private, they'll be treated as confidential. However, the following exceptions can work in your favor:

Exception #1: Inaccessible data. Under the Federal Rules of Civil Procedure (the rulebook on federal court trial procedure), inaccessible data is data that involves too much work to obtain. This data, if requested, must only be identified; it need not be produced. Inaccessible data can include deleted emails.

If a party claims that certain information is inaccessible during the discovery process, the party must show that the information is not reasonably accessible. Accessibility of ESI depends on the media in which it is stored. If the ESI is no longer in a searchable format and would require high cost to restore, a court could determine that the ESI is not reasonably accessible.

Exception #2: Attorney-client privilege. In general, communications with your attorney are considered "privileged"—that is, outside the scope of discovery. However, this protection isn't all-encompassing. That's because while a message between an attorney and a board member offering advice or outlining legal strategies is clearly privileged, email messages among board members discussing the attorney's advice may be at risk. A judge might conclude that a group email dis-

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Legal Compliance

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cussion of the attorney's advice, if that group consists solely of board members, destroys the privileged protection of the exchange between the board member and the attorney. Therefore, board members are best advised to treat their discussions of information provided by their attorney as if those discussions might be subject to discovery, and to avoid having those discussions via email.

PRACTICAL POINTER: Don't try copying all email communications to the association's attorney as a means of shielding them from discovery. This is probably ineffective, as a court is likely to see this action as an attempt to make all board communications exempt from discovery. Only direct communications between an attorney and client can be reasonably assured of protection.

Follow Duty to Preserve Evidence

Your office has the obligation to preserve evidence when you are on notice that the evidence is relevant to a current lawsuit or when you should have known that the evidence may be relevant to future litigation. The obligation to preserve evidence doesn't require you to preserve every scrap of paper. Rather, you should preserve evidence that's reasonably likely to be the subject of a discovery request, even before that request is actually received.

So when does your duty start? Your duty to preserve electronic evidence is defined by the "trigger date." For instance, the date of the commencement of litigation, or some other preceding event. You have no duty to preserve evidence before the trigger date. For example, if a member's guest is involved in a slip-and-fall accident in a common area, and the guest hasn't yet sued the association, your community's staff should not delete email messages pre-dating the accident, in which a member noted that a section of the common area was iced over from a nearby malfunctioning faucet.

Be Aware of Voluminous Records

If you're sued, you still have to review your documents for privilege. This is intimidating when you consider the time and effort involved in reviewing many thousands, even millions, of documents. Consider a management office of 20 employees working 250 days, creating 25 email messages a day. This scenario would produce 125,000 messages. Now, multiply that number by 12 monthly backups. This would create 1.5 million messages residing at stored data locations.

Understand Complex Discovery Problems

Many management companies still remain unprepared to meet strict court requirements for the discovery and handling of electronic evidence. For example, businesses must be able to quickly produce such data "including email, digital word documents and images, and digital audio and video," when required by a federal court. So you should explain to your management team employees that they should not treat communications from their work email accounts as private.

It's recommended that a management office establish a policy requiring the periodic removal of old email messages. The federal rules of civil procedure establish a "safe harbor" for information lost "as a result of the routine, good-faith

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Legal Compliance

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operation of an electronic information system." So there's not as much pressure as you can imagine. But to be on the safe side, create a policy to help your staff determine what information sent or received by email should be retained. Like our *Model Policy: Inform Staff How to Avoid Discovery Hazards,* yours should give employees email retention rules. And explain in a meeting how important it is to follow these rules so that the association isn't open to any liability.

Management should also decide on policies in the event of threatened or actual litigation. How are the documents relating to the lawsuit to be preserved and archived? The answer depends on each office's computer system and information technology structure. In such instances, information technology decisions must be coordinated with an attorney, and everybody should be informed of ESI rules. ♦

MODEL POLICY

Inform Staff How to Avoid Discovery Hazards

Emails are the bulk of electronically stored information in a management office. Ask your association's attorney about adapting these email retention rules to help your staff understand the legal guidelines associated with email use. Have your employees sign and acknowledge that they understand the policy and encourage them to come to you with any questions if they are unsure whether information should be kept or destroyed.

EMAIL USAGE & RETENTION

PURPOSE: The purpose of this policy is to ensure the proper use of company email and to help staff determine what information sent or received by email should be retained and for how long.

EMAIL USAGE: Email is a communication tool, and you are required to use this tool in a responsible and lawful manner. The [*insert company name*] email system shall not be used in the manner outlined below. Employees who receive any emails with this content from any [*insert company name*] employee should report the matter to their supervisor immediately.

- Sending or forwarding emails with any libelous, defamatory, offensive, racist, or obscene remarks.
- Unlawfully forwarding confidential information.
- Sending an attachment that contains a virus.
- Unauthorized use, or forging, of email header information.

EMAIL RETENTION POLICY: This policy is intended to help you determine what information sent or received by email should be retained and for how long. The information covered in these guidelines includes, but is not limited to, information that is either stored or shared via electronic mail or instant messaging technologies.

Category	Definition	Retention Period
Administrative Correspondence	Includes, though is not limited to, clarification of established company policy, including holidays, dress code, and workplace behavior.	4 years
Fiscal Correspondence	All information related to revenue and expense for [*insert company name*] and budgetary data.	4 years
General Correspondence	Covers information that relates to client association interaction and the operational decisions of [*insert company name*].	1 year