Community Association Management Insider®

Helping You Run Your Condo or Homeowners Association Legally and Efficiently

SEPTEMBER 2015

FEATURE

Here's how you can increase the odds of passing proposed amendments to governing documents at the community you manage.

IN THIS ISSUE

PRODUCED IN CONSULTATION WITH

community ASSOCIATIONS INSTITUTE

Boost Chances of Proposed Amendments Being Passed

The governing documents that initially served your association well may not work anymore to keep the community operating efficiently or make members happy to live in it. Evolving communities must deal with various issues—such as an aging membership, wear and tear on buildings and amenities, changes to the law, and the need to adapt to new technology—that can make managing the community difficult, if rules and regulations are out of date.

Whether you're seeking to amend your community's declaration or its bylaws, there are bound to be members in favor of the change and members against it. But there are things you can do to give your proposed amendments the best chance for success.

Strategize Before Holding Member Vote

Amendments are helpful to implement some changes and also eliminate ambiguities in the existing documents. Although it seems simple enough, amending governing documents actually can be a very difficult and expensive thing to do, and there's no guarantee of success.

Your community could invest a great deal of time and expense in the process only to see proposed amendments get voted down by members. But you'll have a better chance of making change happen if you consider doing the following:

Amend the amendment clause. It's a good idea to check your declaration to see what percentage of your members must vote in favor of the amendment for it to be passed. Most community associations' declarations specify what percentage of members must vote in favor of an amendment to the declaration for it to be passed, and what percentage must vote in favor of an amendment to the bylaws for it to be passed. For instance, your declaration might say that 75 percent of members must vote to amend the declaration, and 51 percent must vote to amend the bylaws. If the percentages are very high, your chances of amending your governing documents are lower.

(continued on p. 2)

Proposed Amendments

(continued from p. 1)

So don't waste time and money trying to pass an amendment when the percentage of members who must vote in favor of it to get it passed is unrealistically high. Instead, before trying to pass any substantive amendments, amend the amendment clause of your declaration to reduce the necessary percentage. For example, propose an amendment reducing the percentage from 75 percent to 60 percent. Taking this step will increase the chances of future amendments getting passed.

Confirm proposed amendment's effectiveness. Think about whether the amendment you have in mind will really solve the problem at hand. Don't propose an amendment unless you're confident that it will be effective. If members intuitively doubt the effectiveness of the amendment, they'll be less likely to vote for it.

Suppose the problem in your community is aggressive dogs. An amendment restricting the size of dogs that members can have as pets won't achieve the desired results, because many smaller breeds of dogs are more aggressive than larger breeds. And if you try to pass such an amendment, many pet-owning members will probably resist, decreasing the likelihood that the amendment will get passed.

Identify and eliminate "deal-killers." Some boards try to include multiple changes to the governing documents in one proposed amendment. For example, a board may seek in one amendment to ban pets, ban recreational vehicles, and impose leasing restrictions. If you know that one part of your proposed

(continued on p. 3)

Editor: Elizabeth Purcell-Gibney, J.D. **Executive Editor:** Heather Ogilvie **Production Director:** Kathryn Homenick **Director of Operations:** Michael Koplin

COMMUNITY ASSOCIATION MANAGEMENT INSIDER [ISSN 1537-1093 (PRINT), 1938-3088 (ONLINE)]
is published by Vendome Group, LLC, 216 East 45th St., 6th Fl., New York, NY 10017.

Volume 15, Issue 2

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: *egibney@vendomegrp.com*. Call: Elizabeth Purcell-Gibney at (212) 812-8434. Fax: (212) 228-1308. **TO PLACE AN ADVERTISEMENT:** Please contact Heather Ogilvie at *hogilvie@vendomegrp.com* or call (212) 812-8436.

Proposed Amendments

(continued from p. 2)

amendment will strike a particularly sensitive chord in your community, consider removing that part from the proposed amendment so that what's left of the amendment has a chance to pass.

For instance, say you're trying to pass an amendment like the three-part one described above. If half of your association's members are investors who lease their units to renters, and you need 60 percent of your members to vote in favor of the amendment for it to get passed, remove the leasing restrictions from it. Or if many of your members have pets or recreational vehicles, remove those bans from the amendment. At the end of the day, it's better to pass what you can than to waste time and money trying to pass an amendment that has no chance of success.

Minimize disruption with grandfather clauses, good-cause exceptions. If you know that a proposed amendment—or part of a proposed amendment—will strike a nerve with members, an alternative to giving up on it or removing that portion entirely is to tailor it so that it will cause minimal disruption to members. For example, if you want to pass an amendment restricting leasing in a community that has many investor-members, you can "grandfather" in existing leases. That way, new restrictions won't apply to certain existing circumstances.

For example, you could say that the amendment doesn't apply to members who were already leasing their units to renters at the time the amendment was passed. Or you could say that the new restriction doesn't apply to current association members, but does apply to people who become members after the amendment is passed. The more resistance you expect to get to your proposed amendment, the broader your grandfather clause might have to be.

You can also minimize disruption to your members by saying in the amendment that the board can make exceptions to its requirements for good cause. That way, if, for example, a member who rents out his unit loses his job and needs the rental income, the board can decide not to apply the restriction to him.

PRACTICAL POINTER: Remember that boards should make good-cause exceptions only to the extent *authorized in the amendment.*

Conduct Effective Educational Campaign

Educating members on a proposed amendment before holding a member vote is a good way to build community support for it, and increases its chances of success. Consider taking these steps:

Disseminate information. Publish articles in your community newsletter with information about the amendment. And send members letters explaining why the amendment is necessary and why it will benefit the community as a whole.

Hold "town hall" meeting. Face-to-face discussion is also an effective means of communication in addition to written correspondence and phone calls; it can help to flesh out problems and convince members of the need for the amendment.

(continued on p. 4)

Proposed Amendments

(continued from p. 3)

A crucial part of an education campaign is to hold a "town hall meeting" to discuss the proposed amendment face-to-face with members. They'll feel that they have a say in the community's direction, which can help preempt problems. Taking some simple steps can maximize the effect of your meeting.

- **Present the problem.** Begin the meeting by summarizing what the problem is and how the proposed amendment addresses it. Be honest and direct.
- **Act in professional manner at all times.** And even if some of your members become belligerent, board members and others representing the association must stay calm.
- **Utilize convincing resources.** Invite experts, such as local realtors and lenders, to bolster your case for why the amendment is good for the community. Realtors can explain how the amendment will improve property values, and lenders can explain how it will make it easier to get financing on units.
- **Pay attention to legal concerns.** It's also a good idea to have the association's attorney on hand to answer any legal questions that might arise.
- **Give members forum within meeting.** Finally, end with a question-and-answer period so that members can voice their opinions in a direct setting as opposed to letters or phone calls. ♦

IN THE NEWS

➤ HUD Agreement Sides with Minority Condo Residents

A recent U.S. Department of Housing and Urban Development (HUD) agreement with a Florida condominium association highlights the ongoing issues of discrimination in housing. The agreement settled allegations that the association's board president harassed and made discriminatory comments about black and Hispanic residents—even attempting to evict them.

The conciliation agreement with the association, located in North Miami Beach, noted that HUD continues to have a "zero-tolerance" for those who discriminate based on race. And that discrimination has cost the association $109,000 in the form of a compensation fund to pay damages to more 20 residents harmed by the board president's alleged behavior. The association must also now adopt an application policy that doesn't allow discrimination, and provide fair housing training for the association's board members, officers, and employees.

The association's actions violated the Fair Housing Act (FHA), which makes it illegal to refuse to rent to or to make housing unavailable to any person because of their race, color, national origin, religion, sex, familial status, or disability. The FHA also makes it unlawful to intimidate or interfere with any person's right to enjoy his or her home. The discrimination victims were mainly Section 8 residents; under Section 8, payments are provided to private landlords as hous-

(continued on p. 5)

In the News

(continued from p. 4)

ing assistance to low-income families, the elderly, and disabled people. Some of the victims ultimately moved out of the complex as a result of the poor treatment they received.

➤ Purple Playground Leaves Family, HOA Members Seeing Red

A Missouri homeowners association has escalated the controversy surrounding the requested removal of a purple playground from a family's backyard. It is now threatening to pursue jail time for the members, who installed the playground—which is visible only to their next-door neighbors—for their children.

The members have so far refused to take down the playground, which has been in their yard for two years, asserting that it actually was painted purple to comply with the association's requirements. The members have said that there is nothing in the rules about the color of such equipment; they claim the rules say it has to be "harmonious" with the community and with nature and there is nothing that dictates the color of the swing set. The members were considering their daughters' request for pink paint, but chose the purple color to be harmonious because it matches the color of the trees in the fall. The homeowner's association disagreed and fined the members, alleging that the equipment and its color had to be pre-approved.

The members successfully appealed and had the fine thrown out; however, they've received more letters, demanding the purple playground's removal, and threatening that if it isn't gone from the subdivision within two weeks, the members would go to jail. Another letter said the association's lawsuit would cost the family "greater than any principle you are trying to prove."

According to the members, the association has ignored a petition signed by more than a dozen neighbors saying they were not bothered by the equipment. Several neighbors were upset and incredulous that the association would spend so much valuable time and money pursuing an issue that isn't offensive to any other members, when the budget could be spent on meaningful resources for the community.

➤ Realtor Addresses Selective Enforcement of HOA Rules

An Arizona realtor and homeowners association advocate who has sold properties in planned communities is responding to a growing consensus among members that they are afraid to live in their homes because of what they feel is a constant threat of being fined or sued for even minor infractions of community rules. The realtor has seen many harmonious communities, but there also has been an uptick in complaints of selective enforcement of rules and near-constant controversy in others—sometimes rising to the level of harassment.

The realtor has written a report—which she also has sent to Arizona state lawmakers—explaining exactly how associations operate, what authority they have,

(continued on p. 6)

In the News

(continued from p. 5)

and what homeowners can do to fight back against selective enforcement. She hopes the guide will motivate lawmakers to create new laws to help homeowners better resolve association disputes, without having to go to court or feel uncomfortable in their homes.

The realtor notes that part of the problem is a lack of education for the public about associations, coupled with inconsistent application of association rules after homeowners have moved into a community—for example, an association may fine a member for a minor violation, but not aggressively pursue major delinquencies. ♦

DEALING WITH EMPLOYEES

Take Four Steps to Recruit Good Management Employees

Although managing a condominium building or planned community well can be rewarding, it can also be difficult to do without the help of qualified and dedicated employees. Effective association management requires a varied skill set: customer service for members, financial savvy, organization, and building good relationships with outside professionals like vendors and contractors, among other talents.

Hiring and retaining good employees—who are essential to effective management—can be hard. Because of a tough job market for several years, some unqualified applicants might want the job simply because they need a salary. How can you save time and avoid wading through these applications only to possibly have to work with employees who are not serious about association management? If you already have conscientious management team members, use them as a resource by implementing an employee referral program that pays them for referring job candidates whom you hire.

Set Up Referral Program

Thoughtfully implemented employee referral programs are excellent ways to attract the best people at the lowest recruiting cost. An employee referral program's value lies in its economy and ability not only to attract good job candidates, but also to show goodwill and commitment to the employee making the referral.

Your staff members make great recruiters because they're plugged into a network of people with similar education and interests. They can produce more quality hires than online recruiting resources or job fairs for all types of job seekers. And they'll make an effort to recruit their peers not only because you'll pay them a commission to do so, but also out of pride.

(continued on p. 7)

Dealing with Employees

(continued from p. 6)

Implementing an employee referral program is a four-step process:

Step #1: Plan bonus structure. There are many different ways to set up your referral program. For example, you can pay an employee a referral bonus when you hire someone the employee referred and the referral stays for at least 90 days. On the 91st day, give the referring employee a check for the amount you've offered under the program. You could also give the employee a more immediate reward; pay an offered amount on the day the referral starts work, and another amount after a certain amount of months.

The amount of money that you give, when you give it, and any other rewards you choose to offer will depend on your market and what works best for your company.

Step #2: Announce program to staff. To tell your employees about the program, send them a memo or a brochure describing the program and the bonus structure you've chosen. Your memo or brochure, like our Model Memo: Implement Employee Referral Program, should introduce the program to the staff by telling them that they can earn extra money by referring their peers and people they meet. And the memo should set eligibility rules, such as requiring the referring employee to remain employed for the entire waiting period.

This means that both the referral and the referring employee must complete the announced days of active employment for the employee to get the bonus. It's important to include the word "active." You don't want to pay a bonus to an employee who's out of the office on leave. But you don't want to deny the

(continued on p. 8)

MODEL MEMO

Implement Employee Referral Program

If you decide to implement an employee referral program for your staff, draft a memo introducing it and explaining the rules.

EMPLOYEE REFERRAL PROGRAM

To: **All Employees of ABC Association Management**

From: **Jane Smith, Human Resources Director**

We're pleased to announce ABC Association Management's new Employee Referral Program. You'll be able to earn extra money by referring job candidates we hire. Beginning today, Sept. 1, 2015, we'll pay a referral bonus of $200 to any employee who refers a job candidate whom we hire, subject to the following eligibility requirements:

1. The new employee must have named you as the person referring him or her when the new employee first filled out a job application. Any employees who are named later will not be eligible.
2. The new employee must complete 90 calendar days of employment after his or her start date.
3. You must also remain actively employed for a full 90 calendar days after the new employee's start date. You will not be paid a bonus until you complete 90 days of active employment after the new employee's first day of work. The $200 bonus will be in the first paycheck you receive after the end of the 90-day period.

Dealing with Employees

(continued from p. 7)

employee her bonus when she comes back, either. By requiring 90 days of active employment, you'll be able to stop counting days when the employee leaves, then start again when she returns.

The memo should also state when and how the bonus will be paid. Some associations or management companies pay the bonus by writing the employee a check on the day she becomes eligible for it. Others give the employee cash or include the bonus in the next paycheck after eligibility. Choose the method that best suits your situation.

Step #3: Ask for referring employee's name on job application. To ensure that you're paying bonuses only to employees who actually make referrals, add a line to your job application for applicants to write the names of the employees who referred them. If you hire a person whose application doesn't indicate that she was referred, don't let anyone later claim to have referred the person.

Step #4: Send thank-you letters to referring employees. When you hire a referral, send the referring employee a letter thanking her. Your letter should also tell the employee how much she'll get, and when. The letter serves two purposes: It's motivating, because people like to be recognized, and it reminds employees that they have to wait for some or all of their bonus. ♦

RECENT COURT RULINGS

➤ Association Didn't Have Immunity from Sidewalk Accidents

FACTS: A homeowners association was responsible for the maintenance of the community's common areas, including sidewalks. A snowstorm with freezing rain led to the accumulation of ice on the sidewalks and streets within the community. A landscape contractor salted the roadways, but the association didn't request that the common sidewalks and walkways also be cleared after that particular storm. A homeowner slipped on ice on one of the sidewalks. She sued the association and the property management company for her personal injuries.

The association and the management company each asked a trial court for a judgment in its favor, without a trial. They argued that the sidewalks in the community should be considered to be the functional equivalent of a public sidewalk for which the association had immunity against lawsuits for personal injuries.

The trial court ruled in favor of the association and the management company. An appeals court later affirmed the decision. The homeowner appealed again.

DECISION: A New Jersey appeals court reversed.

REASONING: The appeals court explained that the duty of care that a property owner owes to a pedestrian on a sidewalk on or abutting his property depends on whether the sidewalk is characterized as a "public" or "private" sidewalk. Generally, whether a sidewalk is classified as public or private depends on who owns or controls the walkway, rather than who uses it. A critical factor in deter-

(continued on p. 9)

Recent Court Rulings

(continued from p. 8)

mining whether a sidewalk is public is whether the municipality has sufficient control over or responsibility for the maintenance and repair of the sidewalk, or whether a private party does.

The appeals court concluded that the immunity of a property owner from claims for injuries on a public sidewalk didn't apply to bar a claim for personal injuries against the homeowners association and management company here. That was because the sidewalk on which the homeowner fell on ice constitutes a *private* sidewalk; it's part of the common area owned by the homeowners association. Moreover, the association's by-laws and statutory obligations require the association to manage and maintain the community's common areas, the appeals court emphasized.

Additionally, an owner of private property has a duty to exercise reasonable care to protect those entering the property from dangerous conditions on the property. Therefore, a duty exists to make private walkways on the property reasonably safe, and, to the extent reasonable, to clear snow and ice that presents a danger to known or expected visitors and residents, determined the appeals court.

- Cuiyun Qian v. Toll Bros. Inc., August 2015

➤ Disability Discrimination Claim Barred by Statute of Limitations

FACTS: A condominium member sued his homeowners association and its property management company for claims arising from water damage to his property. The member's disabled brother also lived in the unit. The member alleged that the association's failure to make repairs amounted to disability discrimination in violation of fair housing law, and negligence. The association and the management company asked a magistrate to dismiss the lawsuit.

DECISION: A California magistrate ruled in favor of the association and the property manager.

REASONING: The magistrate determined that the disability discrimination claim was barred by the applicable statute of limitations. That is, the member was allowed a period of two years from the time of the alleged discriminatory housing practice to file a lawsuit. The member had pursued the lawsuit several years after his first complaint to the association and the management company.

The member argued that his claims "arise through a perpetual water leak in the walls of the home in question, with the association and the management company's full knowledge." He added that it took years for the leak to reveal damage, in the form of mold and mildew, meaning that the member did not become aware of the resulting mold and mildew until several years after his first complaint of damage.

The magistrate disagreed. It noted that supposed "delayed discovery" doesn't toll—that is, pause—the limitation period. Rather, the limitations period "begins to run when the plaintiff knows or has reason to know of the injury which is the basis of the cause of action," said the magistrate. Under the delayed discovery rule, the statute of limitations begins to run when a plaintiff

(continued on p. 10)

Recent Court Rulings

(continued from p. 9)

has reason to suspect an injury and some wrongful cause, unless the plaintiff proves that a reasonable investigation at that time would not have revealed a factual basis for the future lawsuit, the magistrate stressed. In that case, the statute of limitations will be tolled until such time as a reasonable investigation would have revealed its factual basis; that was not the case here. Several years prior to his lawsuit, the member specifically mentioned the mold and fungus caused by the water leak. The fact that he continued to contact the association about the increasing damage caused by the water leak doesn't toll the statute of limitations.

- Yung So v. Woodland Prop. Homeowners Assn., July 2015

➤ Association Solely Responsible for Repairing Floor Slab

FACTS: Condominium unit members observed excessive moisture in their unit, which was causing damage to the unit and its contents. They reported the problem to the association. Over the course of several years, various experts were brought in to assess the problem. Ultimately, it was determined that a moisture barrier over the concrete floor slab would solve the problem. The association didn't provide a barrier; it claimed that the members were responsible for the repair. In the meantime, the members had moved out of the unit, which had become uninhabitable.

The members asked a Florida trial court for an injunction ordering the association to make the necessary repair. They also sought compensation for damage to their condominium unit, damage to their personal property, and for loss of use of the unit. The court denied the injunction. The members appealed.

DECISION: A Florida court reversed and granted the injunction.

REASONING: The court noted that injunctive relief is specifically authorized by statute in cases brought by unit owners against condominium associations for their failure to perform obligations as required by the condominium documents. In order to establish entitlement to a mandatory injunction there must be a clear legal right that has been violated, irreparable harm must be threatened, and there must be a lack of an adequate remedy at law.

The declaration specified the items that the association was responsible for maintaining, repairing, and replacing. This included floor slabs. Because moisture was coming from outside the owners' unit through the floor slab and the association failed to resolve the problem, the owners established that they possessed a clear legal right to have the association repair the slab. The association had violated that right. And because the association had the exclusive duty to make repairs to the slab, the owners could not make the repairs and obtain reimbursement from the association. That meant that they had no adequate remedy at law in the face of the association's ongoing failure to perform its obligation. The members had also shown that they had been irreparably harmed because they had lost the use of their unit and their personal belongings had been destroyed by moisture damage. ♦

- Amelio v. Marilyn Pines Unit II Condo. Assn., July 2015