Community Association Management Insider®

Helping You Run Your Condo or Homeowners Association Legally and Efficiently

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FEATURE

There are three items that managers and associations should pay special attention to if they want to end up with a complete contract that protects both sides.

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Negotiating Management Contracts: How to Meet in the Middle

Associations and their management companies have the same overall goal: Keep the community running smoothly so homeowners enjoy living in it. That's easier said than done, however. Fulfilling that goal involves numerous coordinated efforts between the manager and association. The first effort is negotiating a management contract that fits the needs of both sides, which means making decisions about what items each side wants to demand or is willing to concede.

As with any contract, every term has been suggested for a reason, but there are three items that managers and associations should pay special attention to if they want to end up with a complete contract that protects both sides. In Fort Myers and Naples, Fla., attorney Joseph E. Adams's experience, the termination clause, the indemnification clause, and the insurance provisions, especially pertaining to fidelity bonding, are the issues of the greatest economic significance, aside from business terms that are always subject to negotiation. We'll tell you why you should address these items, and how to negotiate them from the perspectives of the association and the manager.

Termination Clause Can Benefit Both Sides

"Some management contracts have a set term, such as one year, and can be cancelled only for 'just cause.' But this benefits only the management company because if it quits, the association is unlikely to pursue a legal remedy; it will just find a new management company," says Adams. "If the association terminates for 'cause,' there's often a fight from the managers as to whether just cause did exist, if proper notice was given, if performance deficiencies are cured, and the like," he explains.

Making the agreement be terminable by *either* party with or without cause on reasonable notice—for example, 30 days—helps avoid this. "Some parties compromise by including a probationary period where the agreement can be terminated without cause and then require cause," Adams notes. He points out that, if the contract has a so-called "evergreen clause"—that is, self-renewing unless

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cancelled—it should be terminable without cause during the renewal periods, at least from the perspective of the association. The management company, though, may object to that.

Indemnity Shouldn't Benefit Negligent Party

Indemnity is a contractual, "hold harmless" undertaking. Management companies often want associations to indemnify them for their actions, even if they were negligent. "This seems counterintuitive because the association is paying for the manager's expertise, so why should the association pay for the manager's mistakes?" Adams says. Another issue is that unless the manager is named as an additional insured on the association's various insurance policies (and they often are), the association may not have insurance coverage for an indemnity claim because it is an assumed contractual obligation, he says.

"I do not recommend that associations sign contracts that contain a 'one-way' indemnification clause, meaning a clause in favor of the manager—especially when the claim is based on the manager's negligence," Adams emphasizes. A common compromise is a two-way indemnity clause, including an agreement by the management company to indemnify the association if loss results from the manager's negligence, breach of the management agreement, or a violation of law.

Insurance Coverage Is Key

Fidelity bond (also known as theft) coverage is often misunderstood. Fortunately, most managers and management companies are honest and the incidence of

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

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theft is small. However, when it does occur—and it does—the results can be devastating to an association. "There is a common misconception that the manager's fidelity bond covers losses of the association," says Adams. Often it doesn't; it covers damage to the management company only if one of its employees steals its money, he warns. Even where there is coverage, the limits can be a problem because there are cases where a dishonest employee of a management company steals from several clients at once, and the total coverage is inadequate for multiple claims.

"The dovetail of insurance coverage between a management company and the association is often overlooked, which is why it's important to have the manager listed as a named insured in insurance policies where available," Adams stresses.

PRACTICAL POINTER: With the exception of the terminology used based on the governing statutes in a particular state, and the scope of duties (usually much more limited in a planned community), there is no significant legal difference between a management contract for a condominium versus one for a planned community. The association's and the manager's attorneys will be able to tailor the management contract to the particular situation. ♦

Insider Source

Joseph E. Adams, Esq.: Managing Shareholder, Southwest Florida Offices of Becker & Poliakoff, P.A., 6 Mile Corporate Pk., 12140 Carissa Commerce Ct., Ste. 200, Fort Myers, FL 33966; *www.becker-poliakoff.com.*

RECENT COURT RULINGS

➤ Manager Couldn't Refuse to Accept Delinquent Payments

FACTS: A homeowner owed $150 in past-due fees to the association. The association sent her a bill for over $1,000. It then pursued a homeowners' association foreclosure sale. The homeowner sued the association and its management company for wrongful foreclosure, bid rigging, and unfair debt collection practices, among other claims. The association and the management company each asked the trial court to dismiss the claims.

DECISION: A Nevada trial court ruled in favor of the homeowner on the wrongful foreclosure, bid-rigging, and unfair debt collection practices claims.

REASONING: The trial court refused to dismiss the wrongful foreclosure claim against the management company and the association. That was because the homeowner had made several attempts to pay her past-due fees in order to avoid foreclosure, but the management company had refused to accept the payments. The trial court pointed out that the management company was an agent of the association for the purposes of collecting both *currently* due and *past*-due assessments. Under state law, a community manager is specifically prohibited from refusing to accept from a unit owner's payment of any assessment, fine, fee, or

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Recent Court Rulings

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other charge that is due simply because there is an outstanding payment due, the trial court pointed out.

The trial court also ruled in favor of the homeowner on her bid-rigging claim. The association had attempted to sell the property for approximately 10 percent of its fair market value and conducted the sale in the private offices of an auctioneer.

The trial court determined that the association—but not the management company—had engaged in unfair debt collection practices. The notice of default included a past-due amount that was greater than 10 times what the homeowner owed. She asserted that unlawful fines and fees had been added so that she wouldn't be able to afford to pay the bill prior to the impending sale. The trial court noted that the association and its attorney attempted to collect amounts "not authorized by law or contract." This violated the rule against unfair or unconscionable debt collection under state laws.

- Mendez v. Fiesta Del Norte Home Owners Association, August 2015

➤ Unit Owner Couldn't Request Money Damages for Unpaid Fine

FACTS: After a fire due to clogged dryer vents damaged a member's unit, the other members in a condominium building were required to provide proof, in the form of a receipt from a cleaning company, that their dryer vents and ductwork had been cleaned. A unit owner had documentation that she had complied with the requirement, but she didn't submit the receipt to the association before the announced deadline.

The association fined her $100 and imposed a daily fine of $5 a day, which would continue to accrue until it received the receipt. The unit owner refused to pay. She filed a claim against the association in small claims court. The association asked the court to dismiss the claim. A trial was held.

DECISION: A New York City small claims court dismissed the case for lack of jurisdiction.

REASONING: The court explained that the small claims part of the civil court "may only grant the relief requested by a plaintiff or defendant in regard to causes of action 'for money only' not in excess of $5,000." But the unit owner never paid the fine and the penalties. Therefore, she had no claim for money damages. Had she paid the fine and penalties and *then* came to court seeking a refund alleging that the imposition of them by the condominium violated the declaration and bylaws, she would have had a cognizable claim on its face, the court added. "In effect because she has not paid those charges, she is asking the small claims court to declare the action of the defendant a nullity and issue an order canceling the obligation…but the small claims court lacks such power," it determined. ♦

- Esposito v. Barr, August 2015

REPAIRS & MAINTENANCE

How to Tell if Your Condo Building Needs Repointing Work

In many parts of the country, winter is quickly approaching, and the cold and snowy season brings with it concerns that association managers should take seriously. The winter season creates liability in the form of slip-and-fall accidents and other personal injuries due to ice, snow, and freezing rain. It's important to set up or renew contracts with snow removal companies and other winter services vendors, and to talk with your staff about winter-specific issues they should be on the lookout for. You can review the *Insider*'s winter weather checklist, *"Follow 'To Do' Checklist to Prepare Community for Winter,"* available on our website.

It's important to tend to structures in the community as well. Winter is the season that hits a brick façade the hardest. Problems already present in the façade are sure to grow as moisture in cracks and cavities expands in freezing temperatures. Don't wait until winter hits to find out if you need repointing work. Determining this and gathering contractor bids to catch up on these needed masonry repairs now is important. We'll explain how to tell if your building needs repointing and how to choose a good contractor. And we'll give you seven items to cover in your repointing contract. Repointing is crucial to the appearance of your building. Although it's expensive, it ultimately will help the association's bottom line by avoiding major repairs later.

What Is Pointing?

In a masonry building such as a brick, stone, or concrete building, pointing is the mortar that holds the pieces together. These areas between the bricks and stones are called "mortar joints," and they essentially "glue" all the different parts of the façade into a whole.

Besides binding the bricks, pointing also forms a watertight seal between these pieces of the building. As soon as this seal is violated, you can expect the mortar or pointing to deteriorate rapidly—and your masonry to follow soon after. Initially, water causes damage by making the lime, the mortar's binding agent, disintegrate. As the defective mortar joints steadily loosen, they become more vulnerable to snow, wind, and rain, which threaten the stability of the building. Repointing—the chiseling out of old, worn mortar between bricks and having it replaced with fresh mortar—is undoubtedly one of the most common maintenance procedures a brick building will undergo.

Costs Go Up When Pointing Breaks Down

The most dangerous result of letting your building's pointing disintegrate is the destructive effect it will have on bricks. If the mortar between bricks falls apart,

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water can seep behind the face of the wall, soaking the bricks and destroying the walls of the building.

In winter, the effect is even worse, because moisture will freeze up and expand, pushing the bricks outward. This is how "bulges" appear on building walls. Even more ominous for the association is when the invading water soaks into the metal girders and supports of the building. The resulting rust expands the metal, wrecking havoc with a building's superstructure.

So when you have an expert repoint a building, you're taking a preventive maintenance measure to preserve the outside walls of your building. And you're preventing water from leaking in and destroying interior supports.

Tell-Tale Signs of Need to Repoint

Finding out you need to repoint should never be as dramatic as having a brick fall out of the façade with its possible legal consequences or seeing a wall begin to bulge. Perform these tests to see whether repointing is necessary.

Check roof. Go to your roof and look for loose masonry and coping, the top layer of masonry on a parapet wall. Loose coping stones can mean that there will be water seeping into the structure. Check for cracks and stains on the roof of the building, where it meets the wall. This is a tipoff that water may have seeped into the façade because of holes, cracks, or leaks in the bricks, masonry, or coping stones.

Check mortar of parapet. While on the roof, check the mortar of the parapet, the portion of the wall that extends above the level of the roof. To do a mortar check, try to poke out the mortar in the joints between the masonry using a pencil or even just your finger. If the mortar is solid and cannot be penetrated or scraped away, then it may be fine. But if you can poke into or scrape out the mortar between the masonry, or if there are spaces between stones where the mortar has completely flaked away, chances are your building needs repointing.

Check mortar in upper stories. As best you can, using windows, balconies, or fire escapes, check some of the mortar in the upper stories of your buildings. These are the sections where you can expect problems to arise first.

The upper floors are more likely to need repointing because they get more exposure to the elements than the lower, and generally, are not as well maintained. If you're reluctant to probe a patch of masonry because it's hard to reach, at least check visually for white stains called efflorescence, which bleeding, water-damaged mortar will form on the bricks as another sign of trouble.

Choosing the Right Contractor

Before you hire a contractor to start the repointing process, ask him to explain in detail how he'll do the job. Generally, a contractor cuts out the old, decaying mortar using a mechanical grinder and hand-cutting tools. The cut into the old mortar should be a solid inch deep, enough to make sure all the bad mortar is extracted, but not enough to threaten the stability of the bricks while the work is

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going on. (Ask the contractor about how deep he will make the cut.) Then fresh mortar is applied to these new gaps, to roughly the level of the face of the bricks.

Finally, these damp joints should be "tooled" or pressed compact. This last step, frequently ignored by contractors who want to cut costs with less labor, will assure a good new watertight seal. Ask your contractor ahead of time if he'll do this, and consider going with a different contractor if it seems like he'll take shortcuts.

If the repointing job is small, ask your contractor to draw up a repointing contract for you to sign, so that you can see exactly what work will be done and the contractor will be required to perform it.

If you need extensive repointing work, also consult a professional engineer or a registered architect to create specifications, or "specs." Specs explain to a contractor exactly what areas need to be fixed, and what kinds of materials should be used and in what quantities. After reviewing the specs, you can then let various contractors bid on the information contained in the specs.

INCLUDE SEVEN ITEMS IN REPOINTING CONTRACT

Whether you need straightforward or extensive repointing work, you'll need a solid contract to minimize liability, lessen disturbances to residents, and ensure quality workmanship and materials. Use the following as a guide to you help you ensure that all the bases are covered in your repointing contract.

Item #1: General Terms

Changes. The contract should state that you must agree in writing to any changes to the contract that the contractor has signed, or else those changes won't be effective.

Nontransfer clause. You should always include a "nontransfer" clause in the agreement. That way, the contractor can't sign the contract, and then subcontract the job out to someone else. The clause in your contract should read something like this: "None of the work described herein will be subcontracted to another contractor without express written approval from the association."

Insurance. State that the contractor must have public liability and property damage coverage as well as workers' compensation insurance, and that the contractor's public liability and property damage insurance must co-insure you and your engineer.

Permits. Require the contractor to obtain and pay for all necessary permits, and comply with all local codes and ordinances.

Safety. State that the contractor must provide all the work-protection equipment required—such as barriers, scaffolding, and bridges—for the protection of the workers, building occupants, and the general public during the job.

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Item #2: Time Frame

Completion. State that the contractor must assure that the work will be completed as expeditiously as possible.

Date. The date of the contract should be filled in, or it won't be valid.

Begin/end. Make sure the contract clearly states when your job will begin and the estimated date of completion.

Terrace. Where terrace access is required by a contractor, require that it gives you at least 48 hours' notice.

Progress. Make sure that the contractor will continuously advise your building superintendent on the progress of work.

Schedule, delays. The agreement should note that within a week of being hired for the job, the contractor must submit a schedule of when each part of the job will be done. The schedule should include a 20 percent allowance for time lost due to bad weather. The work should be conducted in a continuous manner during the normal work days, however. State that failure to follow these rules will be considered a "breach of contract."

Penalty. Some associations may want to put in a penalty clause covering work that isn't completed on time. However, this clause, known as a "Liquidated Damages Clause," is very tough to prove because you have to show in court that the contractor's delay directly caused you to lose money.

Item #3: Scope of Work

Materials. State that the contractor, not you, will furnish and install all materials, labor services, guarantees, and permits required for the job specified in your specs or the contractor's proposal.

Substitutions. State that only products equal to those in your specs or the contractor's proposal may be substituted. Make sure the contract states that a sample of these materials must be given to you for your approval in advance.

Name brands. Specific brand names, quantities, and how they are going to be used must be laid out in detail. If your engineer's specs give the contractor this information, make sure he agrees to abide by it before work begins.

Precautions. For safety reasons, the contractor should be required to use only equipment that is in sound operating condition. State that all procedures and work should include the highest safety considerations for those involved in the work, and that the contractor must observe all OSHA and local regulations.

Item #4: Terms of Payment

Approved expenses. If the contractor submits a monthly bill, your engineer—if you hire one—should be the one to check the expenses on the bill and approve them.

Final payment. State that work will be completed to the satisfaction of the association or association's representative before final payment is made. If you are

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having an engineer periodically check the work being done, you should get him to approve the job before you hand over the final payment.

Item #5: Labor

Workers. Get a rough estimate of how many workers you can expect on your site on any given day, what their hours will be, and what days you can expect them.

Skill. The agreement should state that all work will be performed by skilled workers who are regularly engaged in, and specialize in, the work they need to perform. You must make sure that the workers on the scaffold, who are doing the actual repointing, are skilled and experienced in repointing.

Item #6: Job Site Debris

Carting. Require the contractor to have all debris carted away daily from the site.

Protection. Require the contractor to properly protect all areas of the interior and exterior from damage and dirt.

Storage. Limit storage of materials in the building to an area designated by the superintendent or manager.

Cleanup. Stipulate that the contractor must leave his work and the building clean and in good condition. Splatters on windows, sills, terraces, and other areas will be removed by the contractor before the job is finished.

Workmanlike condition. Make sure that all work will be left in a neat, clean, and workmanlike condition. Add that work will be carefully trimmed, stains will be removed, and all removed material will be swept, collected, and disposed of by the contractor.

Dust, dirt. Include that all work will be done in a way that precludes the creation of dust that may be a nuisance to building occupants, neighbors, and pedestrians.

Item #7: Guarantees

Workmanship, materials. Guarantees for repointing work are usually one to two years in duration and cover both workmanship by the contractor and materials by the supplier. Make sure that you don't sign the contract until the contractor agrees in writing to the guarantee. Here's an example of what your contract should say about guarantees:

> The Contractor must guarantee all work under this contract for a period of two (2) years after completion of all the work. Cracking, peeling, separation, or significant discoloration of materials installed under this contract will be repaired by the Contractor at no additional cost to the Association, within the guarantee period. Upon notification of problems, the Contractor will promptly make the required repairs. ♦

IN THE NEWS

➤ Judge's Ruling Swings in Favor of Homeowners' Purple Playground

A family's purple playground set gained national attention when their homeowner's association demanded that it be removed, going so far as threatening jail time for noncompliance, as we reported in last month's issue *("Purple Playground Leaves Family, HOA Members Seeing Red").*

After the dispute went viral, other homeowners in the community signed a petition in defense of the playground installation. Many expressed anger that the association had wasted time and money pursuing removal when neighbors hadn't complained about the color, and the association's governing documents weren't clear-cut regarding paint shades to be used on such equipment.

After a week of legal proceedings, a Missouri judge ruled that the playground can stay in the Lee's Summit-located community. The association had argued that the equipment must be "within harmony of other colors" in the community. The family's attorney said the governing documents that contained the "harmony" requirement weren't clear, and that the family actually had chosen the color purple because they felt it blended well with fall foliage—a color in the community.

The playground set's owners think that the association should apologize to the entire neighborhood. Other residents lamented the media exposure, noting that they felt it had damaged the community's reputation. The neighborhood held a celebratory barbeque party after the court's decision was announced.

The association hasn't commented on whether the governing documents will be amended to avoid ambiguity that could lead to future litigation with other homeowners. ♦