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PREVENTATIVE LAW HOW TO UTILIZE YOUR ASSOCIATION ATTORNEY

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INTRODUCTION

Homeowner associations are increasingly finding themselves in the middle of legal controversies. The issues are all too familiar. Contract disputes with landscapers, lawsuits from people injured on the common property, fights over the meaning of poorly worded legal documents, actions to enforce rules and regulations, and disagreements over the legality of special assessments and annual meeting procedures are just a few of the types of legal disputes regularly confronting homeowner associations.

While the number of lawsuits in the community association field continues to rise, lawyers continue to be used largely to react to legal problems. In other words, they are brought in after the fact to defend lawsuits or actions already taken by the homeowner association.

We believe there is a better way. Homeowner associations can use their lawyers to try to prevent legal problems from arising. More specifically, the lawyer can be used to evaluate an association's legal documentation and operations and procedures and make specific recommendations on how areas of legal risk can be reduced.

The purpose of this article is to discuss the benefits of a preventive law approach and explain the types of issues an association should focus on in implementing a preventive law program.

BENEFITS OF A PREVENTIVE LAW APPROACH

There are three benefits of a preventive law approach. The first is that legal risks can be reduced if they can be identified on a preventive basis and actions taken to minimize the risks. The second is that if a preventive law approach is followed from the beginning of a dispute, there is a greater likelihood of an association successfully resolving the dispute. This is largely because the lawyer working with an association on a preventive basis can usually help structure the transaction or influence the factual record to put the association in as strong a legal position as possible. There is an old saying that it is better to have good facts than a good lawyer. Having the lawyer advise on a preventive basis how to shape the facts as a dispute unfolds tends to increase the likelihood that an association ends up with good facts and a "winnable" case.

The third benefit of a preventive law approach is that it tends to save community associations money both in the short run and the long run because there are fewer disputes to begin with, and more successes in court. This reduces the risk of large judgments against the association. This also puts the association in a position where it will not have to bear the large legal fees associated with litigation as frequently.

In summary, a preventive law approach should be viewed as a sophisticated risk management tool for homeowner associations interested in minimizing their legal risks and the costs associated with them.

Skeptics may ask why, if a preventive law approach is so beneficial, more associations do not already use one. There are two good reasons. The first is that some board of directors do not understand or appreciate the legal consequences of their actions. Take for instance, the example of the busy board which put off an owner who requested exterior lighting to make her property safer, eventually turned down her request, and later removed the light as an architectural violation when the owner installed it herself. Do you think that the board had any notion that it would be sued for millions of dollars when the owner was raped in her unit the night the board removed the light? Probably not, but that case occurred in California. In these days where people are quick to sue, it is difficult to see all of the potential legal risks associated with operating a homeowner association without a careful focus on the subject.

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The second reason a preventive law approach is sometimes not used is that, in the absence of a dispute, the sense of urgency on the part of an association to take the steps necessary to protect itself is often not present. The golden rule of a community association practicing preventive law must be to hope for the best, but plan for the worst. The remainder of this article will explain how to implement a preventive law program in a community association.

IMPLEMENTATION OF A PREVENTIVE LAW PROGRAM

The best way to implement a preventive law approach is to begin with a legal audit or checkup, in which a lawyer conducts a comprehensive review of all association legal documentation and operations and procedures and prepares a report on the legal risks faced by the association and how they can be minimized and reduced.

There are five steps to a proper legal audit or checkup. These include the following:

1. Review of all association documentation including the:
 - a. Declaration;
 - b. Bylaws;
 - c. Articles of Incorporation;
 - d. Policy Resolutions;
 - e. Rules and Regulations;
 - f. Minutes
 - g. Insurance Policy;
 - h. Contracts; and
 - i. Correspondence.
2. Review of an association's operations and procedures.
3. Review of dangerous conditions which may exist on the property.
4. Preparation of a report on the areas of legal risk and how these risks can be minimized or eliminated.
5. Development and implementation of an action plan to minimize and eliminate legal risks.

The remainder of this article will discuss the kinds of issues a lawyer will focus on in conducting a legal audit, and explain why these issues are important. In this way, the process of identifying and minimizing legal risks and the benefits of a preventive law program can be better understood. For the sake of clarity, questions and explanations from a typical legal audit will be listed below. Obviously, in an article of this type, the list cannot be exhaustive and it is impossible to list anything other than the most important questions.

A. REVIEW OF LEGAL DOCUMENTATION (DECLARATION, BYLAWS, ARTICLES OF INCORPORATION, RULES AND REGULATIONS, AND POLICY RESOLUTIONS)

1. Do the legal documents comply with state law requirements?

Since state laws regulating community associations are being constantly revised, it is not uncommon for association legal documents to not comply, or be in conflict with new state law requirements. The risk of challenge for any lack of compliance with state law requirements can obviously be eliminated by amending the association's legal documents.

2. Do the legal documents comply with federal law requirements?

An association's legal documents should also be reviewed to confirm that they comply with federal law. For example, the Fair Housing Amendments Act of 1988 prohibits discrimination in housing on the basis of familial status. This law now generally prohibits an association from enforcing covenants which prohibit children from living in the community. It may also impair an association's ability to create "all adult" hours at swimming pools. There are also federal laws dealing with requirements to provide handicap access. Legal documents which do not comply with federal law should again be amended to eliminate the risk of challenge or the imposition of federal penalties.

3. Do the legal documents contain contradictory provision?

It is not uncommon for legal documents to contain provisions which contradict one another. The most common examples are maintenance, quorum, notice, and amendment procedures which are either internally inconsistent or are written one way in the declaration and another in the bylaws. It is also not uncommon for rules and regulations to be in conflict with the declaration. Obviously, conflicts in the legal documents creating uncertainty in operating the association, and increase the risks. As such, the legal documents should be amended to eliminate conflicts.

4. Do the legal documents contain provisions which are vague?

Many legal documents contain provisions which are vague or subject to uncertain interpretation in court. For example, many legal documents contain the following business use provision:

"Units shall be used for residential purposes only and no business or business activity shall be conducted in units."

While at first blush, this provision might seem clear enough, courts in different jurisdictions have interpreted this language in a variety of ways. Some courts have said this language prohibits all business activities including even inoffensive activities such as a real estate agent making telephone calls from home or a computer programmer working on a computer at home. Other courts have gone to the other extreme and have said that so long as the owner lives and sleeps in the unit, ancillary business activities are permissible. Still other courts have looked to zoning regulations to resolve the issue.

Clarifying vague provisions in legal documents can help give homeowner associations greater confidence in their ability to enforce the legal documents, as well as to understand them. A legal audit should identify and include recommendations on how to clarify vague provisions.

5. Do the legal documents contain basic provisions for sound operations?

Some legal documents occasionally fail to contain provisions necessary for the basic operation of the association. Examples include legal documents which do not address architectural control issues, assessment collection responsibilities, maintenance responsibilities or covenant enforcement and due process issues. As part of the legal audit, a careful review should be undertaken to confirm that the legal documents have the basic provisions necessary for successful operation.

6. Do the legal documents address all of the problems which the association is facing?

Many legal documents are based on forms which are over twenty (20) years old. As a result, they often do not address the problems encountered in homeowner associations today. For example, many legal documents may contain provisions disclaiming a duty on the part of the association to provide security to try to reduce the association's risk in the

area. Similarly, many legal documents in communities where the association maintains the building exteriors now regularly condition the approval of an architectural change on the owner agreeing to maintain the change to avoid the association assuming a maintenance responsibility for a change it did not construct. Obviously, the more legal problems which can be clearly addressed in legal documents, the less the likelihood of disputes arising in a community.

7. Are restrictions contained in the right legal document?

The trend in the law of community associations is that courts give much greater deference to provisions contained in declarations than to rules and regulations. This is because all owners purchased subject to the declaration and amendments are typically adopted by a super-majority of the owners. Rules on the other hand are normally adopted by the board. As a result, courts tend to apply a "shock the conscience" standard in deciding whether to enforce declaration provisions but only a reasonableness standard in reviewing rules and regulations. As a result, controversial restrictions such as leasing restrictions or rules prohibiting pets should, if at all possible, be placed in the declaration rather than in rules and regulations. Part of a preventive law evaluation of an association's legal documents should include a review of whether an association's ability to enforce its legal documents would be enhanced by moving controversial provisions to the declaration.

8. Are the legal documents reasonable in how they draw distinctions between different classes of owners?

One basis for challenging legal documents, particularly rules, is to argue that the distinctions they draw between types or classes of owner's bears no rational relationship to any legitimate need or purpose of the association. For example, a rule which restricts pool use based on the height or weight of owners would likely be struck down because there is no rational basis for the distinction. Risk of challenge in this area becomes greater when the distinctions are based on whether the owner is a resident or nonresident, whether the resident is an owner or tenant, or the date that an owner acquired his unit. So, for example, is a rule which permits owners who owned pets as of a certain date to keep them, but prohibits all future owners from having pets susceptible to challenge? In an effort to minimize risk, all rules and covenants which give different rights to different classes of occupants should be carefully scrutinized.

9. Are the restrictions or rules reasonably related to a legitimate purpose of the association?

Another basis for challenging legal documents, particularly rules, is to argue that they are not reasonably related to the purpose of an association. If an association were to pass a rule requiring owners to attend church on Sundays or belong to the Democratic party, it would obviously be struck down as not being reasonably related to the purpose of the association. Some legal documents, however, define the purpose of the association so narrowly that rules which require owners to do things inside their units such as installing smoke detectors or replacing aluminum wiring with copper wiring are subject to attack. A review of the rules and regulations in relation to the purpose of the association is always a part of the process of reducing legal risk in an association.

10. Are the rules or restrictions reasonable in scope?

Legal documents are also subject to challenge on the basis that they are unreasonable in scope. Since courts tend to scrutinize rules more carefully than declaration provisions, the attacks are usually more focused on rule. Restrictions which are unreasonable in scope are ones which try to do too much or are unreasonably harsh. For example, if an association, in an effort to reduce pet problems, adopted a rule that pets not being walked on a leash may be shot on sight, it would obviously be unreasonable in scope. In other words, it is a

proper purpose of the association to be addressing pet problems, but the scope or magnitude of the enforcement action is too great. A rule imposing a curfew on teenagers in a community to prevent acts of petty vandalism is an example of a rule which could go either way with respect to being unreasonable in scope. The test of whether rules are subject to challenge in this area often are done at a gut level. For example, a rule imposing \$5 or \$50 fines might not make owners uncomfortable, but as the fine increases to \$500 or \$5,000, many owners (and judges) would likely say it is unreasonable in scope based on the common sense evaluation. Legal documents should be carefully scrutinized for risks in this area.

B. REVIEW OF ASSOCIATION'S OPERATIONS AND PROCEDURES

1. Are the legal documents enforced in a uniform, fair, and consistent manner?

An association can have the best legal documents in the world, but if they are not enforced in a uniform, fair, and consistent manner, the actions of the association will be subject to attack. Charges of breach of fiduciary duty on the part of the board, selective and discriminatory enforcement, and waiver arguments are common when legal documents are not enforced in a uniform, fair, and consistent manner. Any legal audit designed to minimize risk should include a careful review of how well an association is performing in this area.

2. Are there provisions in the legal documents which the association do not enforce?

It is not uncommon for a board of directors to not enforce various provisions in an association's legal documents. This is usually the case because the board does not like the provision in question. Failing to enforce a covenant can subject the board to a breach of fiduciary claim or make it more difficult to enforce other provisions. Provisions which a board is not willing to enforce should be removed from the legal documents by amendment. A preventive review of the association's operations should seek to identify provisions which are not being enforced.

3. Are actions of a board reasonably related to the purpose of the association?

Another basis for challenging decisions of the board is to argue that the decision is not reasonably related to the purpose of an association. Some legal documents so narrowly proscribe the purpose of an association that actions of the board, for example, in entering into a cable television contract or making improvements to the common areas are subject to challenge. A preventive review should evaluate decisions against this standard.

4. Does the association have power to act?

From time to time a board will take some action when it has no legal power to do so. Examples of board actions as varied as fining or taking other enforcement actions against a drug dealer, skinny dipper, or unruly teenager might fall into this category. Prior to acting, major decisions of the board should be reviewed to confirm that power exists to address the problem.

5. Is power being exercised by the right party?

A more common problem in community associations is having the wrong party exercise power. For example, it is not unusual to see boards borrow money, make substantial capital improvements, and even levy special assessments when the legal documents require such actions to be approved by the membership. Since such actions are subject to being attacked, part of a legal audit should include a review of decisions based on this standard.

C. REVIEW OF THE PROPERTY

1. Do dangerous conditions exist on the property?

In conducting a legal audit, a lawyer should also help identify dangerous conditions on the property which could result in a claim being asserted against an association. Some of the obvious areas of risk for a community association might include the swimming pool, the clubhouse, security gate, lakes, retention ponds, and other attractive nuisances. With respect to the swimming pool, the evaluation may be as simple as asking whether the association fills out and dates a checklist of safety equipment or a self-latching gate. The use of the clubhouse for parties (particularly when alcoholic beverages are consumed) is an area where questions should be asked to minimize the risk. With respect to lakes, retention ponds, and other attractive nuisances, the focus should be on whether the association is taking steps to make these areas safe.

The provision of security has become an area of special risk for associations. Some courts have held that an association owes a duty of care to its residents to protect them from the criminal acts of third persons. Even in those states where courts have not held that the association owes such a duty, a court may hold that an association has assumed that responsibility by holding itself as a provider of security to its residents. An evaluation of dangerous conditions on the property should include a review of security issues. For example, Is the associations' landscaping creating good hiding places for burglars and other criminals? Similarly, does the association provide sufficient lighting at night to help minimize the risk of criminal acts?

It is better on a preventive basis to try to implement strategies to make high risk areas safer than to defend lawsuits from persons who have been injured.

D. RECORD KEEPING

1. Are attorney/client privileged communications marked and segregated?

If attorney/client privileged communications are not kept separately, a homeowner requesting copies of the association's records may obtain information which could destroy the association's legal position in a particular lawsuit. All documents which are marked by the attorney as an attorney/client privileged communication or those which the board knows would hurt the association's legal position if communicated to a hostile homeowner, should be kept in a separate file which is not accessible to everyone in the community. A preventive law review should evaluate whether this is being done.

2. Are all decisions of the board properly reflected in the minutes?

Are there decisions being made outside of the formal board meetings or at the meeting itself which are not being recorded in the association's minutes? If these informally made decisions are not being properly recorded in the minutes, they are subject to being successfully challenged by an owner.

3. Will the minutes help or hurt the association in court?

Often time, minutes contain statements which reflect prejudices of directors toward a particular person or a lack of sound business judgment in reaching a decision. Minutes should be carefully scrutinized to eliminate such "smoking guns" and to insure that a jury reviewing the minutes will view the association in a sympathetic light.

4. Are legislative histories set forth in controversial areas?

In minutes, rule-making, and the adoption of policy resolutions, there should be the selective use of a legislative history section where the nature of the problem the association is attempting to address is described and the solution to the problem explained. This is particularly helpful in controversial areas where a judge or jury reviewing the action might not understand what the problem was or why a given solution was implemented.

5. Is there a proper paper trail when disputes arise?

One of the major reasons associations lose cases is because they have little or no documentation to prove their cases in court. Communications with contractors and homeowners should with rare exception be documented in writing. Writings take on a life of their own in court. It is one thing, for example, to have a manager testify that he verbally asked an owner to correct a violation before a fine was levied. A jury may or may not believe the manager. It is quite another thing for the manager to support his statement with a confirmatory letter. The credibility of the manager's testimony increases substantially in this latter situation. The goal in court is to make the association appear as reasonable and businesslike as possible. A good paper trail is an invaluable part of this process. The legal audit should always review whether such paper trails are being created.

6. Will the records be admissible in court?

In order for records to be admissible in court, certain evidentiary standards have to be met. Some associations end up not being able to introduce critical evidence because these standards have not been met. Part of a legal audit should include a review of whether such things as photographs, videos, financial statements, and minutes are being kept in such a way as to increase their likelihood of being admissible to court. It should be noted that whether a piece of evidence is admissible in court is ultimately in the discretion of the judge.

E. CONTRACTS

1. Are provisions designed to protect the association included in contracts.

A legal audit should include a review of all contracts entered into by the association to confirm that they contain provisions designed to put the association in a strong legal position. A complete contract checklist cannot be provided in this article. Nevertheless, provisions making it easy to terminate the contract, requiring the contractor to indemnify the association and maintain liability insurance, spelling out clearly the contractor is an employee or an independent contractor and providing for attorney fees in the event of a breach are of particular concern.

CONCLUSION

The old saying that "a stitch in time saves nine" embodies the essence of a preventive law approach for community associations. Obviously, there is no way to eliminate all disputes, controversies, and litigation in a community association. Nevertheless, if an association has its major areas of legal risks identified, and a report of recommendations on reducing risks is prepared and implemented, the legal exposure associated with community association operation can be significantly reduced.