

# Community Association Management *Insider*<sup>®</sup>

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## Colorado HOA Managers May Face Licensing Requirement

Faced with a growing number of complaints from Colorado homeowners about American flags, access to financial documents, and the right to speak up at meetings, the Colorado Legislative Action Committee of the Community Associations Institute (CAI) is asking the state to investigate the need to license community association managers.

“State law says you must allow people to fly an American flag,” said committee chair Chris Pacetti in a press release. But some associations are fighting homeowners over flying flags at their homes. Pacetti says that this is an example of the fact that many association managers aren’t aware of what state law requires and that anyone can operate as a homeowners’ association manager without any qualifications. He believes that requiring a license will change that because managers would

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## FEATURE

## Control Members’ Access to Association Records

Community members may want to inspect the records of their association for a variety of reasons, some legitimate and some improper. It may be hard to tell whether a member wants access to records for a harmless reason, to harass the association, to gather confidential information to which the member isn’t entitled, or for information that will support his case if he’s planning to sue the association. This makes it difficult to know when to grant and when to deny requests when they’re made. But properly controlling members’ access to association records can save your association from having to deal with unnecessary arguments or even a lawsuit.

Because the job of the board is to serve the interests of the entire association, it’s important for board members to know which requests for access to association records to grant and which to deny. Here’s how you can screen out improper requests to obtain information that members aren’t entitled to see.

### Three Factors Determine Confidentiality

The right to inspect community association records is governed by three factors: applicable statutes, governmental regulations, and a

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## BEST PRACTICES

## How to Implement a Smoking Ban in Your Community

Smoking not only poses dangers such as fire and health risks to a community, it also annoys nonsmoking members and their guests, resulting in more complaints that you have to address. Cigarettes or cigars that haven’t been completely extinguished can spark flames. And secondhand tobacco smoke—Environmental Tobacco Smoke or ETS—has been classified by the Environmental Protection Agency (EPA) as a “Group A” carcinogen, a known cause of cancer. Aside from preventing fires, health problems, and time-consuming complaints, there may be other positive reasons for a ban, such as increased property values. If it’s within your association board’s power to ban smoking, you should seriously consider proposing a ban

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**Access to Records** (continued from p. 1)

particular association's governing documents, says New Jersey attorney and *Insider* board member David J. Byrne. Governing documents will usually specify which records members have a right to see. And almost all states have laws on the issue.

Although the records you must share vary widely from state to state, the general rule in most states is to give members access to association records unless the requested records fall into an exception. For example, some records include information that, if disclosed, would constitute an invasion of privacy. Other records could harm the association if disclosed, such as confidential advice from the association's legal counsel.

Also familiarize yourself with the types of records that your state's law specifically *bans* an association from disclosing. For example, if disclosing a member's criminal past is a violation of state law, the association shouldn't give a member access to the records containing that information, or any other records that discuss that subject.

**Deny Request for Certain Records**

Keep the following types of records confidential unless your state law or governing documents say otherwise. As always, speak with your association attorney to help make the best decision.

**Members' documents not related to business.** Don't let other members see documents provided by individual members that contain personal information not directly related to the business of the association. In some instances, an association will gather members' medical information for emergency purposes. That information should be

**Colorado HOA Managers** (continued from p. 1)

have to take a test. "The idea is to require managers to be a little more educated and to better understand how to handle those kinds of conflicts," said Pacetti.

The committee thinks that requiring managers to be licensed would also help prevent crimes like embezzlement, because anyone with a prior conviction wouldn't be eligible. "Running an HOA is like running a business," said Dee Wolfe, a member of the committee's licensing task force. "Association managers are responsible for protecting and maintaining property values in the communities they manage." Requiring a license provides additional consumer protection and would elevate the level of professionalism of association management, according to the CAI.

The Colorado Department of Regulatory Agencies is investigating the need for licensing association managers. Depending on its findings, the CAI could propose licensing legislation in the 2012 session. Nine states and the District of Columbia have already enacted manager licensing or certification standards, and seven more states have pending legislation to enact such laws.

kept private. Under most states' laws, members who seek access to association records must have a proper purpose—that is, one that's related to the member's membership interest in the association—for wanting to see them. Commercial use and personal financial gain are not valid reasons for accessing records. But even if the member establishes a proper purpose, that doesn't mean that you have to provide the sought-after records. Remember that your association must weigh the purpose against the reasons to keep the records confidential.

For example, documents and records that could allow a person to secure personal information that could be used to perform acts of identity theft should not be given to members, Byrne notes. (For more information about what you must do to prevent identity theft at your association, see "What Associations Need to Know About the Federal 'Red Flags' Rule," in the January 2011 issue of the *Insider*, available on our Web site.)

**Privileged communications.** Don't grant a member access to any letters or emails sent by your association's attorney to a board member or to you, if that letter or email is subject to attorney-client privilege. "Documents and records cloaked in attorney-client privilege should be 'off-limits' all of the time," says Byrne. "Absent a vote by the board to waive the privilege, communications between a lawyer and the association should remain off-limits," he specifies.

Don't be swayed if a member argues that because he's a member of the association, and because the attorney represents the association, the attorney represents the member too. This isn't true. You

can explain to the member that the association's attorney is general corporate counsel whose client is the corporation, not the board or the membership.

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**PRACTICAL POINTER:** How do you know if a communication is privileged? If the communication contains legal advice and was prepared in contemplation of actual or possible litigation, it's privileged and shouldn't be shared. So, for instance, if the communication involves the association's enforcement options against a member who's in violation of the rules, it would be privileged. But if it contains merely an explanation of how many votes are necessary to amend the bylaws, it wouldn't be privileged.

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**Records concerning pending or potential lawsuits.** The association might have records that involve a pending or anticipated lawsuit. Members shouldn't be given access to them. It could put the association at a great a disadvantage in a future lawsuit if that information was shared with other members.

**Transactions in negotiations.** The process of negotiating certain transactions, like contracts, is a very sensitive one, and often involves confidential information. In addition, part of the process often involves accepting bids from several vendors. It would undermine the integrity of the bidding process if members were able to access this information. For example, if a member were a friend of a vendor competing for the association's business, he might be tempted to look at the competing bids and report back to his friend.

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**PRACTICAL POINTER:** Restrict members' access to individual personnel records. If a member wants to know the total amount of how much the association is paying its

employees, this information is permissible to share with him. But individual personnel files—including job evaluations and disciplinary actions—should be kept confidential. Employment records, including salary, benefits, and private files, are generally considered to be absolutely private, and shouldn't be shared with anyone except those people who need to know, such as a supervisor, board members, or the manager.

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### Records That Fall into Gray Areas

There are two types of records that seem as though they would be private but are sometimes given to members who request them. "What an association, in any 'gray area,' should fight to keep free from inspection varies from jurisdiction to jurisdiction," says Byrne.

#### Closed meeting minutes.

Some states permit boards to hold closed meetings, which exclude the participation of members. It seems as though the minutes of the meeting shouldn't be available, or it would defeat the purpose of having the closed meeting. But Byrne doesn't believe that. Depending on the particular jurisdiction or definition of "closed meeting," minutes of closed meetings may be protected from member inspection. Or, depending on the jurisdiction, an owner may have the right to forcibly review or inspect them, he notes. "In relation to 'minutes,' generally, if an association makes them, a court is likely to allow an owner to see them," Byrne says. Associations should, therefore, be judicious about making minutes when not required by law, he adds.

**Accounting records.** Many members feel that they should get access to individual mem-

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## Access to Records

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ber accounts because they have the view that members are business partners with regard to the association, and if some partners aren't paying their dues, then the other partners are entitled to know this. In some jurisdictions, members have the right to inspect all generally kept/accepted accounting records, including those that reveal the names, addresses, and account balances of owners. But members' rights to force an association to allow inspection of these records vary from jurisdiction to jurisdiction.

### Require Access Request to Be Made in Writing

To avoid disputes, any time a member wants access to the association's records, your association should require him to fill out a written request form. "It is always the best policy in the context of any organization with respect to which laws and fiduciary duties are involved that records of inspection requests, and *actual* inspections, be kept," says Byrne. "I really think that any record inspection or copying policy should include a written request component," he stresses.

Byrne points out that the nature and extent of a written request form will vary from jurisdiction to jurisdiction because it may depend upon the law or other issues related to the access. For instance, if the law specifically allows an owner to inspect the association's delinquency report and that law makes no reference to any conditions, any form that imposes conditions may not be lawful, he points out. Byrne notes that, at the very least, the name,

address, and contact information of the member should be requested. That's likely to be enforceable even with respect to records to which owners have a clear inspection right, Byrne says. He recommends that the association should also consider including on

the form various disclosures and notices that may protect the association should the owner utilize the information inappropriately and/or improperly.

Your request form, like our Model Form: Screen Out Improper Records Inspection Requests,

## MODEL FORM

### Screen Out Improper Records Inspection Requests

Require a member to do three things in order to make a request for access to your association's records. You can adapt this form for use at your community after showing it to your attorney.

#### REQUEST FOR ACCESS TO ASSOCIATION BOOKS AND RECORDS

MEMBER NAME: \_\_\_\_\_ DATE: \_\_\_\_\_

ADDRESS: \_\_\_\_\_

TEL. #: \_\_\_\_\_ EMAIL: \_\_\_\_\_

Pursuant to [insert relevant section of state law, if any] and [insert relevant section of governing documents, if any], I hereby request that ABC Community Association (the "Association") provide access to the books and records of the Association.

- The books and records that I wish to review are (attach separate piece of paper if necessary):
  - \_\_\_\_\_
  - \_\_\_\_\_
  - \_\_\_\_\_
- I certify that my request to review the books and records of the Association is for a proper purpose related to my membership in the Association, and that this request is not for commercial purposes or my personal financial gain. Specifically, my reason for wanting to review the books and records of the Association is as follows:
 

\_\_\_\_\_

\_\_\_\_\_
- I acknowledge and accept the association's records access and inspection procedures. I acknowledge and accept that the books and records of the Association will be made available to me only at such time and place as the Association's policy provides, and that there may be a cost associated with making these documents available to me. I agree to pay any costs associated with reviewing the books and records of the Association, including but not limited to the actual and reasonable costs of labor and photocopying material. I further acknowledge that these costs may be required of me prior to reviewing the books and records.

MEMBER SIGNATURE: \_\_\_\_\_ DATE: \_\_\_\_\_

should require a member requesting to access association records to do the following:

**Specify which records.** If you don't limit the request in this way, members will ask for everything. Not only is that time consuming and unwieldy, but it might be strategically disadvantageous if the record request is because of a lawsuit between the association and the member [Form, par. 1].

**State reason for access.** This can help you determine whether the member has a proper purpose in seeking access to the records. You should also check to see whether the information in the requested records relates to the member's stated purpose [Form, par. 2].

**Acknowledge and accept association's access, inspection procedures.** Access and inspection procedures might include

times, days, and locations at which the records will be made available for inspection, as well as a cost for inspecting the records. If the association requires an inspection fee, the member should have to agree to pay the cost before being given access to any records [Form, par. 3].

#### Insider Source

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## RECENT COURT RULINGS

### ► Co-op Manager Not Liable for Breach of Management Agreement

**Facts:** A member in the penthouse apartment of a New York City cooperative building sued the co-op, its board, and its manager, claiming that they failed to maintain the building in good repair and that they concealed from the co-op's members that dangerous problems existed in the building's fireplaces and flues.

Two of the 11 complaints in the member's lawsuit were against the manager individually. According to the member, smoke, fumes, and soot have regularly seeped into her apartment for decades because of the fireplace and flue problems. The member said that it had been "depriving her of the full use of the apartment, and endangering the life of others who have occupied the apartment with her, and placing other residents of the building in danger." She also alleged that the manager had breached the building management agreement by failing to properly maintain the building and hire competent contractors.

The member also sued the co-op, board, and manager for retaliation, saying that they forced her to remove her rooftop garden after she complained to the board and other members about the chimney problem. The co-op, board, and manager asked the court to dismiss the member's claims.

**Decision:** The court granted in part and denied in part the request to dismiss the claims.

**Reasoning:** The court dismissed all but one of the member's claims. In her claim against the manager for "aiding and abetting" the board's breach of its fiduciary duty to her, the member stated that the

manager "exercised no independent thought, but did whatever the board told him to, including covering up and actively concealing from the residents, the board's misconduct with respect to the dangerous condition of the chimney and flues." Because the member presented evidence that the board had breached its fiduciary duty to the members of the co-op, the court denied the manager's request to dismiss the claim and ordered it to proceed to trial. The manager was liable for aiding and abetting the board because he had carried out its orders that caused that breach, specifically, misrepresenting certain information about the chimney and flue problems to members in the building.

However, the court ruled in favor of the manager on the member's other claim against him for allegedly breaching the management agreement by failing to properly maintain the building and hire competent contractors to perform work on it. That was because the member made that claim based upon her status as a "third-party beneficiary" of the contract. But the court pointed out that a party asserting rights as a third-party beneficiary must establish: (1) the existence of a valid and binding contract between other parties; (2) that the contract was intended for his or her benefit; and (3) that the benefit is sufficiently *immediate*, rather than *incidental*, to indicate the assumption by the contracting parties of a duty to compensate him or her if the benefit is lost. The court noted that the member is "at best, an incidental beneficiary of the management agreement, but not a third-party beneficiary thereof."

■ Hubshman v. 1010 Tenants Corp., et al., October 2011

## Best Practices

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in either part or, depending on what type of community you have, all of the community.

### Pass Bylaw to Enforce Policy

Because of the risks involved with smoking, many community association boards feel that it's their responsibility to ban smoking in their communities, says Maryland attorney and *Insider* board member P. Michael Nagle. Some boards feel that putting an end to smoking in common areas is enough, while others try to prohibit smoking in members' units as well. If you decide to do one or both, you should write an effective bylaw so that you can enforce a no-smoking policy.

Although you could probably ban smoking in common areas just by passing a rule, a bylaw is better because it requires a vote of the members, notes Nagle. "This will give you a stronger mandate to enforce the smoking policy, and members will appreciate being included in the decision," he points out. To extend your smoking ban to members' units, on the other hand, you probably don't have a choice, and will have to hold a member vote and pass a bylaw. That's because you probably don't otherwise have the authority in the governing documents to regulate this type of member behavior within their units.

### First Decide Where to Ban Smoking

A good anti-smoking bylaw will help you implement a ban on smoking at your community, but what you put in the bylaw will be

## MODEL BYLAW

### Use Bylaw to Ban Smoking at Your Community

The following bylaw bans the smoking of cigarettes, cigars, and pipes in common areas and, if you choose to extend the ban in your community, within members' units as well. The bylaw is effective because it makes members responsible for the smoking of their guests, provides for a fine to enforce the policy, and says that if the association must sue the member to enforce the policy or collect a fine, the loser of the lawsuit will have to pay the winner's legal costs. Check with your attorney before adapting this Model Bylaw for use in your community.

#### SMOKING TOBACCO PRODUCTS OF ANY KIND PROHIBITED IN COMMON AREAS [Optional: AND MEMBERS' UNITS]

The smoking of tobacco products of any nature or description in the community by members, their family members, tenants, guests, or invitees constitutes a nuisance and therefore is prohibited at all times in the common areas [optional: and individual units] of Shady Acres Community Association. This prohibition against smoking includes all common elements, including but not limited to lobbies, hallways, stairwells, elevators, storage areas, laundry rooms, or any other component of the common elements. [Optional: It also includes smoking within members' individual units.] The prohibition against smoking is effective immediately upon the recordation of this Amendment. Members shall be responsible for the conduct of their family members, tenants, guests, and invitees. Infractions of this provision shall, after notice and a hearing, incur a fine of not less than One Hundred Dollars (\$100) per occurrence, and any fines so levied shall become a lien against the unit and shall be collected in the same manner as an assessment. The Board of Directors is also specifically empowered to bring suit against the member for all infractions of this provision, and the suit may seek to enjoin further violations, collect any fines levied hereunder, or both. In the event legal action is necessary to enforce this provision, the prevailing party shall be entitled to an award of all costs and all attorney's fees actually incurred in the enforcement hereof, including costs and attorney's fees incurred prior to the commencement of litigation.

determined by where you want to ban smoking there. In the past, communities banned smoking only in the common areas, but in recent years banning smoking anywhere in the community has become more prevalent—including within members' units. This is more likely to happen where smoking, even within the confines of a unit, affects other units, such as in single, high-rise buildings.

Think about what's most likely to work in your community. For example, you'll have to consider

your community's physical layout. If it's comprised of single-family homes on fairly large lots, you probably don't have a valid reason to ban smoking that's confined to a member's unit. In that case, you can ban smoking in all common areas, but shouldn't try to ban it within units. However, if your community is comprised of units that share a common ventilation or HVAC system, or a common wall that's not a cinderblock fire-wall, it's reasonable to extend the

ban to smoking within members' units.

### What to Include in Bylaw

To be effective, the smoking ban bylaw, like our Model Bylaw: Use Bylaw to Ban Smoking at Your Community, should base the ban on the nuisance provisions in your governing documents. Virtually all governing documents ban members from doing anything that would be a nuisance or annoyance to others in the community. Since secondhand smoke is a known carcinogen, smoking in common areas, where members congregate, is certainly an annoyance to members who don't smoke and is likely to fall within the legal definition of "nuisance," says Nagle. And in communities where members' units share common walls or ventilation systems, smoking is a nuisance even when confined to a member's private unit, because smoke often seeps through the walls. Nagle says that in both situations, the association has not only the right to ban smoking—it has the responsibility.

The bylaw should also state exactly where smoking is banned. Then specify that members may not smoke cigarettes, cigars, or pipes in banned areas.

To make your new policy effective, the bylaw should ban smoking by members *and* their guests. Often it's a guest, not a member, who is smoking. In communities that ban smoking within members' units, this means that the members must tell anyone they've invited into their unit that they're not allowed to smoke. Make mem-

### ► Facing Member Opposition to Smoking Ban

Sixty-two thousand nonsmokers die from coronary heart disease every year because of secondhand smoke, which is also responsible for 3,000 deaths from lung cancer in the United States annually, according to the National Institutes of Health. These are just the people who died because someone else was smoking. Overall, tobacco-related deaths number more than 430,000 each year among U.S. adults. And medical costs directly attributable to smoking total more than \$50 billion per year.

That's why it's important for associations to consider smoking bans in their communities—bans may not only help attract new members, but may also be essential to the health and well-being of members, guests, and employees. But sometimes when associations try to implement a smoking ban, they face opposition from members.

If this is an issue at your community, don't drop the idea of a smoking ban. Instead, realize that you can overcome this by proposing a remedy or remedies acceptable to all parties.

One way of getting buy-in is surveying members before proposing the ban. That way, you can gauge the level of support and opposition to the plan. The more smokers residing in the community, the less likely the ban will be approved.

If you believe that the majority of members would oppose a smoking ban, you can otherwise limit smoking in common areas. You can come up with creative solutions to potential stalemates. For example, you can exempt existing smoking members from the ban—that is, "grandfather" them—and suggest establishing designated areas within the general common areas where they can smoke without bothering nonsmokers and new members to whom the ban applies. Remember that in all circumstances, prohibiting smoking within a certain distance from units or near children's play areas should be a top priority.

bers responsible for the behavior of their guests, whether that guest is smoking within the member's unit or in a common area. By having the authority to fine a member for her guest's behavior, you'll give the member an incentive to take the initiative and control that behavior.

It's important to give the association the authority to fine members for violating the policy. Any policy will be more effective if the association has a way of enforcing it. Remember to make the loser in any lawsuit responsible for the winner's costs and legal fees. Despite your best efforts to

explain your policy in advance to your members, and despite your authority to fine members, some members might still violate the policy. So say in your bylaw that, if the association must sue to enforce its policy, or if it must defend itself in court against a member who has challenged it, the loser of the lawsuit must pay for the winner's costs and legal fees.

#### Insider Source

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## IN THE NEWS

### California Counties Aim to Snuff Out Smoking in Condos, Apartments

In a new proposal, Marin County, Calif., health officials are circulating an ordinance cracking down on smoking in multi-unit apartment and condominium complexes. The antismoking law, due for review by county supervisors in December, is almost identical to the ordinance adopted earlier this year by Larkspur, Calif. That city's ordinance bars residents from lighting up in most condominium and apartment units. County officials have said that the smoking crackdown is necessary to "preserve healthy communities."

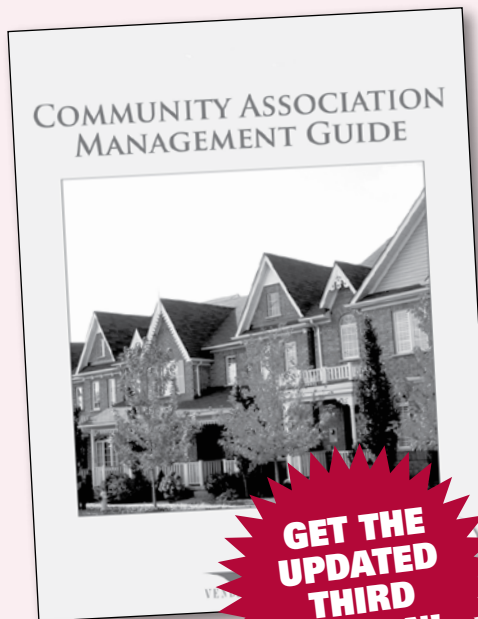
The law is based on concerns that secondhand smoke seeping from one unit assaults residents in neighboring units, jeopardizing their health, according to Bob Curry, head of the county's tobacco disease program. Curry noted that the county understands that smoking is an addiction, but that it offers a number of programs to help smokers quit.

Under the ordinance, smoking wouldn't be allowed inside apartment and condominium units or

on associated balconies or patios—as well as in residences with shared walls. An ordinance in Novato, Calif., includes similar restrictions, but allows half of the units in existing complexes to opt out—and a quarter of units in new developments to do the same. The Smoke-Free Marin Coalition and the Marin County Tobacco Related Disease program are working with officials in Tiburon and Fairfax, Calif., on strict smoking crackdowns as well.

The county proposal, called the Marin County Smoke Free Air and Health Protection ordinance, would apply to tobacco products as well as any "tobacco-like product, spices, or any other plant or herbal material," including marijuana. The law would be enforced by county health officials and violators would be fined \$100 and/or five days of community service. A second violation would trigger a \$300 fine and/or 10 days of service, and a third violation within one year would result in a \$700 fine and/or 15 days of community service.

## COMMUNITY ASSOCIATION MANAGEMENT GUIDE



**GET THE  
UPDATED  
THIRD  
EDITION!**

Whether you are a community association manager or board member, or a professional advisor, **COMMUNITY ASSOCIATION MANAGEMENT GUIDE** is your convenient one-stop resource that will help you safely and effectively handle your typical and not-so-typical management issues. This all-in-one handy guide provides practical guidance that gives you concrete suggestions on how to keep your community afloat in a down economy, keep out of legal trouble, work effectively with board members, and maintain smooth day-to-day operations.

**COMMUNITY ASSOCIATION MANAGEMENT GUIDE** provides in-depth information on these critical topics:

- ◆ Money and Cash Flow
- ◆ Maintenance and Repairs
- ◆ Fair Housing and ADA
- ◆ Insurance and Risk Management
- ◆ Contracts and Contractors
- ◆ Environmental and Green Issues
- ◆ Rules and Regulations
- ◆ Meetings and Records
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