Community Association Management Insider®

Helping You Run Your Condo or Homeowners Association Legally and Efficiently

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FEATURE

Make sure the high-risk components in your members' units don't cause damage or lead to unnecessary insurance claims.

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Preempt Disasters by Getting Board Authority Over Equipment in Members' Units

Proper and timely maintenance of every feature in a planned community or condominium is key to keeping things running smoothly. But members will inevitably have a wide range of attitudes toward their own maintenance obligations. On one end of the spectrum will be members who understand that, depending on the governing documents, they have maintenance obligations that are not the responsibility of the association. On the other end, you'll encounter members who either don't understand their obligations or don't take them seriously.

To some degree, you can control certain aspects of members' own maintenance. For example, members may be required to keep the exterior of their units or freestanding homes in a specific condition or conforming to a certain appearance. Because not complying is easy to see, you can take action immediately and be sure to nip any maintenance failure in the bud with warnings, fines, or legal action in a worst-case scenario.

Unfortunately, control over the inside of a member's unit is less clear cut. Items like hot water heaters, washing machines, some kinds of pipes, or even smoke detectors, which have the potential to malfunction and cause damage to the member's unit and adjoining units, are essentially invisible to the association. These so-called "high-risk components" that are located in a member's unit belong to the member, and it's the member's responsibility to maintain, repair, and replace them. It wouldn't be surprising to find out that many members tend to fix something only after it breaks—and with these high-risk components, that can be too late to avoid damage to other units or common areas. Here's how you can ensure that the high-risk components in your members' units are properly maintained.

Get Authority Over Members' Unit Maintenance

A major issue involved in a members' failure to maintain so-called "high-risk" components in their units is insurance. Even communities

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of freestanding homes need to make sure that high-risk components within individual units are properly maintained if the community has a master insurance policy. Insurers today often refuse to renew policies for what they consider to be high-risk community associations. Or if they do renew the policy, they do so only in return for much higher premiums. So if these components falter and lead to claims, your association could lose its insurance or have to pay a lot more to keep it.

Creating a policy to deal with high-risk components before disaster strikes can not only help to avoid the serious consequences from things like water heater leaks or the possibly fatal outcome of a faulty smoke detector, but also minimize problems with the association's insurance. Passing an amendment that gives your association the authority to compel proper care of high-risk components solves the problem.

Key Points to Include in Amendment

Like our *Model Amendment: Obligate Member to Take Care of Unit's 'High-Risk Components',* yours can be incorporated into the association's governing documents. The amendment would be either to your bylaws or declaration—depending on whichever of these governing documents addresses the issue of maintenance.

Your amendment should do the following:

Establish authority. Give the board authority to designate high-risk components. Say that the board has the authority, from time to time, to pass resolutions designating certain unit components as high risk [Amend., par. 1].

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Set requirements. Allow board to set requirements for care of high-risk components. Say in your amendment that whenever the board passes a resolution designating a component as high risk, it will detail what steps members must take to care for the component [Amend., par. 2]. Then, in the amendment, list the ways the board can require members to care for high-risk components. These listed requirements should be as broad as possible, to give your board the maximum amount of flexibility in setting specific requirements for specific high-risk components in the resolutions. Since the specific actions will be different for each type of component, don't go into detail about them in the amendment. The requirements you should list in your amendment should allow the board to require the following:

- **Inspection at specific intervals by an inspector designated by the association.** The board should be authorized to require inspection of high-risk components at set intervals [Amend., par. 2(a)]. But since the specific intervals may differ for each type of component, don't define the inspection time interval in the amendment. That should be done in the resolution that designates the high-risk component. The interval the board chooses will depend on the type of high-risk component it is. For example, you might want to require inspections of chimneys every year, while a smoke detector might require inspection every six months. Also, by remaining flexible, you give the board the ability to recognize technological changes in the future. For example, if a domestic hot water heater is invented that has a useful life of 20 years, the board can redefine the interval without having to amend the bylaws or declaration. To determine what inspection intervals to set in the resolution for each component, consult appropriate professionals. For example, the component's manufacturer might have standards for inspection, maintenance, and repair. You can also consult your insurer.
- **Replacement or repair of component at specified intervals, even if it's still working.** It's very important to act preemptively with respect to high-risk components because once they falter, it might be too late to avoid serious damage. So give the board the right to require repair or replacement at specified intervals, even if the component isn't demonstrably deteriorated or defective [Amend., par. 2(b)]. The key to all of this is acting preemptively. As with inspection intervals, to set repair and replacement intervals, consider advice from the component's manufacturer and/or your insurer. You can even link the repair/replace requirement to the manufacturer's warranty on the component.
- **Replacement or repair of component with items or components meeting designated standards.** To prevent members from buying cheap replacement parts that are likely to malfunction or wear out quickly, give the board the right, when designating a new high-risk component, to impose standards on the repair or replacement parts, or on an entirely new component [Amend., par. 2(c)]. Again, the exact specifications will be different for each component, so don't try to create a blanket standard. Instead, include the specifications in the resolution.

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- **Additional components or installations when a high-risk component is replaced or repaired.** Sometimes, a type of component might have been improved since the last time it was repaired or replaced. If an improvement makes the new component safer, the board should require it to be installed [Amend., par. 2(d)]. For example, exhaust fans over stovetops can collect grease and cause fires.
- **Replacement or repair by qualified contractors.** To avoid shoddy workmanship that could lead to problems later, say that the board can require members who are replacing or repairing a high-risk component to use contractors with appropriate licenses, training, or professional certification [Amend., par. 2(e)]. Also say that the board may require contractors to be approved by the association. Some associations keep a list of preapproved contractors for each type of high-risk component. Making this list available to your members makes it easier for the members to care for their high-risk components as the association wants them to. It can also save members money; some associations sometimes work out volume discounts with contractors, like chimney sweeps or plumbers.
- **Unit access for association-designated professional to inspect repairs and replacements.** In practice, members will often defer to the association to implement the maintenance, repair, and replacement of high-risk components. But sometimes, a member will take care of it himself. In those cases, it's important for the association to have the right to have the completed work inspected by an inspector chosen by the association [Amend., par. 2(f)].
- **Keep responsibility for high-risk components on members.** Include in your amendment a statement that even though the association is imposing maintenance, repair, and replacement requirements, it's still the members' responsibility to perform and pay for these things [Amend., par. 3]. Some members might think that the association is assuming that responsibility. Members must know that each high-risk component still belongs to them and that it's their obligation to insure, maintain, repair, and replace it, and to pay for each of these things.

Give association enforcement rights. Give the association a choice of three ways to compel members to care for their high-risk components [Amend., par. 4]. The amendment should allow the association to:

- **Fine member for noncompliance.** If a member ignores the association's notification that it's time to maintain, repair, or replace a high-risk component, then give the association the right to fine the member [Amend., par. 4(a)]. This is too important an issue for the association not to enforce. A fine will make members more aware.
- **Enter unit to perform maintenance, repair, or replacement.** It's not enough just to fine a member who ignores the association's notification that it's time to maintain, repair, or replace a high-risk component. The objective isn't raising revenue; it's safety. So, in your amendment, give the

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MODEL AMENDMENT

Obligate Member to Take Care of Unit's 'High-Risk Components'

The following Model Amendment—which can amend either your association's bylaws or declaration—sets a policy enabling the board to compel members to take proper care of "high-risk components" in their units. Check with your attorney before using this amendment in your community, to make sure that you're complying with state law and your governing documents in the process by which you pass the amendment.

INSPECTION, MAINTENANCE, REPAIR & REPLACEMENT

1. **Board Designation of High-Risk Components.** The Board of Directors (the "Board") of Shady Acres Community Association (the "Association") may, from time to time, after notice to all members and an opportunity for member comment, determine that certain portions of the Members' units (the "Units") required to be maintained by the Members, or certain objects or appliances within the Units, pose a particular risk of damage to other Units and to the Common Elements if they are not properly inspected, maintained, repaired, or replaced. By way of example but not limitation, these portions, objects, or appliances might include smoke detectors and water heaters. Those items determined by the Board to pose such a particular risk are referred to as "High-Risk Components."

2. **Requirements for Care of High-Risk Components.** At the same time that it designates a High-Risk Component, or at a later time, the Board may require one or more of the following with regard to the High-Risk Component:
   a. That it be inspected at specified intervals by a representative of the Association or by an inspector or inspectors designated by the Board.
   b. That it be replaced or repaired at specified intervals, or with reference to manufacturers' warranties, whether or not the individual component is deteriorated or defective.
   c. That it be replaced or repaired with items or components meeting particular standards or specifications established by the Board.
   d. That when it is repaired or replaced, the installation include additional components or installations specified by the Board.
   e. That it be replaced or repaired by contractors having the particular licenses, training, or professional certification or by contractors approved by the Board.
   f. If the replacement or repair is completed by a Member, that it be inspected by a person designated by the Board.

3. **Member Responsibility for High-Risk Components.** The imposition of requirements by the Board under Section 2, above, shall not relieve a Member of his or her obligations regarding High-Risk Components, including but not limited to the obligation to perform and pay for all maintenance, repairs, and replacement.

4. **Board Authority to Enforce Member Obligations.** If any Member fails to maintain, repair, or replace a High-Risk Component in accordance with the requirements established by the Board hereunder, the Association may, in addition to any other rights and powers granted to it under the governing documents and state law:
   a. Fine the Member or the occupant of the Unit, or both;
   b. Enter the Unit for the purpose of inspecting, repairing, maintaining, or replacing the High-Risk Component, as the case may be, and charge the cost to the Member as a common expense attributable to the Unit; and
   c. Bring an action against the Member for specific performance of the Member's obligations hereunder.

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association the right to enter the unit and do the maintenance, repairs, or replacement itself if the member doesn't do so even after being fined [Amend., par. 4(b)]. This right, however, authorizes the association to enter the member's unit if the member resists. In situations where the unit occupant is a renter, rather than the member, this tactic will often succeed. Renters typically like to have this work done, especially since they won't have to pay for it; the member will.

- **Take legal action to compel compliance.** Finally, if the member doesn't respond to a fine, and the unit is owner-occupied and the member resists entry by the association, give the association the right, in your amendment, to take legal action to compel compliance [Amend., par. 4(c)]. This compliance can either be an order by a court for the member to perform the required maintenance, repairs, or replacement, or it could be an order to grant the association access so it can do so. ♦

Q&A

Disclosing Denial of Leasing and Sales Transactions

Q The board of directors of the community association I manage has the authority to approve or deny proposed leasing and sales transactions. If there is a denial, should we disclose the reasons behind it? If so, what is the best way to do so?

A This will depend on a variety of factors. Like yours, many community association boards have the authority under their governing documents to scrutinize proposed leasing and sales transactions and to approve or deny them. Before you decide whether to disclose the reasons for a denial, take these issues into account.

Fuel for Legal Battles

Boards are often advised by legal counsel that it's safer to simply say that an application was "denied" without going into the details surrounding that denial. If the property owner wishes to know the reason for the denial and pursues it legally, then yes, the board will have to provide that reason.

One school of thought is that providing reasons for a denial could fuel unnecessary legal fights. The other school demands transparency and the reasons that the board is exercising its authority to deny when screening renters and purchasers. There may be legitimate reasons to support a denial, and by failing to articulate them, a potential purchaser or renter can leap to an incorrect conclusion that a discriminatory motive was involved.

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Q&A

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Regulations May Give Rise to Claims

In recent years, some states and counties have been getting involved in the association approval process. For example, in Broward County, Fla., there is an ordinance that requires all Broward County condominium, cooperative, and homeowners associations to give a specific reason in writing for the denial of an application for purchase or rent. In addition, all Broward County associations must also give written notice to the Board of County Commissioners of the status of all pending applications to rent or purchase a dwelling.

The ordinance is intended to head off denials that are discriminatory. Critics of the ordinance have pointed out that many communities are self-managed and strapped for time as it is, so this ordinance overlooks how impractical it may be for a volunteer board to advise the county about the status of every pending sales and leasing application. There are already fair housing mechanisms in place to combat discriminatory practices there (and practically every other location in the country), but discrimination is such a concern that the ordinance was seen as necessary.

Use Abundance of Caution

For association managers, the question remains whether you should communicate the reason an application for purchase or lease was denied. Most association attorneys would agree that any communication in this area should flow only to the owner of the unit and not to the applicant. The reason for this is that the owner has what is called "privity" with the association, meaning he or she is the party who has standing to enforce the association's governing documents.

If you do communicate a specific reason for the denial, it is then the owner's decision whether to relate that information to his or her applicant. Of course, if your association's governing documents or your state's statutes or county ordinances outline a specific procedure for this communication, then that must be followed.

Some communities have begun requiring owners to conduct their own background checks on the people to whom they plan on renting or selling their property, in addition to the association running one. This protocol results in the owner having the pertinent information without the association having to involve itself in the process of relating the reasons for a denial. Of course, if the board is inclined to deny an application and the screening results don't support such a denial, then there's going to be a problem.

Every application presents its own unique set of facts and circumstances, so it's essential that you discuss how to handle each with your association attorney. Remember that, as with all dealings, words count, so the manner in which you frame the association's thoughts and decisions requires deliberation and some measure of finesse. ♦

DEALING WITH MEMBERS

How Business Judgment Rule Can Protect Association from Lawsuits

Typically, if decisions made by the board turn out well, members are happy. But if the decisions lead to unforeseen costly expenses to the community, some members might sue, regardless of the board members' good intentions. That's why it's more important than ever that your board's judgments be the result of a sound, deliberative decision-making process. If they are, there's a much better chance that courts will defer to them in case of a lawsuit.

If a board can show that a decision was made as a result of such a process, the board can often rely on the "business judgment rule" when faced with a member's lawsuit over a particularly unpopular board decision. Here's what you need to know about this important legal framework.

How Rule Works

The business judgment rule is a part of corporation law. It holds that a judge or court of law will generally not interfere or hold liable the decisions of a board as long as that board is acting in good faith in the best interest of the shareholders.

The business judgment rule limits judicial scrutiny of actions of association boards when they act in good faith, exercise honest judgment, act with the best interests of the association, and in an informed, prudent manner. Although generally regarded as a rule of liability for corporate directors, courts have used the rule as a test to determine the validity of association board decisions.

Abide by Decision-Making Principles

Here are a few guidelines an association board can implement to better ensure that a court will defer to the board's decisions.

Gather information, obtain expert advice. Directors should be informed. Directors should ask questions of management, legal counsel, engineers, or other experts as often as possible before making decisions. Getting the advice of appropriate professionals can help show that your board made an informed and reasonable judgment.

Obtaining expert advice is particularly important when dealing with an issue that's clearly outside board members' expertise, such as a structural problem with the physical components of your community. Although directors are not required to accept the advice of experts, that advice should be carefully considered in making decisions. If that advice is disregarded, the board should document the reasons.

Consider alternatives. Directors should consider alternative courses of action. When alternatives are proposed, the board should give appropriate consideration to the alternatives. Decisions made in good faith are likely to be upheld, whereas arbitrary decisions are not likely to survive challenge.

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Dealing with Members

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One way to show that your board invited others' input and considered alternatives before deciding on a course of action is to appoint a committee of members to brainstorm solutions to problems. A committee of members can help the board by making recommendations to it, ranking them in order of preference, and explaining why certain solutions are better than others.

Act in good faith. Boards should realize that the business judgment rule is intended to protect them only when they're acting in good faith. It's not intended to shield them from liability when they're acting in a discriminatory manner.

Properly document decisions. Proper documentation can enhance a board's credibility and the potential success of a claim or defense. For example, if the meeting minutes for a particularly contentious decision show little discussion, a court may be less likely to defer to the board's judgment. Even though in many situations concise minutes are more useful, when an important decision is being made, it doesn't hurt to explain the basis for it in the minutes.

Adhere to due process. The board should ensure that relevant due process requirements are met, including notice and timing requirements. For example, if a response must be made to an architectural application within 30 days, that time deadline should be met. Similarly, if the architectural review committee can reject an architectural proposal based on consistency with community standards, the notice of disapproval should identify those standards and identify why the proposal does not meet them. ♦

IN THE NEWS

Board Member Accused of Racial Profiling After Asking to See Resident's ID

A white man who challenged a black family's use of a gated pool in a North Carolina planned community resigned from the homeowner's association board. After the board member, who also was the community pool chairman, asked a mother and her son to produce identification verifying that they were residents of the community, a verbal altercation began. The board member called the police, who diffused the situation.

A social media backlash prompted by the resident's Twitter post about the situation ensued. In a statement made through his lawyer, the board member said that he didn't intend to discriminate based on race and that in seven years as chairman of the pool, he occasionally has had to ask people of all ages and races to leave for violating the rules.

The homeowners association said in a statement that the board member had resigned from both his positions in the community. It stated that association officials "regret the situation at our community pool that left neighbors feeling racially profiled." It continued that, "in confronting and calling the police on one of our neighbors, the pool chair escalated a situation in a way that does not reflect the inclusive values we seek to uphold." ♦

RECENT COURT RULINGS

➤ Membership to Recreational Club Was 'Easement' Permitted by Governing Documents

FACTS: A group of homeowners sought a declaratory judgment from a trial court that an amendment to the governing documents of their homeowners association was null and void. The amendment expressly authorized the association to enter into an agreement with a nearby private swim and tennis club. Under the agreement, the club granted an easement giving the association's members the right to use the club's facilities as members. The agreement provided that club fees would be added to the assessments collected from members by the association and would in turn be remitted by the association to the club.

The homeowners alleged that the amendment to the governing documents was void because Georgia law and the governing documents of the association don't permit the association to force the homeowners, without their consent, to be members of a private club that's not part of the association and to set itself up as a debt collector for a third-party entity over which the association has no legal control or authority.

Both the homeowners and the association asked a trial court for a judgment in their favor without a trial. The trial court determined that the amendment was void and ruled in favor of the homeowners.

DECISION: A Georgia appeals court reversed.

REASONING: A developer recorded the original declaration of covenants and restrictions for the association in July 1992. The association filed an amended declaration in August 2011, which authorized the association to accept an "easement" granting the homeowners access to recreational facilities, for the common benefit of all the homeowners, and to assess the homeowners their pro rata share of the ongoing cost of the easement. The appeals court determined that the membership to the club was an easement.

Additionally, the 2011 amendment authorized the association, acting through its board of directors, "to acquire, lease, hold, and dispose of tangible and intangible personal property and real property." The appeals court noted that, "by definition, an easement is an interest in real property, albeit a limited one." ♦

- Amberfield Homeowners Assn. v. Young, June 2018