Helping You Run Your Condo or Homeowners Association Legally and Efficiently

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FEATURE

Don't let an unclear view protection bylaw lead to litigation.

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Produced in consultation with

Put Five Key Details in View Protection Bylaw

Whether they're sunset or city skyline views, homes in areas noted for their scenic beauty are a hot commodity. Homeowners who have paid a premium for housing that boasts those views feel they should be entitled to enjoy them—unfettered by other structures or foliage that might later get in the way. To this end, some of the most notable community association litigation cases have dealt with view protection bylaws. Those cases involved owners who have paid for a specific view that they can no longer enjoy, or that previously made their unit more valuable and unique than others, suing the association. Here's how you can keep owners with a pricey view happy.

Pass Specific Protections to Avoid Dispute

If your association doesn't already have one, it should consider passing a view protection bylaw that prohibits owners from building or planting anything that would block other owners' views. You can pass and implement a successful view protection bylaw, like our *Model Bylaw: Shield Association from Protected View Lawsuit,* by carving out some key rights for your association. Remember, as with all bylaws and governing documents, you should make sure that terms that will be applied are clearly defined.

Be aware that even though the object blocking a view could be something that another owner has put up, leaving you with the impression that it's an owner-to-owner dispute, the association generally has an obligation to enforce its rules, so associations are sometimes sued too. An association could also be sued by an owner if it denies the owner's request to build an improvement that would block another owner's view. So consult with the association's attorney before taking any action if you're unclear.

Clearly Spell Out Terms

Associations with ambiguous view protection bylaws often lose cases brought by owners. At the very least, a vague bylaw and the prospect

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View Protection

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of losing a case often force associations to settle the case on less favorable terms than they otherwise could have, and only after they've spent a lot of money on legal fees.

It's important to specify two major things in your bylaw: (1) at what point in time a view is "protected"; and (2) whether the association must enforce the bylaw that protects the owner's right to that view. Carve out these rights:

Right #1: Protected views can't be established post-construction. Sometimes members might add a deck, for example, after construction on their unit is finished, and then claim that someone else's unit is blocking their newly created view from the deck. This could even happen years after the unit was originally built. To avoid this type of never-ending difficulty, say in your bylaw that protected views can't be established post-construction [Bylaw, par. d].

Right #2: Association has right not to enforce bylaw. In some situations, the board might decide that it's in the association's best interests not to enforce a view protection bylaw—for example, if the specific facts of the case make it a tough one to win [Bylaw, par. e].

Make sure that before changing your bylaw to give the board this right, you check your governing documents. If the governing documents say that the association may enforce its bylaws through legal action, you can probably give the board the authority to choose not to enforce them in any given case. But if your governing documents say the association shall enforce its bylaws through legal action, you probably can't give the board the authority not to enforce a view protection bylaw at its discretion.

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View Protection

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Define Important Terms

You must make sure that your association's view protection bylaw is drafted so that it's clear and contains all of the details it needs—otherwise, courts may not allow you to enforce it.

Also, an unclear bylaw will make it difficult for your architectural control committee to decide whether to approve members' requests to build an improvement or to plant trees or shrubs that could potentially infringe on another owner's scenic view. Remember that an association can get sued not only for approving a request it shouldn't have, but also for refusing to approve a request it should have.

Clarify these key terms to prevent ambiguity in your view protection bylaw:

Term #1: "Protected view" or "view." Often, view protection bylaws simply refer to a protected view, without defining specifically what view is protected. For example, many bylaws say, "There shall be no improvement which sub-

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MODEL BYLAW

Shield Association from Protected View Lawsuit

Adapt the five key details in this model view protection bylaw for your own. It can help make your terms enforceable when and if there is a dispute. Show this bylaw to your attorney before using it.

PROTECTED VIEWS

a. Protected view. All Lots shall have a protected view of [*insert description of protected view(s)*] (the "Protected View").

b. No substantial obstructions. No object, thing, planting, vegetation, or other improvements shall be erected, placed, constructed, planted, or maintained in such location or of such height as to substantially obstruct the Protected View from any immediately adjacent Lot. A view shall be considered "substantially obstructed" if the object, thing, planting, vegetation, or other improvements in question shall reduce visibility of the Protected View by more than [*insert %, e.g., 50 percent*].

c. Maximum height. Not by way of limitation, no object, thing, planting, vegetation, or other improvements shall be erected, placed, constructed, planted, or maintained that shall exceed a height of [*insert height, e.g., 18 feet*], measured from [*insert explanation of measurement, e.g., "the highest point of the Lot in question"*].

d. Post-construction. A Protected View cannot be established by improvements (e.g., a second-story deck addition to a Unit) added to a Lot after the time of initial construction of the Unit.

e. Board discretion. The decision of the Association to pursue enforcement action in any particular case shall be left to the Board's discretion, subject to the duty to exercise judgment and be reasonable, as provided for in the Declaration, and further restricted in that the Board shall neither be arbitrary nor capricious in taking enforcement action. A decision of the Association not to pursue enforcement action shall not be construed as a waiver of the Association's right to enforce such provisions at a later time under other circumstances, or to preclude the Association from enforcing any other covenant, restriction, or rule.

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View Protection

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stantially impedes the view of any adjacent lot owner," but this can refer to any view, and that can lead to trouble if two neighbors disagree over what view is protected. Rather than rely on a court to determine who's right, make your bylaw specify the exact view that's protected—for example, the Rocky Mountain "peaks" [Bylaw, par. a].

Term #2: "Substantially obstruct." Bylaws often say that an obstruction must be substantial in order for it to violate the bylaw. But many bylaws don't explain how complete an obstruction must be before it's considered substantial. That can lead to unnecessary litigation.

To avoid confusion, make sure your bylaw includes some definitive measure, such as a percentage, that defines "substantial" [Bylaw, par. b]. You might say, for instance, that anything that blocks more than 50 percent of a member's view will be considered substantial.

Term #3: "Height" or "above grade." View protection bylaws often restrict the maximum height of any improvements—such as trees and swing sets—but don't explain where this height should be measured from, except sometimes to say "above grade." And they often don't define what grade the bylaw is referring to.

Make sure your bylaw specifies where one is to measure from to determine the allowable height of trees, swing sets, or other improvements [Bylaw, par. c]. ♦

RECENT COURT RULINGS

➤ Short-Term Condo Rentals Weren't 'Business' that Violated Covenants

FACTS: An association notified some of its members who were renting their units to vacationers that this was in breach of the restrictive covenants because they were essentially running a business out of their units. The members refused to stop renting their units. The association sued the renters. A Florida trial court ruled in favor of the members. The association appealed.

DECISION: The appeals court upheld the trial court's decision.

REASONING: The appeals court concluded that the short-term vacation rentals were residential uses—and not business uses—because the renters were using the properties for residential purposes. The appeals court noted that the owners' use of their properties as short-term vacation rentals didn't violate the covenants restricting the properties' use to residential purposes only and prohibiting their use for business purposes, because there was no allegation that the renters were using the properties for anything other than "ordinary living purposes." ♦

- Santa Monica Beach Prop. Owners Assn. v. Acord, April 2017

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RISK MANAGEMENT

Compare Insurance Professionals to Fit Association's Needs, Budget

Having the right kind of insurance and enough coverage under an insurance policy is key to operating an association. After all, insurance can protect the association from liability that might financially sink the community if costs for repairs, lawsuits, and accidents had to come out of pocket. But community association insurance is specialized. And not all insurance agents and brokers are really qualified to recommend insurance products, work with the association to determine its insurance needs, and keep up with changing insurance requirements as time goes on.

Gather Relevant Information

That's why as the association manager you should be prepared to present the board of directors with viable insurance brokers to choose from. And that means comparing professionals in that field with each other to get the right person for the job. A big part of management is organization, so to keep the information you get about insurance brokers and agents clear and to jog your memory when you're presenting information about these professionals when it's decision-making time, use a qualification form.

Like our *Model Form: Use Qualification Form to Compare Insurance Agents/ Brokers,* yours should focus mainly on the insurance agent or broker's experience with insuring community associations. That's the most relevant information that will ensure that the professionals you're considering will be appropriate for your community.

Form Comes in Handy for Current Coverage

An insurance broker or agent qualification form is also worth drafting because it can help you reevaluate your current agent or broker to determine whether you're getting the best possible service. Even if you're not dissatisfied with your current insurance professional, that doesn't mean that the agent or broker should rest on her laurels. It's important to revisit insurance issues every so often to see if there are better deals to be had on insurance pricing or if extra or less coverage is necessary.

Send Form to Prospective Professionals

Don't be shy about asking about the level of experience an agent or broker has with associations. A professional should be happy to explain their experience and to answer any other questions. Remember that this person will be making a profit from the insurance products they sell. And, if something isn't as clear as you'd like it to be in the answers an agent or broker sends back, call with follow-up questions about community association risk and coverage issues that you're concerned about. ♦

➤ ➤ ➤ *Model Form follows* ➤ ➤ ➤

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MODEL FORM

Use Qualification Form to Compare Insurance Agents/Brokers

Send this form to prospective insurance agents/brokers to learn about their experience and service in community association risk and coverage. You can also use this form to reevaluate your current agent/broker to determine whether you are getting the best possible service.

INSURANCE AGENT/BROKER QUALIFICATION

AGENCY/BROKERAGE: ____________________

CONTACT PERSON: ____________________

ADDRESS: ____________________

TEL. #: ____________________ EMAIL: ____________________

ASSOCIATION EXPERIENCE

What percentage of your clients are community associations? ____________________

How many members are in these associations? ____________________

What lines of coverage do you regularly provide? ____________________

____

____

____

Are you a member of any association industry or insurance-related associations? ❑ Yes ❑ No

If yes, please list: ____________________

____

____

CLAIMS

Do you have a claims department? ❑ Yes ❑ No

If yes, do members of that department have a background in association-related claims? ❑ Yes ❑ No

What types of accident and claims investigations do you provide?

____

____

____

____

REFERENCES

Please give us the names of three community associations comparable to ours, as references, and the name of a person to contact at each of those associations.

1. ____________________
2. ____________________
3. ____________________

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DEALING WITH MEMBERS

Address Member's Maintenance Problem Immediately

The draw to residential communities for most owners is that there are rules that keep homes looking nice, and when their neighbors neglect their properties, it can not only conflict with the community's aesthetic, but also cause damage. For example, an unresolved plumbing leak can cause damage to adjoining units. The good news is that, typically, associations' governing documents require members to maintain their properties, and authorize the association to compel compliance. And when members purchase their homes, they sign documents saying they understand that their home is in a deed-restricted HOA community. The bad news is that this doesn't mean that members will actually keep their maintenance promises. In fact, a large number of court cases between associations and members involve disputes over home maintenance.

Address a maintenance problem immediately, before it spirals into an eyesore, causes costly damage, sparks owner dissatisfaction, and reflects negatively on you—all of which can affect property values in the entire community. You can do this by letting the member know at the first sign of his violation of maintenance rules, that there is an issue. We'll give you *Model Letters: Take Action Two Ways When Member Shirks Maintenance Obligations,* which you can adapt for use at your community.

Know Association's Rights

Before you contact a member about his maintenance issues, you should determine the standards for care. To do this, check your association's governing documents. Also get up to speed on your rights. Don't assume the level, if any, at which owners are required to maintain their properties. If your governing documents have limited or no enforcement powers at all, you need to know before making demands of an owner who isn't properly maintaining his property.

Pay attention to the maintenance standards that members must adhere to under the governing documents. Some associations have specific maintenance standards—for example, how often members' lawns must be mowed, how long the grass can be, and how often shrubs must be trimmed, among other particular things. But if your association is much less precise, you can run into trouble if you demand that the owner go above and beyond what's necessary.

Send Polite Letter First

There's no need to jump to conclusions about why a member isn't maintaining his property appropriately. Often, an owner will be happy to comply with the association's maintenance standards, but hasn't been aware that there's a problem. A polite letter reminds the member of his responsibilities, without creating any hostility.

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Dealing with Members

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If the owner isn't able to make the repairs himself, a polite letter will open the door for him to ask the association to make the repairs it deems necessary and give it access to the property to do so. Send the member a letter, like our first Model Letter, politely reminding him that the community has rules about property maintenance and that his property is in disrepair. Remember to specify in what way his property is substandard, and set a deadline for making repairs. You can also ask the member to contact you if he needs help in complying with the rules. Consider offering to make the repairs for him and bill the cost to him. This resolves maintenance problems in senior communities especially. A good letter will inform the owner about the problem and give him options for rectifying it.

Send Tougher Letter Demanding Compliance

If the member doesn't comply with the first letter, either by making the necessary repairs or allowing the association to make the repairs and bill them to the member, send a tougher follow-up letter, like our second Model Letter.

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MODEL LETTERS

Take Action Two Ways When Member Shirks Maintenance Obligations

Failing to maintain properties according to community standards can be a simple case of negligence or something more serious. So it's wise to start notifying the member with a polite letter reminding the member of his maintenance obligations and giving him a deadline by which to remedy the situation. If that doesn't work, you'll have to resort to a harsher follow-up letter, which cites your association's authority to take certain actions against him, according to your governing documents, if he doesn't take immediate steps to comply with community maintenance standards. Have your attorney review these letters before sending them.

#1: POLITE LETTER

[*Insert date*]

Dear [*insert member's name*]:

As you probably recall, when you moved into Shady Acres Community Association you received a packet that included the rules and regulations of the community. These rules and regulations have been designed to ensure that your community remains a wholesome, pleasant place to live and to keep our property values high. As a member of Shady Acres, I'm sure you share in our desire to achieve these goals. A recent inspection of the community found that the condition of certain things at your unit do not meet the standards set forth in our rules and regulations. Specifically, the following have been found to be out of compliance at your unit: [*insert items needing maintenance*]. We're sure that this was just an oversight on your part, and because of that, the Board of Directors would like to provide you with 14 days to correct these things so that they are in compliance with community standards. Or, if you prefer, Shady Acres can arrange for the work to be done for you, and will bill you for its cost. Thank you for your anticipated cooperation, and for doing your part to keep Shady Acres a beautiful place to live.

Yours truly,
Jane Manager

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#2: FOLLOW-UP LETTER

[*Insert date*]

Dear [*insert member's name*]:

As you were advised in a letter to you dated [*insert date of previous letter*], a recent inspection found that the condition of certain things at your unit do not meet the standards set forth in the Association's rules and regulations. Specifically, the following were found to be out of compliance at your unit: [*insert items needing maintenance*]. This puts you in violation of the following [*choose appropriate option(s): bylaws/declaration/rules & regulations]:* [*Insert citations to all relevant document sections*].

These violations are a serious problem that also may involve health code violations and/or nuisance issues, and therefore require your immediate attention. The poor condition of your unit is affecting other units as well as the common elements. As you are aware, there have been numerous correspondences and other communications between you and the Association. Despite these efforts, you have not made the repairs necessary to bring your unit into compliance with the Association's rules and regulations. The Board of Directors, therefore, having a fiduciary obligation to the Association and its members, has no alternative but to take action to correct the situation.

Please be advised that if you do not correct the condition(s) specified above by [*insert date*], the Association will pursue all legal remedies, including but not limited to [*insert remedies authorized by governing documents, e.g., fines, suspension of voting privileges, suspension of right to use of community amenities*], as well as the following:

1. As authorized by [*insert citation to relevant document section*], entering your property to maintain, repair, or replace that portion of your unit and related conditions that are out of compliance. The Association may also request the assistance of local governmental health officials to deal with this condition. This letter constitutes notice of the Association's intention to exercise this right. All expenses will be imposed against you.
2. As authorized by [*insert citation to relevant document section*], getting a court order for the right to enter your property to make these repairs and/or to force you to make the repairs. All costs including attorney's fees will be imposed against you.

Proof from a professional contractor that these repairs have been made and problems remedied must be received by the Association no later than [*insert date*]. I strongly suggest that you resolve this problem at once. Should you wish to discuss this in greater detail, please contact me at [*insert tel. #*].

Yours truly,
Jane Manager

Dealing with Members

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Your letter to an owner who refuses to clean up his property should state: (1) that certain conditions at his unit don't meet the standards set in the association's governing documents; (2) exactly what's wrong with his unit; and (3) which of the association's governing documents this violates. Then tell him that unless he makes the necessary repairs by a specific date, the association will pursue its remedies. You may prefer to have this letter come from the association's attorney.

Know, Pursue Association's Remedies

Your governing documents will determine exactly what actions you can take and should be included in your letter. Some common ones include: fining the member, suspending voting privileges, and suspending his right to use the community's amenities. Engaging in self-help—that is, entering the property to make

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Dealing with Members

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the repairs, or getting a court order requiring the repairs—is the most serious remedy and should be very carefully carried out.

In an upcoming issue, we'll explain self-help, show you how to determine if it's permissible, and give you tips for executing an intervention after a member fails to take maintenance action. But regardless of which remedy you choose, tell the member that the association will bill all costs and attorney's fees to him. ♦

Q&A

Determining Liability to Handicapped Member Under Fair Housing Law

Q I manage a condominium building that was previously owned before the current association took it over. A handicapped unit owner claims that some elements of the building—namely, some doors—are difficult, but not impossible, for him to use as a result of his disability. He is suing the association under the Fair Housing Act (FHA) and asking that the association spend what would be a considerable amount of time and money redoing the design and construction of the building to accommodate him. The association is operating on a tight budget, and it would be very difficult to do this. What are the chances that the association would prevail in court?

A It's possible that the association could win the lawsuit because the original owner didn't construct the building in a way that's handicap accessible, while the association unfortunately more or less inherited the problem.

According to a Florida appeals court, the problem with your member's type of fair housing claim is that although he's facing difficulties that seem unfair because they hinder his movement in and out of the building, the law doesn't allow him to "visit his accessibility problems arising from the design and construction of his building upon a subsequent owner of his building"—that is, an association that wasn't the original owner or developer.

The Florida appeals court made that observation in a case with facts similar to yours, where a condo unit owner complained that the doors in the building made it difficult for him to get around. The court there noted that, "to be sure, the Act forbids discrimination connected with 'the design and construction' of a covered dwelling, but in this case the association did not design or construct the building, nor make any alterations to the disputed door pressures after assuming ownership of the building."

The appeals court noted that the condominium building in that case was developed by a corporate entity and the association was a successor in interest; the association had no role in the design or development of the condominium; and, although some aspects of the door design were out of compliance, the association didn't install the doors and the evidence was insufficient to show that

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Q&A

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the association altered the doors since it took over operations. In that case an expert even showed that the doors weren't adjustable, so it was impossible for the association to make them more convenient for handicapped members, although it had asked its maintenance team to try to adjust them.

The Florida appeals court concluded that because the association had nothing to do with the design and construction of the condominium's doors, the FHA's discrimination provisions did not apply to it, or require it to fix the nonconforming doors. "The FHA's terms squarely visit design-and-construction discrimination on entities that discriminate 'in connection with the design and construction,'" said the appeals court, which also specified that the court was "not at liberty under the statute to turn subsequent property owners into guarantors of noncompliant designs and construction" [Harbour Pointe of Perdido Key Condo. Assn. v. Henkel, April 2017].

In making its decision, the appeals court called on the decision in an earlier case, in which a condominium resident also attempted to bring an FHA design-and-construction claim against a subsequent owner of his apartment complex. The court in that case unanimously rejected the claim, finding the law not to visit design-and-construction discrimination liability on subsequent owners. The court noted that, despite the fact that the association wasn't involved in the design or construction of the building, all of the member's claims that the association violated the FHA are alleged through the lens of the design-and-construction guidelines in that statute. The member had alleged a series of inaccessible conditions resulting from the association's initial failure to comply with the guidelines and argued that its failure to remedy those conditions constituted an independent act of discrimination prohibited by the FHA. The member in that case argued that the FHA not only requires designers and builders to adhere to certain standards of accessibility but also imposes an ongoing duty on subsequent owners to ensure that a dwelling conforms to those standards. But the court in that case pointed out that FHA's plain text demonstrated that that argument was erroneous.

It noted that the statute's text connects liability for design-and-construction-related discrimination explicitly to a dwelling's actual design and construction: "discrimination includes in connection with the design and construction of a covered dwelling, a failure to design and construct those dwellings in a non-accessible manner" [Harding v. Orlando Apartments, LLC, April 2014].

In both court cases, the courts found that the associations had no role in the design or development of the condominium and hadn't altered the doors since they took over operations, so although it was a difficult situation for both members to deal with, the text of the FHA prevented the courts from finding the condo associations liable for discrimination and forcing them to modify or replace the doors. ♦

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