

Community Association Management *Insider*[®]

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Survey: Member Satisfaction with Associations at a High

The more than 65 million Americans who make their homes in condominiums and homeowners associations are overwhelmingly satisfied with their communities, according to a national survey conducted by Public Opinion Strategies for the Foundation for Community Association Research. Almost two-thirds of community association residents rate their overall association experience as positive, while 26 percent are neutral on the question. Only 10 percent express some level of dissatisfaction.

"All institutions have issues—our schools, businesses, government, and the entertainment industry—but I think it's safe to say community associations fare very well in comparison," said Thomas Skiba, CAE, chief executive officer of the Foundation and Community Associations Institute (CAI).

(continued on p. 5)

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FEATURE

Proceed Cautiously When Enforcing Overlooked Rules

Boards should strive to set fair rules and enforce them consistently and effectively. But that's not always easy to do. Sometimes boards let rules slide because it takes less effort, especially if only minor rules are being disregarded by members. But this creates a huge problem for an incoming board that realizes once it enters office that its predecessors haven't enforced community rules.

Since the rules are official, the board might think that it can immediately start enforcing the previously overlooked rules right away, as if they hadn't been ignored. Letting members who have been violating rules for years continue to do so with impunity seems unfair. But it's not that simple. While an incoming board should certainly revive previously overlooked rules when it takes charge, it needs to handle the situation carefully and diplomatically. The best way to do this is to send members written notice of the board's intent to revive overlooked rules. Like our Model Notice: Announce Revival of Community Rules, yours should include four key items.

(continued on p. 2)

Q & A

Following Declaration Precisely to Preserve Board's Authority

Q The board of directors of the association I manage has determined that we need to make extensive repairs in the community. Members were informed that this will be paid for through a special assessment. Now, one member is asserting that this isn't valid because we didn't announce it as required by our declaration. He's refusing to pay, and other members are following suit. But the repairs are badly needed. Does it really matter how we announce special assessments and other charges if they are completely necessary?

A Yes, it's crucial to follow the requirements in your community's declaration when making announcements for special assessments—and in general. That's because if the board's actions don't comply with the declaration, members don't necessarily have to heed them. A recent New York case highlights the importance of not only following your declaration's guidelines, but also making sure that the declaration itself is clear and unambiguous.

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Overlooked Rules (continued from p. 1)

Evaluate Situation Before Taking Action

It's important that you don't abruptly start enforcing previously overlooked rules. Reviving these rules is a delicate matter. If your predecessor board let members violate certain rules with impunity, members probably believe it's okay to continue to ignore those rules. Because it was the board's actions or inaction that created this belief among the members, fining or otherwise punishing them for engaging in behavior they'd been led to believe was acceptable would be unfair. If you try to revive a rule too abruptly, members might refuse to comply. And if a dispute leads to a lawsuit a court might agree with the member.

It's even more complicated if a member, relying on the previous board's tacit approval to break a rule, has spent money in the process of doing so. For example, if a member encloses a balcony despite a rule against doing so, thinking his action was okay because several of his neighbors had done the same thing, a court may be hesitant to let the association enforce that rule.

But if you send members a notice warning them that the board will be resuming enforcement of previously overlooked rules, you'll stand on firmer ground with your members and with courts, if disputes end up there. Remember, before trying to revive an overlooked rule, ask your attorney whether your state and local law lets you do so. (Some laws prohibit the enforcement of previously overlooked rules in certain situations. For example, in some states, if a board doesn't enforce a no-pets rule within a certain time period of getting notice that a member is keeping a pet, the pet is allowed to stay.)

Include Four Key Items in Notice

The notice you send to members letting them know about the board's intentions to revive overlooked rules should do the following:

Item #1: Remind members of the value of rules. First, remind members that the association has various rules, and that these rules are important to maintaining a harmonious community and sustaining property values. Saying this should help convince members that enforcing rules is good for everyone, increasing the likelihood that they'll accept the new board's decision to resume enforcement of the rules [Ltr., par. 1].

Item #2: Tell members that previously overlooked rules will once again be enforced. Explain to members that the incoming board has realized that in the past, many important community rules had gone unenforced, and give some examples of the types of rules you're talking about. Then tell members that the incoming board believes that enforcing these rules is important, and so it will be resuming full enforcement of them [Ltr., pars. 2 & 3].

Item #3: Say that the board won't necessarily enforce rules retroactively. Tell members that, though the board will resume vigorous enforcement of all previously overlooked rules, it won't necessar-

ily seek to enforce rules retroactively. It's unfair to hold members accountable for behavior that the sitting board approved of when the members engaged in that behavior. And it's hard to force members to comply with rules retroactively, because courts are less likely to back associations in such situations.

Although, in general, you shouldn't enforce rules retroactively, don't promise this with regard to all rules. Instead, give yourself leeway by saying that the association will compile a list of existing violations and review them on a case-by-case basis to decide whether to enforce them.

If you think it's essential to enforce a particular rule retroactively, speak with the association's attorney before doing so. There might be instances when you can do this, but it's best to proceed with the help of a professional.

Finally, stress in your notice that new violations won't be tolerated. For example, if you want to revive a previously overlooked no-pets rule, you could say that members can keep existing pets, but not replace such pets after they are gone [Ltr., par. 4].

Item #4: Explain that board will give members a grace period in certain circumstances. Tell members that the board will, on a case-by-case basis, give members a grace period to comply with certain revived rules. Forcing members to immediately comply with all rules might be unfair. For example, if a member is in the middle of having his balcony enclosed and has spent a substantial amount of money on it, requiring him to stop work on it would probably lead to problems. But don't give a community-wide grace period for all revived

rules. Otherwise, many members might rush to, say, enclose their balconies before the grace period ends. A reasonable grace period is 30 days [Ltr., par. 5].

MODEL NOTICE

Announce Revival of Community Rules

You can adapt this Model Notice to inform members that the board will be enforcing previously overlooked rules. The notice stresses the importance of community rules. It's important that your letter, like ours, tells members the specific plans you have for reviving rules, such as giving members a grace period in certain circumstances. Show this notice to your attorney before using it for your community.

NOTICE OF REVIVAL OF OVERLOOKED RULES

[Insert date]

Dear Members:

As you are aware, the governing documents of Shady Acres Community Association contain several rules and regulations relating to both the units and the common areas. The existence of these rules, and their consistent enforcement, is important for all of us because they not only help maintain a harmonious living environment, but also help to sustain our property values.

Unfortunately, the current Board and the management team have realized that certain rules violations have gone undetected or have been overlooked in the past. For example, members have violated rules by making architectural changes to their units, keeping pets without the Board's approval, parking in unauthorized areas, and bringing food into the fitness center. Regardless of the nature of the violation or how these matters might have been handled in the past, your current Board believes that more attention must be paid to enforcement of our rules and regulations from this point forward.

Accordingly, we want to make it clear to all members that although certain rule violations may have been overlooked in the past, they will not necessarily be allowed in the future. To the contrary, we are committed to the uniform adherence to, and enforcement of, the rules and regulations to which we have all agreed to be bound. We trust that we will receive your support and cooperation in this effort.

However, we understand that many members have spent considerable amounts of money or made other commitments based on the previous board's treatment of some rules. Therefore, we have instructed our management team to compile a list of existing violations, which we will review on a case-by-case basis to determine if correction or other form of enforcement is appropriate. This does not mean that we will tolerate new violations. For example, if you keep a pet despite Shady Acres' no-pets policy, you may be allowed to continue to keep that pet, but you will not be allowed to replace that pet after it passes away.

Finally, please note that your board will, on a case-by-case basis, give members a grace period to comply with certain rules. Please contact our manager at [insert tel. #] if you feel this applies to you.

We thank you for your cooperation and hope that you agree that we need to enforce our community's rules as our governing documents envision.

Shady Acres Board of Directors

PRACTICAL POINTER: Ask your attorney to check whether your state law or governing documents require you to send the notice using a special method, such as certified mail. ♦

DOS & DON'TS

X Don't Start Renovations Without Informing Members

Common area renovation projects can be a nuisance to members. And while most members are usually supportive and tolerant of those projects because they realize they help to make the community a better place to live, not everyone feels that way. Frustration can crop up if members find that they have to unexpectedly put up with noise and construction, especially if it's near their units.

Keep member complaints and dissatisfaction to a minimum by being upfront with members and telling them in advance what is happening. A great way to announce a planned renovation project to your community's members is to send them a letter like our Model Letter below. It explains how the project will benefit them, includes notes about when the work will take place and what inconveniences they can expect, and includes a telephone number and an email address for members if they have any questions about the project and how it will affect them.

Model Letter: Notice of Upcoming Renovation

Dear Members:

As part of Shady Acres Community Association's maintenance program, work will soon begin to replace 100 linear feet of concrete curbing along the north side of First Street. This work is being done in advance of a planned resurfacing project of that road, and will help keep the community's road infrastructure in prime condition, so that you can easily travel around the community.

The curb replacement work is scheduled to begin on [insert date] and is expected to run for approximately [insert #, e.g., thirty (30)] calendar days, weather permitting.

To reduce delays on First Street, detours will be established using Second Street and Main Street. If a detour road is not available, one lane of traffic on First Street will be kept open at all times, and flagmen will direct traffic flow. We will try to keep delays to a minimum, and we encourage you to allow adequate travel time as well. Please drive with care in the work zones.

If you have any questions about the curb replacement work or the planned resurfacing project, please feel free to call [insert name of contact person] at [insert tel. #], or email [insert him or her] at [insert email address].

Thank you in advance for your patience and cooperation.

Yours truly,
Jane Manager

✓ Train Staff for Elevator Breakdowns

If there's an elevator in your community, it's important that your employees know the proper steps to take if it breaks down while passengers are in it. If the employees don't take the proper steps and passengers get injured during the breakdown, the association could get sued.

To reduce the chances of facing a lawsuit, develop elevator breakdown procedures if these aren't already in place, and put them in a memo. The memo should focus on communication with the passengers and waiting for expert help. You can adapt and use our Model Memo to educate your employees.

Model Memo: Procedures for Elevator Breakdowns

TO: **Employees**
FROM: **Management,**
Shady Acres Community Association
DATE: [Insert date]

Please use the following procedures in the event that there is an elevator breakdown at our community. Please read this memo carefully and keep it handy for future use. If you have any questions, contact [insert name] in the management office at [insert tel. #].

- 1. Call the elevator service company.** Immediately notify the elevator service company of the breakdown, at the following number: [insert tel. #]. Make sure you tell the service company the community's address, the location of the broken down elevator, the apparent nature of the problem, and whether there are passengers stuck inside the elevator. Also, ask how long it will take a technician from the service company to arrive. Do not try to fix a broken-down elevator yourself, and do not let other staff members on the scene try to fix the elevator.
- 2. Reassure passengers.** Promptly communicate with passengers, using the elevator's [telephone/intercom system]. If this does not work, go to the floor nearest to where the elevator is stuck and speak loudly. Tell passengers that you know they are stuck, that you have called the service company, when a technician is expected to arrive, and that they are safe.
- 3. Warn passengers not to fix or exit elevator.** Warn passengers not to try to fix a broken-down elevator or try to force open the doors. Remind them that they can get injured if the elevator suddenly starts moving while they are trying to exit.
- 4. Give passengers frequent updates.** Give passengers frequent reports on the progress of the elevator repair. For example, tell the passengers when the service company technician arrives and how long the technician expects the repair to take.

X Don't Forget About Bedbug Threat

Getting rid of bedbugs can be extremely difficult; they multiply quickly and can move easily from one location to another. Bedbug problems have been spreading in recent years, particularly in major cities like Boston and New York, sparking much concern among public health and housing officials. Bedbug issues were prominently featured on national and local news for many months at the height of outbreaks. It seems like the issue isn't talked about as much anymore, but don't be fooled into thinking that infestations have died down. It's especially important in condominiums, where units are attached, to educate members.

Successful bedbug control requires preventive measures and quick responses by owners and managers, intensive pest control service, constant follow-up, and a high level of member cooperation. Make sure that your members have basic information about these pests. Send them a letter, like our Model Letter, that gives facts and prevention tips, and requests that members notify management immediately should bedbugs appear.

Model Letter: How to Prevent Bedbugs

Dear Member:

You probably have noticed news reports or heard personal accounts of bedbug infestations. We currently do not have a problem with bedbugs. However, because bedbugs can multiply so rapidly, we ask for your vigilant cooperation to prevent such a problem.

Here is some basic helpful information about bedbugs:

- Bedbugs travel from place to place in clothing, backpacks, and luggage. Bedbugs are not attracted to you because of poor hygiene; blood is their source of food.

- People you allow to enter your room, especially from other infested rooms or other housing that has bedbugs, can bring these bugs with them.
- Bedbugs are active mostly at night and are hard to see. You would become aware of them only by receiving a bite.
- Bedbugs burrow into bed joints and corners, bedding, furniture (especially wood), and baseboards. They are killed by heat, so regular washing of bedding and clothes in very hot water is important.

Here's what you can do:

- Protect yourself with frequent laundering of bedding, and vacuuming.
- Do not bring used mattresses, headboards (especially wood), sofas, etc., into your unit.
- Do not attempt to eradicate bedbugs yourself. Common household bug sprays will only make the problem worse because the bedbugs will burrow deeper into their hiding spots.

Immediately notify management of any of the following:

- Small, brownish, flat insects, slightly smaller than a ladybug, but without wings.
- Bites you may experience, especially during the night, causing itching and welts on hands, arms, or other parts of the body exposed while sleeping.
- Small, reddish blood spots on sheets, or seams of mattress or box spring marked by darkened spotting or staining.

Thank you in advance for your cooperation. We are committed to providing a pleasant living situation for all members in the community. Please take note of the preventive guidelines in this letter and, most important, if you see bedbugs anywhere or get any bites, notify management immediately.

Sincerely,
Jane Manager

Survey: Member Satisfaction (continued from p. 1)

The March-April 2014 survey also revealed that 90 percent of residents say association board members serve the best interests of their communities; 83 percent say they get along well with their immediate neighbors; 92 percent say they are on friendly terms with their association board members (the homeowners who are elected by their neighbors to govern the community); 83 percent say their community managers provide value and support

to residents and their associations; and 70 percent say their association rules protect and enhance property values.

"This affirms four previous national surveys showing that the people who live in condominiums and homeowners associations are overwhelmingly pleased with their communities," says Skiba, whose nonprofit organization provides information, education, and resources to help association leaders. "More than anything else, this survey

affirms the dedication of homeowner leaders and community association managers who work to build and sustain successful communities."

Skiba says the keys to successful associations are open communication between residents and association leaders, a commitment to transparency in governance, dedicated volunteers, and adherence to best practices for association governance and management. ♦

RECENT COURT RULINGS

► Associations Couldn't Establish 'Adverse Possession' of Bike Trails

Facts: A corporation bought undeveloped land adjacent to two planned communities. The communities' homeowners associations asserted that the company was required to allow members to continue using bike trails on the undeveloped land. The corporation argued that the associations had no claim to the bike trails and that members wouldn't be allowed to use them. The associations sued the corporation, asking the trial court for a judgment in their favor without a trial. The trial court ruled against them, and they appealed.

Decision: A Texas appeals court upheld the trial court's decision in favor of the corporation.

Reasoning: The appeals court noted that the associations relied on the doctrine of "adverse possession" to support their claim that they should be able to use the bike trails. That is, they had adversely possessed certain trails by continuously using them, and by doing so had gained the right to continue using them.

The appeals court explained that, for there to be an adverse possession of the trails by the associations, the members must have "actually and visibly appropriated the trails and commenced and continued this appropriation under a claim of right that is inconsistent with and hostile to the claim of another person."

However, both associations couldn't use the trails and then claim adverse possession; rather each association must have appropriated different parts of the trails "with the intent to claim that part of the undeveloped land as their own," the appeals court specified. That's because joint use is not enough. The appropriation must be of such character as to indicate unmistakably an assertion of a claim of exclusive ownership by each of the associations to various parts of the trails in question, said the appeals court. "Mere occupancy of land without any intent to appropriate it does not support adverse possession," it stressed.

The appeals court acknowledged that each of the associations has been maintaining certain trails on the property since 1994. For the first several years, each of the associations believed that it held title to the trails that each was maintaining. After each of the associations learned that it did not hold title to the trails, each continued to maintain the respective trails. Members from both associations used all

of the trails at one time or another. But there was no evidence that either of the associations excluded the corporation from using any of the trails or that either of the associations intended to exclude the corporation from such use—both necessary elements to establish adverse possession. Thus, the appeals court agreed with the trial court that the corporation wasn't required to allow members to use the trails.

- Kings River Trail Association v. Pinehurst Trail Holdings, July 2014

► Trial Court Had Subject Matter Jurisdiction Over Member's Claim

Facts: An association sued a member for possession of his unit after he refused to pay assessments and common expenses after being served with a demand notice by the association. At a hearing the member acknowledged that he owed the association money, but he disputed the amount of the debt. He asked the court to dismiss the case. The association asked the court for a judgment in its favor without a trial. The court ruled in favor of the association, and the member appealed.

Decision: An Illinois appeals court upheld the decision of the lower court in favor of the association.

Reasoning: On appeal, the member claimed that the trial court didn't have the necessary subject matter jurisdiction over the case, so the case should've been dismissed. But the appeals court disagreed with the member. It explained that, in this case, subject matter jurisdiction was statutorily conferred by the Forcible Entry and Detainer Act. The act provided that a person entitled to the possession of land may take that land back under several circumstances, including:

when any property is subject to the provisions of a declaration establishing a common interest community and requiring the unit owner to pay regular or special assessments for the maintenance or repair of common areas owned in common by all of the owners of the common interest community or by the community association and maintained for the use of the unit owners or of any other expenses of the association lawfully agreed upon, and the unit owner fails or refuses to pay when due his or her proportionate share of such assessments or expenses and the board or its agents have served a demand and the unit owner has failed to pay the amount claimed within the time prescribed in the demand.

The appeals court pointed out that, here, the declaration established that the member's unit was part of a common interest community, and he, as the unit

owner, was required to pay regular assessments. And the association had conferred subject matter jurisdiction to the trial court by serving the demand on the member. The association's demand had included the required elements, including setting forth the amount owed, a time period within which it must be paid, and the time periods when the amounts were originally due. Therefore, the trial court had subject matter jurisdiction over the proceeding.

- Crest Brooke Townhome Association v. Pacyga, August 2014

► Association's Ban on Rentals Was Unreasonable

Facts: A homeowner had leased her house in a community for 26 years until the association adopted an amendment to its restrictive covenants that prohibited the leasing of units by individual owners. However, the association reserved the right to lease vacant units to renters. The homeowner asked the association for a hardship exception because she was unable to live in her unit herself and needed the rental income it generated. The association denied the request.

The homeowner asked a trial court for a declaratory judgment stating that the amendment that sought to prohibit homeowners from leasing their residences was vague, ambiguous, unreasonable, and arbitrary in its application. The trial court ruled in favor of the homeowner. The association appealed.

Decision: An Illinois appeals court upheld the decision of the lower court in favor of the homeowner.

Reasoning: The appeals court found that the amendment was arbitrary because it purported to prohibit the rental of units by homeowners, yet it allowed the association to do so. The amendment also purported to require occupancy, despite the fact that countless reasonable circumstances exist that could prevent an owner from complying with that mandate, which would in turn subject the owner to sanctions with no means of being able to recoup those losses, said the appeals court.

Further, the amendment provided no standards for the association's review of non-owner occupancy or for reviewing hardship applications, thereby subjecting both types of applications to potentially arbitrary enforcement. The appeals court concluded that the amendment was not reasonable, clear, or definite. Accordingly, it agreed with the lower court.

- Studiger v. Honeytree Townhouse Improvement Association, August 2014

► Bylaws Required Unit Owners to Comply with Water Valve Installation

Facts: A condominium was mostly residential, with two commercial units. One commercial unit was a parking garage owned by two brothers. A dispute arose over whether the condominium should install a backflow preventer valve in the garage. The New York City Department of Environmental Protection (DEP) ordered the condominium to install the valve in the garage, in accordance with plans DEP had approved. It announced that it would fine the condominium and possibly terminate water service to the building if the order wasn't followed. The garage owners believed the valve should be installed outside the garage and refused to allow the condominium board to have access to the garage for installation.

The condominium board asked a court for an injunction directing the garage owners to allow access to the building's water meter located in the garage for the purpose of installing the backflow preventer device mandated by the DEP and prohibiting the garage owners from interfering with such access and installation or otherwise impeding the condominium from complying with the DEP's order.

Decision: A New York trial court ruled in favor of the association.

Reasoning: The condominium's bylaws provide that each unit owner shall grant to the board a right of access to his unit for the purposes of performing installations, alterations, repairs, or replacements to the mechanical or electrical services, or other portions of the common elements located within his unit, the court noted. It stressed that each unit owner shall comply strictly with the bylaws and with rules, regulations, resolutions, and decisions adopted by the condominium.

The court also stated that it refused to substitute its judgment for an administrative agency's determination of questions of fact in an area where the agency has greater expertise than the court. Here, the placement of the valve is a factual determination in an area where the DEP has special expertise and the court does not. If the valve is not installed, the condominium will face penalties and possible termination of water service. The court announced that it would not contravene the DEP's order. ♦

- Board of Managers of the 411 East 53rd Street Condominium v. Barton Perl binder and Stephen Perl binder, July 2014

Q&A (continued from p. 1)

There, an association set the cost of annual assessment fees and then, to pay for roof repairs to certain residential units, also imposed a special assessment to be paid in specified increments. A member asked a trial court for a declaratory judgment stating that the imposition of this special assessment violated the declaration and bylaws of the community. Specifically, he said that the fees must be fixed at least 30 days in advance of each annual assessment period and, consequently, the association was without authority to impose the special assessment because the announcement had been late. The association asked the court to dismiss the case.

Instead, the court agreed with the member that the announcement hadn't been made in time, and, therefore, the board didn't have the authority to impose the assessment. It ruled in favor of the member.

The association appealed. It argued that the court had incorrectly interpreted the section of the declaration that mentioned the 30-day rule. An appeals court agreed. It determined that the portion of the declaration at issue was ambiguous. The appeals court said that the ambiguity made it difficult to tell whether the 30-day rule in the section applies to special assessments such as the roof repairs, or, more specifically, whether a special assessment must be included in the amount of annual assessments fixed by the board at least 30 days in advance of each annual assessment period. According to the appeals court, the language used "lacks a definite and precise meaning, and there exists a reasonable basis for differing opinions." The appeals court sent the case back for further proceedings [*St. Denis v. Queensbury Baybridge Homeowners Assoc. Inc.*, July 2014]. ♦

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