Community Association Management Insider®

Helping You Run Your Condo or Homeowners Association Legally and Efficiently

MARCH 2016

FEATURE

Learn how the association can head off noise complaints between neighbors.

IN THIS ISSUE

PRODUCED IN CONSULTATION WITH

community ASSOCIATIONS INSTITUTE

Employ Five-Part Strategy to Prevent Noise Complaints

For many members, the upside of community association living is the ability to have some control over their lifestyle by agreeing to comply with rules aimed at creating a pleasant environment. Governing documents and bylaws that set rules and expectations for peaceful living and provide mechanisms to enforce compliance—like fines—go a long way toward keeping things in check. But unlike cut-and-dried infractions, such as painting a home in a color that isn't in the association's color palette, "noise" is highly subjective. So when you receive noise complaints from members, there often isn't a clear-cut way to handle them.

For starters, what is considered to truly be "noise" as opposed to the sounds of everyday living? How loud does something have to be to qualify as a noise violation? How should the board react when a noise complaint turns into a bitter dispute between neighbors? Here's how you can attempt to prevent future noise complaints from arising.

Be Aware of Common Complaints

Some noise issues are more common than others, and it's wise to make sure that the association's noise policy addresses these.

Noise between units. A very common noise issue pops up when a condominium member installs new, hard flooring in her unit. Sounds that previously were muffled by carpet might be magnified, traveling to adjacent units and creating newfound disturbances.

Renovations/construction noise. Renovations to one home in a planned community might annoy neighboring homeowners, especially if they go on for an extended period of time.

Recreation noises. "Garage band" practice, whether for teens or adults, can be disruptive.

Check, Amend Governing Documents for Guidance

Temporary unwanted noise like construction work will subside at some point, so some disputes will resolve themselves by nature. But

(continued on p. 2)

Noise Complaints

(continued from p. 1)

long-term noise can lead to ongoing fights between neighbors, which is why it's especially important to cover in your rules one of the most common long-term noise disputes: noise between units.

As with many association conundrums, the governing documents can dictate what action you should take. So check your governing documents; many have a provision or two related to noise transmission between units. But if yours are lacking, talk to the board about changing them to add rules that can protect against this type of noise.

For example, because most noise complaints of this type relate to changes in flooring, the rules should state the steps a member must take before remodeling a unit. This generally requires approval from the Architectural Review Committee (ARC), which should take into account noise issues before approval is granted.

PRACTICAL POINTER: If a member installed floors that didn't comply with the ARC, you may need to enforce the rules through fines and other measures until the issue is resolved. Replacing new flooring can be an expensive undertaking; suggest fixes like area rugs or soundproofing the ceiling of the downstairs homeowner to begin with before resorting to more drastic measures. If you think the noise is due to building design, talk with the board about hiring a qualified architect or engineer to review and identify the problem.

(continued on p. 3)

Editor: Elizabeth Purcell-Gibney, J.D. **Executive Editor:** Heather L. Stone **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 9

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 Stone at *hstone@vendomegrp.com* or call (212) 812-8436.

Noise Complaints

(continued from p. 2)

Prevent Future Complaints

While noise caused by flooring or other physical changes to a condo unit can be complicated to resolve, temporary noise caused by homeowners' actions—a garage band, parties, or loud arguments—presents its own set of challenges. These complaints can take a long time to resolve because the whole concept of "noise" is nebulous. In those cases, you'll need to sort out whether the alleged noisy behavior actually rises to the level of being something the association can police, which means documenting the specifics of each complaint to create a picture of what's going on.

The easiest way to deal with noise complaints is to head them off at the pass so they never materialize. Consider this five-part strategy:

Part #1: Create a rule that promotes a quiet environment. Make sure you include hours when lower sound levels are required. Your policy will need to be

(continued on p. 4)

MODEL LETTER

Remind Members to Follow Community Noise Policy

Use the following letter to remind members that they're obligated to follow the community's noise policy, and why doing so is important. Show this letter to your attorney before adapting it for use in your community.

Dear Member:

The management of Shady Acres Community Association values all of its members and wants to ensure that they are able to fully enjoy their homes and the community. We would like to remind members of the importance of following the community's noise policy, which can be found in the governing documents. We believe that following the policy is the best way to create a peaceful, relaxing environment.

While we encourage you to enjoy your [*insert homes/units*] and common areas, we also want to ensure that you do not do so at the expense of other members. That is why we feel it is necessary to occasionally remind all members that the noise policy is part of the community's governing documents and, as such, members are obligated to adhere to it.

Excessive noise disrupts all members, particularly those who work out of their [*insert homes/units*] or who have small children. Members can be helpful by following quiet hours and submitting any remodeling plans through the proper channels to make sure that the changes won't create a noise disturbance.

Addressing noise complaints forces management to divert its attention from its number one goal of maintaining and improving your community. Compliance with our noise policy is needed to keep Shady Acres a pleasant place to live.

Members who would like a copy of the noise policy may stop by the management office during business hours. Please feel free to call our management office at [*insert tel. #*] or contact us at [*insert email address*] to ask any questions. Thank you for your cooperation.

Yours truly,
Jane Manager

Noise Complaints

(continued from p. 3)

specific enough for residents to understand it—so set actual hours—but not so specific that they can find ways around it. For instance, instead of just setting "quiet hours," discourage behavior that significantly interrupts "sleep" or "enjoyment of the community." Stating that a homeowner can't perform certain noisy activities during quiet hours doesn't fix the issue; she'll just have the option to be noisy at other times, which still will be a nuisance.

Part #2: Set rules for enforcement. In order for your rules to work, you have to be able to enforce them. Your noise policy should include the consequences of violations and note that they increase for repeat offenders, so a small fine can jump.

Part #3: Refer to city ordinances. Check your city and county's noise pollution regulations and include them in your policy. At the least, noise pollution typically encompasses construction noise; radios and televisions; and vehicle noise. Repeat offenders who don't care about rules enforcement in the community may feel differently about city and county rules that bring serious penalties.

Part #4: Review and tighten ARC standards. Many ARC standards revolve around the appearance of the community. But condominium building ARCs are wise to set standards related to floor surfaces or connecting walls. They should pay attention to whether hardwood or tile flooring is a good idea, or an alternative should be chosen. Remodeling efforts that could create noise between units should be carefully reviewed.

Part #5: Publicize the policy. Remind members about the community's noise policy. You can do this by sending a letter. Like our *Model Letter: Remind Members to Follow Community Noise Policy,* yours should spell out that full information can be found in the governing documents. Consider making copies of an excerpt of the document that contains the noise policy, and inviting members to stop by the management office to get one. Remember to emphasize two major points: Owners must follow quiet hours and submit remodeling plans through the proper channels.

Remember that while some noise disputes should be initially handled by the members involved in working out a solution, you should be prepared to review and handle the situation. Don't be afraid to consult the association's attorney for complicated issues or those that you think could lead to liability for the association. ♦

IN THE NEWS

➤ NYC Co-op Accused of Denying Disabled Residents Emotional Support Animals

A large cooperative apartment complex in Brooklyn, N.Y., is in hot water following allegations that it refused to allow residents with disabilities to keep emotional support animals—an issue that has come to the forefront recently in national news. The Justice Department took action by filing a fair housing complaint against the 1,144-unit building.

According to the government's complaint, the defendants refused to allow four residents of the co-op to live with emotional support dogs and commenced eviction proceedings against three of them when they refused to give up their animals. The complaint alleged that the defendants took some of these actions even after agreeing to a HUD settlement to allow individuals with disabilities to live with emotional support animals.

"The law is clear that reasonable accommodations must be granted to individuals with disabilities when those accommodations are necessary to afford them the equal opportunity to use and enjoy their homes. This includes the right to live with an emotional support animal. Those responsible for refusing to grant such accommodations or retaliating against individuals with disabilities who try to enforce their rights under the Fair Housing Act will be held accountable," Robert L. Capers, U.S. Attorney for the Eastern District of New York, said in a statement.

"Emotional support animals provide critical care and therapeutic aid for people with disabilities," added Principal Deputy Assistant Attorney General Vanita Gupta, head of the Civil Rights Division. "The department will continue to enforce fair housing laws to ensure that housing providers make reasonable accommodations for individuals who rely on assistance animals in their homes."

EDITOR'S NOTE: For guidance on handling requests for assistance animals in your community, join our free, one-hour live webinar on Feb. 19, "Assistance Animals: What Housing Providers Need to Know." *For more information and to register, click here.*

➤ Angry Association Homeowners Enlist News Channel

A Florida couple whose home was foreclosed on and sold at auction after they failed to pay late assessments has gotten a second chance. The couple, whose past-due assessments totaled $1,900, enlisted the help of a local news channel to garner support for their argument that it was unfair for the association to resort to such drastic measures.

(continued on p. 6)

In the News

(continued from p. 5)

The association asserted that it was within its legal rights to foreclose on and sell the home, since the governing documents for the association permitted it.

The couple's attorney had filed a motion to vacate the sale as what she described as a "long shot." After the local news channel's story aired, the association and the new buyers offered to settle outside the courtroom. The dramatic turnaround allowed the homeowners to stay in their home, but it set them back by an additional $15,000.

Asking the association for a payment plan prior to the foreclosure would've frozen the action. While the couple says that the association never offered a payment plan, they also admit that they ignored two notices that they received in the mail regarding the proceedings and that they didn't approach the association to ask for a payment plan.

Some association members felt that the punishment didn't fit the crime, especially considering the couple had become unemployed, which they claimed was the reason they didn't pay the assessments. But other residents pointed out that, although it seems extreme to sell a home at a foreclosure auction over a relatively small amount of late assessments, that remedy technically was available to the association. Ultimately, the couple's total losses with legal fees will come close to $20,000.

➤ Homeowners Up in Arms After New Management Enforces Rules

Controversy and hard feelings have emerged from a change in management at an Arizona homeowners association. Fearful that things would turn ugly at an annual association meeting, the board of directors brought with them two attorneys and a security guard.

Meeting attendance had skyrocketed since a change in management and a change in the association's choice of law firms. Some homeowners believed they weren't having their voices heard in regard to violations and guidelines, but noted that the board's decision to bring other professionals with them was alarmist. A homeowner explained that some community members were angry because the board had subrogated its responsibilities to an outside management company that's allegedly only interested in making money.

Another source of tension was the newfound regulation of specific things that hadn't been enforced in the past. An announcement by the management company that it would be now fining homeowners for infractions like unsanctioned paint colors or lax maintenance sparked concern and prompted homeowners to argue that an enforcement failure for many years had resulted essentially in the association's "waiver" of its right to enforce the rules.

At the meeting, the association's attorney noted that under the declaration, the failure of the association to take enforcement action with respect to certain

(continued on p. 7)

In the News

(continued from p. 6)

violations in the past does not constitute a waiver of the right of the association to enforce them in the future.

The attorney also addressed accusations that the management company had staged a so-called "takeover" of the community. She clarified that the management company would simply be enforcing the community's "Project Documents"—the term used to describe its Declaration of Covenants, Conditions, and Restrictions; Bylaws; and Rules & Regulations.

She pointed out that under those documents, the association has authority to levy fines against an owner for any violation of them, but reassured homeowners that the documents also provide for a hearing process in connection with any fine imposed for a violation. ♦

RISK MANAGEMENT

Make Sure Fining Bylaw Is Enforceable

Fining members is one of the most unpleasant aspects of managing a homeowners association, but it's unfortunately sometimes necessary to uphold the rules of your community. The administrative aspects of fining can be difficult. When members refute the fact that they owe fines or refuse to pay fines, the dispute can end in hard feelings or, worse, litigation.

Many court cases involving associations originate as fining disputes, and recent fining controversies have revolved around associations acting as debt collectors, which is generally prohibited. So managers and boards should tread lightly when a request for a member to pay a fine gets ugly.

You probably already have a fining bylaw in place, but don't assume that it's written correctly. A poorly drafted bylaw on fines can open the association up to liability and might not even serve its purpose—you might find out once you go to court that it's not enforceable after all. You can save the association from wasting goodwill with members, time, and expense by drafting an effective fining bylaw.

Your bylaw should give you the right to levy and collect fines for members' violations of your association's bylaws, declaration, rules, and regulations, or any relevant state law. Like our *Model Bylaw: Draft Inclusive Fining Bylaw,* yours should state general behaviors that can lead to a fine, but shouldn't specify exactly what those behaviors are or how much the fine for any one violation will be. It should also give every member the right to due process; provide for daily fines for continuing violations; allow the association to create a lien against the unit; authorize the association to collect not only the fine but also attorney's fees; and specify in what order payments will be applied. Finally, the bylaw should not use the word "penalty" in describing the fine. ♦

➤ ➤ ➤ *Model Bylaw follows* ➤ ➤ ➤

MODEL BYLAW

Draft Inclusive Fining Bylaw

Your association most likely has a fining bylaw, but that bylaw is only as good as its enforceability. To ensure that it serves its purpose, ask your attorney about adapting the following bylaw for your governing documents.

BYLAW ON FINES

The Board of Directors may levy reasonable fines against a Member for any violation of these Bylaws; the Declaration of Covenants, Conditions, and Restrictions; the Rules and Regulations; or the [*insert name of relevant state law*] committed by such Member or any occupant of the Unit owned by the Member.

Notice and Hearing. In the event of a violation as herein defined, the Association shall provide the Member written notice of said violation. The Member shall be given a reasonable opportunity, under the circumstances, to correct the violation or, if a first-time and unintentional offense, to assure the Board to the latter's satisfaction that the violation will not be repeated. The Member shall be entitled, upon request, to a hearing before the Board of Directors or any designated committee to contest the violation and/or fine. At such hearing, the Member shall have the right to be represented by legal counsel and to have a reasonable amount of time to produce any statement, evidence, and witnesses on his or her behalf. The minutes of the hearing shall contain a written statement of the results of the hearing and the fine, if any, that is imposed. The Association is not required to provide such notice and opportunity to be heard for recurring or continuing violations unless no fewer than three (3) months have passed from the time of the previous violation.

Continuing Violations. In the case of a continuing or persistent violation: (1) each day the violation continues after written notice thereof shall be deemed a separate and distinct violation and, hence, subject to a separate daily fine, up to a maximum of thirty (30) day fines per violation; and (2) the Board may require the Member to post a bond or other form of security in order to ensure future compliance. For any such violation that cannot be cured immediately, no further fines shall be levied after such time as the Member begins a good-faith cure of same.

Lien Against Unit. [*Optional: Use only if legal in your state*]. Any such fine shall constitute a personal obligation of the Member, as well as a lien upon the unit, which lien may be foreclosed in the same manner as a lien for unpaid community association common area charges pursuant to [insert name of relevant state law].

Fees and Costs. The Member shall be liable for all attorney's fees and costs incurred by the Association incident to the levy or collection of the fine, including legal proceedings.

Crediting Payments. The Association shall apply all partial payments by the Member to the Member's outstanding balance in the following order:

- Attorney's fees and costs;
- Late fees and interest;
- Fines;
- Special Assessments; and
- Regular Assessments, with payment being applied to the oldest balance first.

No partial payments will waive the Association's right to pursue full payment and/or enforce its bylaws, declaration, and rules and regulations.

RECENT COURT RULINGS

➤ Jury Must Determine Whether Association Offered Reasonable Accommodation

FACTS: Two association homeowners tried to sell their home to an organization that planned to use it as housing for three disabled adults. The association tried to block the sale of the house, citing a restrictive covenant in the governing documents, which specified that homes in the community must be used as "single family" residences.

The homeowners and the Fair Housing Center of Central Indiana (FHCCI) alleged that the association violated the Fair Housing Act (FHA). They claimed that the association's approval of the sale would be considered a "reasonable accommodation" for a disability. They asked the association to reconsider its interpretation of the restrictive covenant in light of the FHA to allow the organization to buy the house.

The association sent a letter to the homeowners stating that it wouldn't block the sale, but that it couldn't prevent *individual* association members from suing the homeowners. As a result of the controversy, the organization ultimately decided not to buy the home.

The FHCCI and the homeowners sued the association. The FHCCI and homeowners and the association each asked a trial court for a judgment in its favor without a trial.

DECISION: An Indiana trial court denied both requests and ordered a trial.

REASONING: The association asserted that it had provided a reasonable accommodation to the homeowners by performing the actions they and the FHCCI requested—that is, rescinding the threat to block the sale; thus, it had already provided the homeowners with a reasonable accommodation and no further action was needed.

The homeowners claim that the association's supposed compliance with their request was "less than genuine," particularly when the association made a point of stating it couldn't prevent a homeowner from asserting a legal claim against the homeowners.

The homeowners said that this "accommodation" was no accommodation at all; they had sought to avoid any legal repercussions from the sale, and instead were being faced with possibly more. And ultimately, it caused the deal to fall through.

The trial court pointed out that the answer to whether the association provided a reasonable accommodation hinges on figuring out what really happened—for example, was the association's letter "complying" with the request really just a veiled threat not to continue with the sale? The trial court noted that those were issues for a jury to consider, and it ordered a trial.

(continued on p. 10)

Recent Court Rulings

(continued from p. 9)

- Fair Housing Center of Central Ind. v. Brookfield Farms Homeowners Assn., February 2008

➤ HVAC Equipment Encroached on Common Area

FACTS: A condominium building contained several residential units and one unit for commercial use. When the condominium was initially built, the board of directors was run by the sponsor. It permitted the commercial tenant to install an HVAC unit on the rooftop common area. Several unit owners became board members later. On behalf of all owners, a board member sued the commercial tenant—a business owned by the sponsor.

The unit owner asserted that, under the governing documents for the building, the common area was for the private use of the residents and couldn't be encroached on for commercial purposes without their permission.

The owner said that the HVAC unit was for commercial purposes since it serviced the commercial unit. The commercial tenant claimed that the HVAC could be used by the entire building for air conditioning and heating and was, therefore, also a "common element" and not a structure encroaching on the common area.

The unit owner asked a trial court for a judgment in his favor without a trial. The commercial tenant asked the trial court to dismiss the case.

DECISION: A New York trial court denied the commercial tenant's claims and ordered a trial to determine the issues.

REASONING: The court pointed out that generally the basic agreement among condominium unit owners as to the manner in which the condominium shall be administered and maintained is set forth in the condominium's bylaws; the bylaws in this case specified that the roof was a common area. The court didn't agree that the HVAC system is also a common element and, therefore, could be located on the common element rooftop—without the consent of the other unit owners.

"There is no evidence that the HVAC system was part of the building's central heating, ventilation, and air conditioning system; rather, the tenant's lease agreement with the owners of the commercial unit—the sponsor—required the tenant to build out the unit, and provided that installations such as the HVAC would become the property of the unit owner, not the association, at the conclusion of the tenancy," the trial court stated. "The commercial unit's HVAC system thus was conceived of as a privately owned system, and not a common element," said the court. But a trial was needed to determine the issues in the case, the court concluded. ♦

- Board of Managers of the Sunrise Manor Condominium Assn. v. The Aksakalova Family L.P., et al., January 2016