Helping You Run Your Condo or Homeowners Association Legally and Efficiently

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FEATURE

Keep disputes between members from escalating into costly lawsuits or bad publicity.

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Take Four Steps to Put End to Member-on-Member Harassment

Living in close proximity in a condo building or sharing amenities year after year in more spread out planned communities can throw together members with different points of view—some of them controversial. The past year has created divisiveness in political conversations and discussions about recent exposes regarding sexual harassment. But some states had reported a rise in hostility and aggressive behavior among community association members even before national events brought up these issues to argue over.

Part of your job is to make sure that the community is safe and that all members can live there and enjoy their units or homes peacefully. But when members don't get along, sooner or later, at least one member is going to expect you to get involved. To keep disputes between members from escalating into costly lawsuits or bad publicity, community association managers should know how to handle heated arguments between neighbors, or worse, an ongoing battle that involves harassing behavior, intimidation, or, in the worst case, violence—which has, sadly, not been uncommon.

Zero Tolerance Clause Nips Unpleasantness in Bud

The best way to prevent reports of or complaints about harassment or intimidation is to ban this behavior in your governing documents. This should include "abusive, harassing, and threatening behavior." Most likely, your declaration gives each community member the right to "quiet enjoyment" of her unit—that is, the right to live in and enjoy her unit without being disturbed, harassed, or threatened by the manager, an employee, or other members or residents.

Most declarations ban members and other residents from making excessive noise or engaging in any other behavior that disrupts the quiet enjoyment of others. But it helps to have a "zero tolerance" clause that specifically deals with abusive behavior to fall back on. Your clause should make it clear that no one may engage in any harassing or abusive behavior or any intimidation or aggression—either verbal or physical—directed at any member or other resident.

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Member Harassment

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This Model Clause sets out such a policy. Work with your attorney to tailor it for your particular community's declaration and/or association bylaws.

Model Clause

Members and other Residents shall not engage in any abusive or harassing behavior, either verbal or physical, or any form of intimidation or aggression directed at other members, residents, guests, occupants, invitees, or directed at management, its agents, its employees, or vendors.

PRACTICAL POINTER: It's also smart to ban abusive behavior directed toward guests, occupants, management, employees, and vendors. Bad behavior or outbursts wouldn't necessarily be limited to just members.

What You Should Do to Handle Abuse Complaint

Because of the right your declaration gives each community resident to quiet enjoyment of her unit, it's important for you to look into and try to stop the harassment when it occurs. If you don't, you could face a lawsuit. But, to a degree, how you intervene will depend on the specific facts of the situation. For example, is the member harassing one neighbor or the community at large? Is the member's behavior merely impolite, or is it vulgar? Be aware that if the member's harassing behavior is based on others' race, color, religion, sex, familial status, physical or mental handicap, or national origin, you could be accused of violating fair housing laws and end up having to pay damages.

Here are four general steps that you can take when a member tells you that another member is harassing her and additional steps you can take for unusual circumstances.

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Member Harassment

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Step #1: Verify complaint. When you first learn of a harassment complaint, verify it before acting. It's important to make sure the complaint is credible. You can do this by having your staff try to observe the behavior. For example, if a member complains that another member yells at her each night, have a staff member be on call to hear it. Also, talk to other members who live nearby to see if they've heard or seen anything. And bring a witness along. Document all conversations, and keep a copy of the reports in the abusive member's file. Once the complaint is verified, take the next three steps.

However, if the situation is more a matter of two neighbors failing to get along, each to blame in his or her own way, limit your involvement to an offer of informal mediation of the dispute, continue to monitor the situation, and take additional action if it's necessary.

Step #2: Meet with abusive member. In most situations, you should meet with the abusive member and speak to him about his behavior. An exception is when the abusive member has threatened violence or engaged in violence already, in which case you should call the police. But in most cases, you can discuss the incidents with the abusive member.

Tell him you've received complaints and give him the specifics about those complaints, such as the dates and times they occurred. Also, point out that your declaration and/or bylaws ban abusive, threatening behavior. Remember to write down the date and time of your meeting with the abusive member.

But be on high alert: You should always be concerned about protecting the identity of the complaining member. While in some cases, mediating the hostility in a neutral environment by scheduling a meeting with the abusive member and complaining member might be productive, consider very carefully whether this is safe for the complaining member. And if there's serious animosity between the parties, never set up, or allow a director to set up, a meeting with both sides in attendance.

Step #3: Write warning letter. If the informal approach doesn't work, send the abusive member a strongly worded letter. Your letter, like our *Model Letter: Directly Address Abusive Member,* should: (1) mention the specific incidents; (2) tell the abusive member that his conduct violates the declaration and bylaws; and (3) say that you may take legal action against him, which could include the imposition of fines and sanctions, suspension of privileges, and pursuit of the matter in court if the conduct continues. In your letter, be sure to tell the abusive member what he must do to comply. It's important to check with your attorney before including these actions in any letter because the ability to fine and/or suspend privileges varies from state to state. It could also be regulated by your governing documents.

Step #4: Base further action on resident type. You'll need to take further action against the abusive individual if your efforts fail to stop the harassment. As your warning letter should indicate, further action may include fines, sanctions, suspension of privileges, and pursuing the matter in court. However, the exact steps you take will depend on the specific circumstances and should be taken only after you consult your attorney.

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Member Harassment

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Base your action on the type of resident who's causing the problem—that is, a renter or a member. If the abusive individual is renting his unit, contact the unit's owner and demand that he evict his tenant. Provide the unit's owner with written records of complaints and violations. Also, be sure the other association members and witnesses are willing to testify in eviction proceedings, and be ready to testify yourself, if necessary.

The situation is trickier when the abusive individual is a member, because you can't evict a member and foreclosure isn't likely either. Consider talking to the local police about the problem. If the abusive behavior rises to the level of criminal behavior, the complaining member can press charges; if the abusive behavior falls short of criminal behavior, a visit by the police still might sober all parties involved.

When to Take More Drastic Action

These four steps generally should handle member-on-member harassment, but there are two circumstances that call for additional action on your part. And a failure to take action could lead to lawsuits against the association.

Community-wide harassment. When the harassment isn't directed at one individual, but many, or the abusive behavior affects more than just one neigh-

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MODEL LETTER

Directly Address Abusive Member

Unfortunately, sometimes nothing short of a warning letter might stop a member who is harassing another member. Here's an example of a letter that may be sent to a member causing problems in the community. Note that the letter mentions the specific incidents complained of and warns the member that you can penalize him for the behavior. Talk to your attorney about adapting this letter to use under your circumstances.

[*Insert date*]

Dear Member:

As I discussed with you on [*insert date*], we have received numerous reports of your abusive behavior toward your next-door neighbors. They have reported that on [*insert date*] you have [*insert nature of insults, threats, or actions, e.g., used racial epithets and told them to move*]. These violations are very serious. Your conduct is abusive and threatening toward your neighbors and is a violation of the Declaration and Bylaws of Shady Acres Community Association. Please be advised that your compliance is required by [*insert date*]. If this conduct is repeated and your neighbors are harassed or bothered again, we may pursue any and all legal remedies available to us against you, including, but not limited to, fines, sanctions, suspension of privileges, or pursuing this matter in the criminal and/or civil courts of this state. Further, you may become liable for the Association's attorney's fees and costs incurred in connection with any legal action when the Association prevails. We anticipate your cooperation in this matter. Should you wish to discuss this in greater detail, you may contact me at [*insert tel. #*].

Yours truly,
Jane Manager, ABC Community Association

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Member Harassment

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bor, you have an additional responsibility. If a member is, for example, throwing items off his balcony at anyone who passes underneath, or is verbally abusive and confronts neighbors in a common area, then he's violating the nuisance provisions of your declaration and/or bylaws. But because he's now being abusive toward the community at large, you're no longer a neutral third party; you're involved.

In that case, in addition to involving the police, seek an injunction from a court of law. An injunction is a legal order by a judge, prohibiting certain behaviors. When a member has become a nuisance to everyone in the community, it's the association's obligation to put a stop to it. (You can also consider community-centered punishment, such as fines, sanctions, and suspension of privileges.)

Discriminatory harassment. If a member is harassing or being abusive to others on the basis of any of the prohibited categories set out in federal fair housing law—race, color, religion, sex, familial status, physical or mental handicap, or national origin—the association's obligation to put a stop to it is urgent. If the association does nothing, the harassed member could sue the association for violating fair housing laws. This means that you should take any or all of the steps listed above, as well as any other legal means available to you, to stop the harassment. Additionally, make sure to document everything you do regarding the matter and involve the association's attorney.

Be careful about labeling this type of disagreement as a neighbor-to-neighbor dispute and taking a relatively passive role in trying to help resolve it. This can be a very costly mistake, particularly where protected classes of citizens are involved. ♦

Q&A

Determining Whether Items Not Mentioned in Guidelines Are Permissible

Q In a casual conversation with a homeowner in the planned community I manage for an association, she mentioned she would like to install a mailbox that resembles a cartoon that her children like. She said that she has checked the association guidelines for rules on mailboxes, but they aren't specifically mentioned. However, she doesn't want to install the mailbox only to later be told to take it down, or be fined. What typically happens when association guidelines don't cover rules for certain items? Can an owner simply install something if it's not mentioned?

A That will depend on whether some other portion of the guidelines can be imputed to an item that isn't explicitly mentioned. For example, let's say that mailboxes aren't covered in your guidelines, but they are considered to be a part of a larger category that is governed by the rules. That was the situation in a recent Pennsylvania homeowners association lawsuit.

There, homeowners in a planned community installed a mailbox that was stylized to resemble the Disney character "Tigger" on their property. The

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Q&A

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homeowners association management company asked them to take the mailbox down, on the ground that the mailbox violated the association's regulations. The homeowners argued that mailboxes weren't specifically mentioned in the association's guidelines for the appearance of homes in the community. The association asserted that the term "structure" in the guidelines was a catchall that included mailboxes. The homeowners sued the association. A trial court ruled in favor of the association. The homeowners appealed.

A Pennsylvania appeals court upheld the trial court's decision. It determined that the trial court properly found that although mailboxes were not specifically mentioned in the association guidelines, a mailbox fell within both the "ordinary and legal definitions of a structure" and, as a result, the association had authority to regulate mailboxes under the declaration and guidelines [Weber v. Board of Directors, Laurel Oaks Assn., November 2017].

As with most ambiguous issues in associations, it's best to talk with the association's attorney and then the homeowner to let her know what the association expects in her situation. It'll save you and the association time and money fighting a lawsuit later, and the homeowner from installing a potentially expensive item that she'll be required to remove if it violates the association's rules. ♦

RECENT COURT RULINGS

➤ Short-Term Rentals Violated Restrictive Covenant

FACTS: Homeowners in a planned community asked a trial court for a temporary injunction, prohibiting their neighbors from renting out their home to vacationers for a profit. (A temporary injunction orders a party to do or not do something while a court case is pending.) The homeowners asserted that the rental of the home violated the restrictive covenants of the association, in part because they were using the home for nonresidential purposes—that is, operating a hotel.

The trial court ruled in favor of the homeowners, granting a permanent injunction after determining that the neighbors had violated the restrictive covenants. The neighbors appealed.

DECISION: A Texas appeals court upheld the trial court's ruling.

REASONING: The appeals court agreed with the trial court's order that the neighbors must cease short-term rentals of the property for periods of time of less than 90 days. It noted that the court has previously determined that a short-term rental of 90 days or less constituted a non-residential use in violation of a deed restriction that limited use to "single-family residence purposes." Here, the neighbors' short-term rentals of their property amounted to a non-residential purpose, because such rentals "constituted the operation of a hotel or other commercial use and the use was excluded by the deed restrictions."

The neighbors argued that the deed restrictions here specifically address what duration-of-use limits apply to what buildings and that a certain section of the

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Recent Court Rulings

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restrictions states: "No structure of a temporary character, trailer, mobile house, basement, tent, shack, garage, barn, or other outbuilding shall be used on any tract any time as a residence either temporarily or permanently." They asserted that because this paragraph "evinces the drafters' intent to limit duration-of-use as to outbuildings, but other sections are silent as to duration-of-use limits, the trial court erred in imposing a duration-of-use limitation on the main dwelling."

However, the duration-of-use section of the restrictions that pertains to temporary structures had no bearing on the topic of vacation rentals, said the appeals court. The pertinent part of the restrictions for this situation was regarding restricting the use of the property to "residential purposes" and then specifically stating that "the term 'residential purposes' as used herein shall be held and construed to exclude hospitals, clinics, duplex houses, apartment houses, boarding houses, hotels, and all other commercial uses and all such uses of said property are hereby expressly prohibited." So the appeals court concluded that the language of the deed restrictions prohibited the short-term rentals the neighbors were profiting from.

The neighbors also argued that construing the deed restrictions to prohibit short-term rentals would, in effect, create various other problems, including situations involving property co-owned by multiple parties, leases to multiple lessees, post-sale lease-backs, or an owner's temporary hardship during which a short-term lease could prove beneficial. But the appeals court said that these issues were not pertinent to this case and that a court would not address such hypothetical situations—which would amount to the court rendering an "advisory opinion." ♦

- Ridgepoint Rentals, LLC v. McGrath, December 2017

IN THE NEWS

➤ Fight Over Scenic Neighborhood Photo Shoots Turns Ugly

Neighborhoods that are governed by a homeowners association have a tendency to be attractive and well manicured. After all, that's a major reason why members pay dues and want to live in such a community. But a photogenic Houston community is trying to block photo shoots from its streets. The association placed signs around the perimeters of the neighborhood advising photographers they could not shoot in the park and esplanades on the property.

Local photographers, who use the area for wedding and other types of photo shoots, are puzzled, saying that the area is historic and that they thought the esplanades are part of the public street. Many have cited the fact that they and their clients pay taxes to live and work nearby as a reason why these areas aren't off limits. The association said the signs went up because the photographers disrupt the peaceful neighborhood with large crowds, equipment, and tables.

Houston officials have said that the esplanades are a public right-of-way, which means photographers can use the green spaces to take pictures. However, the

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In the News

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homeowners association said the property was deeded to the group in the 1920s, and is looking for the documentation to enforce its ban.

Community homeowners have noted that although photo shoots are regular occurrences, they typically aren't disruptive.

In the meantime, while the association looks for its documentation, it has removed all signs on the esplanades. For its part, the city announced that if residents see a sign that they think shouldn't be on the right-of-way, they should call the city for an investigation. ♦

DOS & DON'TS

✓ Ensure Board Members Don't Exceed Term

Although board member positions are voluntary, many members take them seriously—and personally. That could create controversy. That's because, sometimes, to comply with the law, association boards must be restructured; if you find yourself in the position of having to deliver the news and help with the restructure, you could be faced with accusations by board members that you're improperly trying to oust them for your own motives. For example, if you've had difficulty working with the current board members, they could assume that you'd like to replace them with members who will be more accommodating.

The laws that apply to condo association and HOA board term limits vary from state to state. So, before talking with the board about the situation, make sure you understand exactly why and how you must comply with the law. It can help head off any arguments that you're pursuing the restructuring for personal or professional gain or ease.

EXAMPLE: Your condo association's board members have three-year terms, according to its bylaws. But you learn that your state's Condominium Act has been amended to outlaw multi-year board terms, including three-year terms. The only exemption contained in the statute is for associations that want to establish staggered terms. In order to establish staggered terms under the law, however, several conditions must be met. First, the terms can't exceed two years. Second, the authority for two-year staggered terms must be contained in the association's bylaws. Finally, the operation with two-year staggered terms must be ratified.

Let's say that, in your case, none of these things ever occurred. Even if someone properly elected in the year that the law was amended, let's say 2015, has been "grandfathered" for a three-year term, his term would expire in 2018—and possibly already. Accordingly, all of your directors are probably serving improperly. The board should be cleaned up at the earliest possible time, such as an upcoming annual meeting. There may be pushback from current board members who say that, rather than resign at this year's annual meeting, they should be allowed to serve out the time as stated in the bylaws. Stress to them that to comply with state law, they're required to resign. Remind them that they may run for re-election if they wish, provided that your bylaws don't contain term limits.

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Dos & Don'ts

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✗ Don't Allow Staff to Work on Elevators

It's smart for associations to have a continuing maintenance and repair contract with an elevator contractor. Elevator issues can turn deadly so experts in that field are invaluable, and can help you avoid liability for you and your staff. But don't let your staff do any work on your community's elevators, except for routine cleaning and light bulb replacement.

At most, when your staff members learn of an elevator problem, they should shut it down and call the contractor immediately. If an elevator malfunctions because of something the contractor did or didn't do, you'll probably be protected by your standard elevator contractor's indemnification clause. This clause lets you shift the financial responsibility for an accident to the elevator contractor, obligating it to defend you against any lawsuits resulting from the elevator malfunction and pay any court-ordered damages. But if your maintenance staff did any work on the elevator that malfunctioned, it might create doubt as to who caused the malfunction. And that could mean that you—and not the contractor—would have to pay damages to the victim. ♦

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