



Community Association Management Insider®

Helping You Run Your Condo or Homeowners Association Legally and Efficiently

FEBRUARY 2018

FEATURE

Here's how to stay on sound legal footing when suspending a member's privileges for nonpayment of fees.

IN THIS ISSUE

Feature:
Motivate Member to Pay Delinquent Association Fees 1
 ▶ **Model Letter:** Suspend Privileges Until Member Pays Assessments 3

DEPARTMENTS

Recent Court Rulings 5
 ▶ Association Couldn't Withhold Records Based on 'Protected' Status 5

In the News 6
 ▶ Security Concerns for HOA's Open-Garage-Door Mandate 6
 ▶ Law That Hastens Foreclosure Causes Controversy 6

Risk Management:
Avoid Liability by Using Well-Drafted Architectural Application 7
 ▶ **Model Form:** Draft Airtight Architectural Review Form 10

PRODUCED IN CONSULTATION WITH



Motivate Member to Pay Delinquent Association Fees

Association fees are an integral part of keeping a planned community or condominium building running smoothly. They're key to paying bills for routine services and amenities and, in some communities, can contribute to additional bonuses for members, like social events. But when members don't pay their association fees it can very negatively affect the community. Even if a few members don't pay their assessments on time, an association can face serious financial problems. Reserves can become depleted, and the community might have to make trade-offs about which bills to pay and which services to forgo.

The manager and board of an association aren't helpless when it comes to late or delinquent dues. Suspending a member's privileges is one remedy. But it's critical to handle such a situation in a way that doesn't make the association vulnerable to legal issues and liability. Here's how you can navigate this tricky situation.

Identify Privileges to Suspend

Associations have a few options when it comes to handling defaulting members. These can include charging late fees, suspending member privileges, and, ultimately, starting foreclosure proceedings. Suspending member privileges is a natural remedy for members who don't pay their association fees, because these assessments pay for or make possible a number of privileges.

Suspending privileges may be an effective way to motivate a defaulting member to prioritize the payment of association fees, if it's at all possible for the member to come up with the money. Losing amenities may help the defaulting member appreciate all the benefits the association fees pay for and help the member realize that benefits may diminish for the entire community as a result of his nonpayment.

(continued on p. 2)

FEBRUARY 2018

Delinquent Fees

(continued from p. 1)

The types of privileges an association may suspend will vary from association to association. Check your governing documents, which should state what privileges your association can suspend against delinquent members. Examples of common privileges associations can suspend are:

- Voting privileges;
- Use of recreational amenities, such as the pool, playground, park, tennis courts, and golf course;
- Use of the clubhouse for functions unrelated to association elections;
- Use of common laundry facilities if laundry machines are paid through members' dues and are not coin-operated; and
- The right to park a car on common property. This may include parking privileges for guests, as they could be required to find parking outside of the community.

Governing Documents Control Extent of Suspension

When considering suspension, very carefully read the community's governing documents to see what is allowed in this regard. As with all association decisions, if you're unsure, ask the association's attorney so you don't misstep.

Many community associations' governing documents include a rule that a member must be in "good standing" to have access to amenities, serve on the board, and vote. Good standing should include being up to date with payments, but don't take that for granted. If it's not spelled out, get confirmation.

(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, J.D.**

Executive Editor: **Heather L. Stone**

Director of Marketing: **Peggy Mullaney**

COMMUNITY ASSOCIATION MANAGEMENT INSIDER [ISSN 1537-1093 (PRINT), 1938-3088 (ONLINE)]
is published by Vendome Group, LLC, 237 West 35th St., 16th Fl., New York, NY 10001.

Volume 17, Issue 8

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: epurcell@vendomegrp.com. Call: Elizabeth Purcell 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.

© 2018 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.

FEBRUARY 2018

Delinquent Fees

(continued from p. 2)

Give Adequate Notice, Follow Local Laws

Many states have laws protecting members' property rights, and an association must follow those laws before taking any punitive or disciplinary actions against a member. Some states have "due process" requirements. Due process is procedural fairness in the board's decision-making process. It requires giving the member notice and an opportunity to be heard before taking adverse action against him.

Other jurisdictions might not use the phrase "due process" but have other ways to ensure that a member is not unjustly punished. For example, a state could

(continued on p. 4)

MODEL LETTER

Suspend Privileges Until Member Pays Assessments

Members' assessments pay for or make possible a number of privileges such as voting and access to amenities. Therefore, there's no reason a delinquent member should get a say in association business and enjoy privileges that other members have paid for. If a member is in arrears and the board is considering suspending his privileges, make sure the board follows proper procedures. Otherwise, if the defaulting member challenges the penalty, a court could rule that the suspension isn't valid.

Here's a letter you can adapt and use at your community when a member has a delinquent account. The letter notifies the member of the association's intent to suspend the member's privileges unless full payment of past due assessments is made by the end of the notice period.

Show this letter to your attorney before using it at your association.

[Insert date]

Dear [insert member's name]:

One of the many advantages of living in Shady Acres Community Association is sharing the costs of certain maintenance, repairs, and amenities that would be too expensive for a single-family homeowner with other members. To properly maintain common areas, it is imperative that all assessments, whether regular or special, be paid in full and on time. Delinquencies throw the association's entire budget off course and negatively affect all members' property values and lifestyles. Our records indicate that your account contains delinquencies for more than [insert time period] days, with an outstanding balance of \$[insert amt.]. This letter is notice of intent to suspend any or all of the following privileges: (1) voting privileges; (2) use of the pool, playground, park, club facilities, lake, tennis courts, golf course, and other recreational amenities; (3) use of the common laundry facilities; (4) use of the storage facilities; and (5) parking privileges. Unless [insert association name] receives full payment by the end of the notice period on [insert date], the privileges or amenities listed above will be suspended.

Sincerely,
Jane Manager

FEBRUARY 2018

Delinquent Fees

(continued from p. 3)

require that before an association takes enforcement or punitive action against a member, it makes alternative dispute resolution available.

When an association seeks to enforce the provisions of its governing documents on one of its members, the association should be able to show a court that it has followed both its own standards and procedures as well as any local law requirements prior to pursuing a remedy. If a decision to suspend a member's privileges is challenged, courts will scrutinize whether the association's procedures were fair and reasonable and that decisions were made in good faith.

Bankruptcy Is Game Changer

Suppose a member is delinquent because he is in severe financial trouble. If your association starts the process to suspend his privileges, but the member files for bankruptcy, the association is not allowed to continue to suspend his right to use its common area amenities.

Continuing to deny these privileges would be seen by a bankruptcy court as an attempt to collect an amount that's protected by the bankruptcy court. However, if a member stops paying ongoing fees after the bankruptcy, the association could conceivably deny privileges—but only with the bankruptcy court's permission. This is another example of why the association's attorney should be looped in on this type of situation. ♦

► Take Additional Suspension Factors into Account

While suspending a member's "use rights" can be a valuable tool for motivating him to pay delinquent fees, it's by no means a panacea for overcoming delinquency problems. So make sure you discuss other options with the association's attorney to try to get results. And some basic rights can't be taken away from a member until he's dispossessed by foreclosure, regardless of alleged bad behavior or delinquency. For example, a manager and board can't suspend access to the unit, elevator, parking spot, and utilities. "Use right" suspensions are for recreational facilities, not essential services.

Suspending privileges may not in some cases be an effective way to motivate a defaulting member to prioritize the payment of association fees if the nonpayment of association fees or an assessment is a function of the member being out of work or having personal or medical problems that have caused financial problems. A member who can't afford the maintenance fees probably isn't going to find a way to pay them so that he can swim in the pool, if basic necessities are tough for him to afford.

You might be left asking what happens when a member won't comply with a suspension. To enforce it, you'd have to go to court and get an injunction. Going to court and getting an injunction isn't instant justice, but the only final authority you have in this scenario is the court system. Remember that this is all governed solely by state law, so consult your association's attorney. If you're on sound legal footing, courts should be sympathetic to your case.

RECENT COURT RULINGS

➤ Association Couldn't Withhold Records Based on 'Protected' Status

FACTS: A condominium member asserted that a resolution in the governing documents, which classified certain association records as “primary and/or protected records” that couldn't be inspected by members, was invalid. The member asked a trial court to order the association to produce 10 types of records that she had asked the association to provide, but that it refused to.

DECISION: A Pennsylvania trial court invalidated the resolution. It ordered the association to permit the member to inspect and view the documents.

REASONING: The trial court determined that, pursuant to the Pennsylvania Non-Profit Corporation Law, which permits a member to apply to the court to compel inspection if the member has not been permitted to inspect a document or if an association has not replied within five days of the member's request under certain circumstances, members of the condominium association should have access to requested records.

The association argued that it didn't have to share so-called “protected” records. But the trial court noted that denying access to records either based on the type of record—that is, those defined as “protected records”—or by finding that considerations of privacy, confidentiality, or privilege outweigh the purpose for the record request is prohibited by the Pennsylvania Condominium Act.

The act states that “all financial and other records shall be made reasonably available for examination by any unit owner and his authorized agents.” Pursuant to the bylaws, the association is governed by the Non-Profit Corporation Law, said the trial court. The act expressly provides that members have access to examine “all financial and other records.” Although this association's bylaws enumerate specific documents that members are permitted to examine, they don't preclude any documents from examination. The resolution permits the prohibition of member review of documents. This is beyond the authority of the board without an amendment to the bylaws confirmed by the required vote of the unit owners, the trial court stated. Therefore, apart from the procedure to request document review and the permission to view and copy documents defined as primary records, the resolution is invalid.

The trial court noted that the procedure set forth in the resolution requires members to state the purpose of their record request. “Such a requirement is consistent with the procedure in the non-profit corporation law. So the board has the authority to request such information from its members, but the board is not permitted to deny a record request based on the member's stated purpose,” the trial court determined.

Additionally, while the court ordered that the association had to allow the member to inspect and view the records, it was not required to allow the member to copy them. ♦

- Rosianski v. Four Seasons at Farmington Condo. Assn., December 2017

IN THE NEWS

➤ ***Security Concerns for HOA's Open-Garage-Door Mandate***

A California homeowners association is requiring members to keep their garage doors open most of the day on weekdays. The new rule is in response to the association learning that so-called squatters—people living in a home illegally—were inhabiting the garage of at least one home in the area.

While squatting can present its own problems for an association, members are complaining that the move is putting them at risk in a different way: Security is compromised.

The garages have direct entrances into the community's homes that normally are given a second layer of protection by a closed garage door. Additionally, items left in the garage are visible and, unless locked down, can be stolen.

Residents are fighting the rule in a future homeowners association meeting, but for now at least the association can fine people \$200 if they keep their door closed.

➤ ***Law That Hastens Foreclosure Causes Controversy***

Under current law, Arizona homeowners associations can foreclose on owners if they fail to pay their dues for a year or get behind by \$1,200—whichever comes first. A bill introduced by one of Arizona's Republican senators would allow HOA foreclosures after six months, with no minimum debt, such as the \$1,200 figure that applies now.

Senator John Kavanagh, R-Fountain Hills, the primary sponsor of Senate Bill 1080, said six months of avoiding payments is a serious infraction. Opponents of the bill are outraged, saying that it's dangerous. The Arizona Homeowners Coalition has spoken out against it. The grassroots group has fought for homeowner protections against HOAs at the legislature for the past several years.

According to those familiar with HOA and foreclosure laws, the bill would make it easier and faster for HOAs to turn to foreclosure instead of working out a payment plan or taking other, less severe steps to recoup the funds. But many homeowners feel that taking someone's home should be the absolute last resort.

A record number of Arizona homeowners in associations were foreclosed on in the past three years, which has only added to public concern about the proposed bill. ♦

RISK MANAGEMENT

Avoid Liability by Using Well-Drafted Architectural Application

One of the draws of living in a planned community is aesthetics—uniformity in the design and appearance of homes, rules and regulations that prevent homeowners from putting up decorations that are eyesores, and specific paint themes and landscaping that are in good taste all make for a neighborhood that looks great. But there are times when members may want to make modifications to their homes. In these instances, the concern for associations is that these changes may affect the harmonious design of a community, decrease property values, and increase liability. For example, low-quality construction can drive down property values, increase the premiums on your community's liability insurance, or even render important warranties void, in addition to interfering with the general look of a neighborhood. Some types of work, such as a new roof deck, if not done right, can lead to injuries and increase your community's exposure to personal injury liability, as well. Here's how you can protect yourself and the association from danger and work productively with homeowners who want to personalize their properties.

Use Form to Ensure Fair Decisions

Like most associations, the many governing documents for the community you manage probably include language forbidding any significant modifications without prior written consent from the board of directors. That's where a review process for architectural changes comes in handy; the approval or denial of a member's application for changes must be made in compliance with the procedures contained in the governing documents. This benefits homeowners and the association because the association has fair warning about changes and can make sure that decisions are not discriminatory, as the approval or denial may not be made arbitrarily.

The administrative part of the process can trip up even experienced managers and boards if it isn't handled correctly and in an organized fashion. To ensure that written consent is obtained and to assist in the uniform and consistent application of the procedures and assure members that everyone is treated alike, your architectural review committee (ARC) should use a well-drafted application form. Like our *Model Form: Draft Airtight Architectural Review Form*, yours should communicate to the applicant what is expected, so it will help protect the association in the event the applicant member fails to follow the process.

Getting Prior Consent Is Key

Requiring members to get board consent before making any modifications to their homes isn't meant to be punitive or make things difficult for homeowners. There are multiple, very justified reasons for this.

(continued on p. 8)

FEBRUARY 2018

Risk Management

(continued from p. 7)

For example, consent prevents low-quality workmanship. Unqualified contractors might build something that's unsafe and results in liability for both the member and the community association. In the case of a condominium building, a contractor might damage another condominium unit in the course of its work. Even if it doesn't cause obvious damage, if a contractor builds something improperly, it could affect other building systems. An example of this is an improperly installed heating system that overloads the building's electrical capacity.

Getting consent also avoids disrupting the community's architectural and aesthetic uniformity. By getting to see the plans before they're carried out, you can ensure that they don't disrupt your community's appearance. A poor appearance can affect property values—which affects everyone from homeowners to management.

Consent also maintains control over construction. Including appropriate language in your declaration will allow you to exert control over noise, dust, safety, and the hours during which work may be done, avoiding nuisances that typically are a downside to living in a traditional neighborhood without an association that can keep them in check.

Consent also avoids setting a dangerous precedent. Allowing modifications without board consent can lead to future arguments. A member might say that the board has legally given up its right to control the construction process or might accuse the board of selective enforcement.

Understand How Disputes and Litigation Brew

Many owners believe that architectural requirements create an unnecessary, time-consuming burden. Most likely, these owners have had negative experiences with their architectural review committees, and, in many cases, these experiences have led directly to court where the committee was blamed for having acted arbitrarily.

There has been much litigation in the area of architectural controls. And courts have made it clear that language in the governing documents regarding architectural controls is valid and enforceable, provided there are clear policy guidelines establishing the overall standards. Boards of directors must establish fairly specific guidelines, and if those rules are not already in your association documents, they should be drafted and approved in accordance with your legal documents and the laws of the state in which your community is located.

The directors also should be aware that the following will be valid defenses by an owner when the association tries to seek enforcement of the architectural standards:

Arbitrary and capricious actions have been taken. The architectural standards must be applied fairly and consistently, across the board and in good faith. All too often, architectural review committees have been accused of asserting dictatorial powers.

(continued on p. 9)

FEBRUARY 2018

Risk Management

(continued from p. 8)

Delays have occurred. If a member is in violation of the architectural standards, the board must take prompt action to assure compliance of the standards. In legal terms, delays might lead to “laches” or “estoppels.” This means that the board has permitted a lengthy period of time to elapse before taking action against an owner. Waiting too long to enforce the governing documents against an unauthorized modification might bar the board from doing so.

A waiver has been granted. Basically, if the board fails to enforce a covenant in the case of one owner in a similar situation, it may be prohibited from enforcing the same standards against another owner.

Why Your Application Form Is Crucial

All members seeking approval from the ARC should fill out a standard application form. A major objective of the architectural review process is to have in place guidelines and procedures that are perceived by members to be fair and reasonable. If members view the process as fair, they are much more likely to comply voluntarily with those guidelines and procedures.

Applications also provide the opportunity to communicate important points to the member. You can use the form to remind applying members of various liability protection issues in your governing documents. You can include language putting the member on notice that the association can recover any losses incurred as a result of members’ unauthorized modifications of their homes, including reasonable attorney’s fees and costs incurred to enforce the governing documents.

PRACTICAL POINTER: Other important reminders might include the fact that: (1) approval does not constitute municipal or county building department approval; (2) the member must notify the committee or board upon completion of an improvement and authorize it to enter onto the property to inspect the improvement; and (3) failure to start or complete an improvement within the time specified on the application shall result in withdrawal of approval unless an extension is requested and approved in writing. ♦

➤ ➤ ➤ *Model Form follows* ➤ ➤ ➤

MODEL FORM

Draft Airtight Architectural Review Form

Your association’s architectural review committee should have a standard, carefully drafted architectural change application that protects it from liability and benefits members who wish to change their properties. You can adapt this form to reflect the important points and requirements of your review process. The architectural review requirements for granting consent should be clearly stated in your community’s governing documents. Show this form to your attorney before using it.

ARCHITECTURAL CHANGE APPLICATION

MEMBER’S NAME: _____ DATE: _____

ADDRESS: _____

TEL. #: _____ EMAIL: _____

The governing documents require that you submit all proposed exterior additions, changes, or alterations to your house/unit and lot to the Architectural Review Committee for approval. Your application must include detailed information describing the proposed changes.

▶ TYPE OF PROPOSED CHANGE

- Outside Walks/Stairs
- Landscape Front or Side Yard
- Sunrooms/Patio Covers
- Decks/Patios
- Fences/Retaining Walls
- Driveway/ Walkways
- Painting House or Trim New Color
- Other _____
- Garage Doors/Exterior Doors
- Roofing Replacement
- Swimming Pool

▶ DESCRIPTION OF PROPOSED CHANGE:

▶ REQUIRED DOCUMENTS FOR CONSIDERATION:

- Elevations—Include front, side, and rear elevation drawings to scale.
- Site plan—Show improvement in relation to the home and setbacks to scale.
- Color samples—for color changes only.
- Extras—Include sketches, clippings, pictures, and/or catalog illustrations for clarity.

It is the member’s responsibility and obligation to obtain all required building permits, to contact the utility and cable companies, and to construct the improvements in a workmanlike manner in conformance with all applicable building and zoning codes.

▶ ACKNOWLEDGEMENT

The undersigned member hereby acknowledges and agrees that the undersigned shall be solely responsible for determining whether the improvements, alterations, or additions described above comply with all applicable laws, rules, regulations, codes,

(continued on p. 11)

ARCHITECTURAL CHANGE APPLICATION *(continued)*

and ordinances. The Architectural Review Committee and Sunny Hills Homeowners Association shall have no liability or obligation to determine whether such improvements, alterations, and additions comply with any such laws, rules, regulations, codes, or ordinances. If a member begins a project and cannot complete it due to construction issues that require changes, the member must resubmit all changes for written approval prior to continuing and finishing the project. The undersigned acknowledges that he or she has 90 days from the date of the approval of this form to complete the requested work. If unable to complete the work in time, the member must request a time extension and the extension must be approved in writing.

I agree not to begin this proposed property improvement(s) until the Architectural Review Committee notifies me in writing of its approval. If any change is made that has not been approved, the Committee has the right to ask me to remove the improvement from my property, and I agree to do so. Also, I agree to notify the Committee upon completion of the improvement(s) and authorize it to enter onto the property to inspect the improvement(s).

MEMBER'S SIGNATURE: _____ DATE: _____

▶ COMMITTEE ACTION

APPROVAL

DISAPPROVAL

COMMENTS: _____

Must be signed by 3 Architectural Committee Members.

COMMITTEE MEMBER _____ DATE: _____

COMMITTEE MEMBER _____ DATE: _____

COMMITTEE MEMBER _____ DATE: _____

▶ COMMITTEE REVIEW

The action below is taken after notification by the member that the approved work has been completed and inspected by a member of the Architectural Review Committee.

ACCEPTED

REJECTED

COMMENTS: _____

COMMITTEE MEMBER _____ DATE: _____