The Regenesis Report

Priceless | Innovative Homeowner Association Management Strategies | January 2006

Regenesis means new beginnings using eternal principles in innovative ways.

Regenesis believes that the goal of every homeowner association Board should be to promote harmony by effective planning, communication and compassion.

The Regenesis Report provides resources and management tools for just that purpose. Every month, articles of common interest to homeowner associations nationwide are offered along with innovative strategies for addressing common problems.

Managing an HOA can be a lonely and frustrating task. Take heart. You are not alone. Help is on the way. Read on.

I welcome your comments and suggestions.

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New Oregon Law: Maintenance Plan

Effective January 1, 2006, the Oregon Condominium (ORS 100.175) and Planned Community (ORS 94.595) statutes include the following language (additions are in **bold text**):

"A 30-year plan **for the maintenance, repair and replacement of common property** with regular and adequate contributions, adjusted by estimated inflation and interest earned on reserves, to meet the maintenance, repair and replacement schedule.

(4) The 30-year plan under subsection (3) of this section shall:
(a) Be appropriate for the size and complexity of the common property; and
(b) Address issues that include but are not limited to warranties and the useful life of the common property.

(5) The board of directors and the declarant shall, within 30 days after conducting the reserve study, provide to every owner a written summary of the reserve study and of any revisions to the 30-year plan adopted by the board of directors or the declarant as a result of the reserve study."

The maintenance plan requirement affects all Oregon condominiums and planned communities that have or institute a reserve plan. This includes both new and pre-existing HOAs. The driving language of this new requirement is "appropriate for the size and complexity of the common property". The requirements for a garden style condo are much simpler than a high rise building with complex and sophisticated systems. The more complex the construction, the more detailed the maintenance plan needs to be.

In developing this new required maintenance plan, here is a series of questions to ask and answer:

Why is a maintenance plan necessary? The benefits of a maintenance plan include the preservation of curb appeal, physical integrity, livability and market value.

Who should perform the maintenance? This requires an assessment of the skill level required for each maintenance activity.

What maintenance should be performed? This requires a scope and complexity of the each maintenance task, ranging from activities like cleaning, inspecting, adjusting, lubricating, re-aligning, repairing and replacing.

Where is maintenance required? This requires an understanding of systems that need various kinds of maintenance.

When is maintenance required? This drives a work schedule which includes coordination with related or similar tasks for efficiency and cost effectiveness.

How is the work done? This requires instructions for carrying out the maintenance work. Product manufacturers produce detailed technical data sheets to assist in this endeavor. Flow charts are also helpful to break down the process in smaller manageable tasks.

Has a centralized checklist of tasks been completed to effectively track accomplishments?

How much does the maintenance cost? The HOA needs to budget adequately to pay for the level of expertise the maintenance requires.

Which tasks are the highest priority? When time or money is limited, it's important to deal with the most important things first (like roof leaks before carpet replacement).

The Oregon maintenance plan requirement is intended to help the board improve and simplify the long range maintenance process. The better maintenance is done, the happier the residents and owners will be. The more organized maintenance is, the simpler the board's job will be. Pair the maintenance plan with both the reserve plan and the operating budget.

Article developed with insight provided by David Albrice of RDH Building Engineering, a company that prepares maintenance plans and manuals. RDH can be contacted at www.rdhbe.com

Ask the HOA Expert

Q Our governing documents contain this provision: "No dwelling shall be used for any purpose other than for a single family residence." A board member has been housing a teenage nephew and his friend. No rent is being charged. Does this constitute something more than a single family residence? The situation is causing problems among the neighbors due to complaints of late night parties and traffic.

A Extended family is generally accepted under the "single family residence" definition as long as no rent is being charged. The friend issue is pushing the definition envelope.

However, late night activity that disturbs the neighbors, whether by family or guests, is a violation of HOA rules. This particular homeowner is a board member so the duty to comply with basic rules is even more important.

The real issue is the disturbance, not the rental arrangement. The issue needs to be framed plainly: Either the kids abide by the rules or there will be ramifications (assuming that the HOA has established fines and penalties). Of course, the neighbors should be encouraged to call the police if there is any illegal activity going on which frequent late night traffic often suggests.

Q We are having an issue regarding allowing signs on the common property. Our governing documents requires board approval for all signs. In the past, the board has given approval for 'For Sale' signs only but not 'For Rent' signs or any other sign. Recently, there were three 'For Sale' signs up at once, all with board approval. Several homeowners complained that the signs were detracting from the appearance of the property and the Board adopted a policy to not allow any signs on the property. Thoughts?

A If the Board has the authority to approve signs, the Board has the authority to enact a Sign Policy. However, the Board cannot enact a policy that prohibits signs since the governing documents imply that signs are allowable. Only an appropriate majority of members as defined by the governing documents can vote to amend the governing documents to eliminate signs altogether.

But such an amendment is not recommended. For Rent and For Sale signs are standard fare in every part of the country with the exception of a few elite communities. These signs are temporary and designed to assist members in a legitimate business enterprise which all will undertake at some point in time. It is, however, appropriate to control the size, look, number, longevity and topic of signs. Political signs, for example, can only be displayed for, say, 30 days before an election and then be removed within 48 hours of the event.

There is a sample Sign Policy in the Policy Samples section of www.Regenesis.net that can be adapted to your use. The sample policy is a reasonable approach to this issue.

Q One of our homeowners sued the board over a disputed policy decision. Our board did not purchase Directors & Officers insurance, even though the governing documents required it, so attorney fees were paid for from the HOA operating funds. Some of us think that's not right. What should be done?

A If the governing documents require the HOA to have Directors & Officers insurance,

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All Portland and Vancouver Metro Area Homeowner Associations that contact us each month are entered into a drawing for a free homeowner association video entitled "The Board".

This Month's Winner:

Carol Rae Chislett
Towerhill Condominium

Thanks to others that responded:

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that's what it means. D&O is specifically designed to provide legal defense for the Board in situations like you describe. There are many HOA Boards that haven't a clue what D&O insurance is and have never read the governing documents to even know there is a requirement for it. As long as the HOA doesn't get sued, they look like heros because they saved the HOA premium expense. But now that your Board has been sued and there was no D&O, they don't look so smart.

So, was the oversight out of ignorance or deliberate defiance of the requirement? If the board made a conscious decision not to spend the money for this insurance, to quote Ricky Ricardo, "(The Board) got some 'splaining to do". Since D&O is usually inexpensive, there is no good reason not to have it.

Changing of the Guard

Part of the routine of running a homeowner association includes annual election of the Board. Usually, some directors step down and others step up to work with the remaining directors whose terms have not yet expired. Staggered terms improve continuity. Seasoned directors bring with them perspective and history that is valuable to decision making. And it eliminates reinventing the wheel on issues that have already been discussed and decided.

But politics are politics. There are occasions when the Board resigns en masse or is voted out by angry homeowners. This is usually prompted by a serious disagreement, allegations of fraud or some other malfeasance. Rumors and rumors of rumors abound. The outgoing Board members often carry a fair amount of resentment and antagonism with them. "Uncooperative" is a given and some engage in subterfuge trying to stir up discontent among their supporters. There is no joy in Mudville.

At times like these, the new Board may be tempted to engage in witch hunting...pinning the blame on somebody for the problems. Witch hunting always finds a witch of some sort and the result is always the same: bad feelings among neighbors. It's at times like these that the wise Board should weigh the benefits of continued conflict (none) versus making peace and getting back on track (good choice). Besides, burning witches violates the local fire ordinances.

Get the Records. There are some prudent things the new Board should get done quickly. If your HOA is self managed, getting the files and records from the outgoing board is a top priority. They are likely scattered between the President, Secretary and Treasurer but they need to be rounded up. The antagonism factor from past directors may interfere with the transfer but press on. The records belong to the HOA and, if necessary, legal consequences should be brought to bear. Reminding that withholding records only reinforces suspicions of chicanery may also help in shaking them loose.

Perform an Audit. Once records are transferred, an audit by a CPA should be performed. There are a number of benefits to this:

1. Improprieties will be identified and provide a basis for prosecution, or,
2. The accused will be vindicated, which is good for healing wounds.
3. A line in time will be drawn from which the new Board can plan. Know where you are to know where you are going.
4. Books are reviewed by an outside, knowledgeable and objective professional.
5. The CPA will recommend improvements to the financial record system.
6. Relieves the new Board of past improprieties. Start with a clean slate.

Identify the Mistakes. The previous Board fell from grace for good reason but it's important that the new Board understand why to avoid the same fate. Some common mistakes include:

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- **Bad communication** with the members. Examples include holding closed meetings, failing to distribute meeting minutes or newsletters.
- **Failure to get member feedback** on proposed budgets, special assessments and policies.
- **Selective enforcement** of rules and collection procedures. A big no-no and sure fire way to create animosity.
- **Domineering attitude.** One of the most infuriating attributes a Board can have.

Make a list of where your prior Board failed and agree to do differently in the future.

We're One of You. It's a funny thing how some members believe the Board members come from another planet. Directors are subject to the same budget, fees, special assessments, rules and policies as everyone else. It's important to reinterate that reality when assuming control. It's also healthy for the Board to chant that mantra when proposing and enforcing policy and all that that entails. If a rule is good, it applies to all. Message to the Members: We are you.

The King is dead! Long live the King! Now you're in charge. As the new guard, you have a golden opportunity to right the unrightable wrongs. Remember why you got to this place and serve with honor. Don't let your guard (or members) down.

Common Sensical

A homeowner association board of directors can often rely on the Business Judgment Rule when faced with a homeowners' lawsuit over a particularly unpopular board decision. The Business Judgment Rule limits judicial scrutiny of actions of HOA boards when they act in good faith, exercise honest judgment, act with the best interests of the HOA and in an informed prudent manner.

The Business Judgment Rule serves to protect the types of decisions that boards must necessarily make in the course of fulfilling their duties. For example, in the frequently cited case of Levandusky v. One Fifth Avenue Apartment Corp., the highest New York court refused to overturn a board's refusal to permit internal architectural building modifications requested by an owner to relocate heating pipes. An HOA rule prohibited the proposed plan, and the board decided not to approve it. Before denying the proposed modification, however, the directors consulted a qualified engineer who confirmed that while the relocation was feasible but that change in the plumbing presented risks that should be avoided if possible. Although the board could have approved the modification, the court concluded that the board's decision fell within its discretionary power.

Another frequently cited case from California, Lamden v. La Jolla Shores Condominium Association, addressed a board's decision to use spot treatment of termites rather than a global "tenting" approach that the member proposed. The court determined that deference to the board was appropriate where the board's exercise of discretion in selecting repair methodologies was "clearly" within the scope of its authority and the directors acted in good faith, upon reasonable investigation, and with regard to the best interest of the community.

The Colorado Court of Appeals has also held that the business judgment rule can be used to defend against a claim for failing to enforce covenants. Colorado Homes, Ltd. v. Loerch-Wilson, the court noted that the substance of the business judgment rule requires a board to make decisions in good faith and to not be arbitrary.
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What steps can a board take to comply with Business Judgment Rule parameters?

1. Comply with the governing documents.
2. Use resources like management, attorneys, engineers or other experts before making decisions.
3. Consider alternative courses of action. The board does have discretion to make such decisions when in the best interest of the HOA.
4. Avoid conflicts of interest.
5. Consider how board conduct will be viewed by objective observers.
6. Properly document decisions and the basis for those decisions. Put it in writing for the record.
7. Adhere to established process requirements. For example, if a response must be made to an architectural application within 30 days, that time deadline should be met.

The Business Judgment Rule has a long tradition of protecting volunteer directors who make informed decisions that someone may not agree with. The operative word is "informed". Do your research and get good advice before making judgments on controversial issues.

Adapted from an article by Orten & Hindman

Canine Companion

In California, a state regulatory agency handed down a ruling that gives individuals suffering from mental and emotional ailments the right to keep an "emotional support" dog with all the legal benefits that apply to animals such as seeing-eye dogs. This ruling mandates that exceptions be made to No Pet Policies to allow an emotional support dog (or cat, or ferret, or etc.). The Americans with Disabilities Act (ADA) has a broad definition of what constitutes disability:

1) Individuals with a physical or mental impairment that substantially limits one or more major life activities;
2) Individuals who are regarded as having such an impairment; and
3) Individuals with a record of such an impairment.

This definition includes "orthopedic, visual, speech, and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, HIV infection, mental retardation, emotional illness, drug addiction (other than addiction caused by current, illegal use of a controlled substance) and alcoholism."

This definition is broad and most likely the board is not qualified to decide whether or not a resident's condition fits within it. Under federal law, the board is entitled to obtain information that is needed to evaluate whether a reasonable accommodation is necessary to "verify that the person meets the Act's definition of disability".

The board should require that all requests for accommodation be made in writing to avoid confusion. As long as an exception to rule or policy is being requested because of a disability, the board has a duty to investigate and respond. If the disabled resident (or his doctor) can show that an emotional support animal would reduce the effects of the disability, the board should look for ways to accommodate.

Once an accommodation is granted, the Board cannot levy extra fees in exchange for waiving the no pet policy. However the disabled resident remains responsible for the animal clean up and damage repair. If the pet proves to be disruptive, the Board can require removal if the resident isn't successful in behavior modification.

Pets are as American as pumpkin pie. So don't get "pie eyed" with power or "squash" the rights of disabled residents who need them for emotional reasons. Look for ways to accommodate those with real needs.

Bit of a Bother

"Nuisance" has been defined as "something that causes harm" and "a bit of a bother". Nuisances are a pretty common occurrence in homeowner associations since living in close proximity is bound to create friction from time to time. Most HOA governing documents include language like: "No resident shall engage in offensive activities which are a nuisance, or interfere with the quiet enjoyment of other residents."

These "nuisance" provisions trigger the need for the HOA to control resident behavior that qualifies. The problem is, there is a growing belief in the legal community that these provisions themselves may be a nuisance for the boards responsible for enforcing them.

One problem is simply defining the term "nuisance". The obvious goal of nuisance provisions is to prevent residents from making other residents miserable. But the broad wording of typical nuisance provisions leads to arguments of whether such provisions apply to almost any activity, or none of them. This ambiguity causes board members charged with enforcing them to echo former Supreme Court Justice Stewart's statement about the difficulty of defining obscenity: "[I can't define it], but I know it when I see it."

In the same vein, many HOA boards would agree that they recognize a nuisance when they see it. However, this approach has mixed results. Behavior that infuriates one person might go unnoticed or overlooked by another. Hyper-sensitive residents may deem all sounds as offensive, while others may refuse to recognize how their neighbors could find the most offensive behavior unacceptable.

The typical nuisance language in HOA documents doesn't offer much guidance to the boards who must mediate these disputes. One option is to list the activities or behaviors that will constitute a nuisance. Generally, the board has the authority to adopt resolutions "to clarify" the governing documents. A nuisance resolution could include:

1. Barking dogs at any time.
2. Unsupervised pets in the common areas
3. Loud music, TV, singing. etc. between 10 pm and 8 am.
4. Obnoxious odors
5. Use of chemicals or equipment that cause life or fire safety concerns
6. Tobacco or barbeque smoke that migrate between units.
7. Housekeeping that causes fire safety or health conditions (overly cluttered, attracts vermin, mold, etc.)
8. Other activities that the Board deems to be a nuisance (catch all provision)

Is a nuisance a bit of a bother or something that causes harm? Good question. But this is an area that the board needs to establish a policy that works most of the time and then focus on those special cases that require more thought or mediation.

Too Cool Roofing

While rain and snow always find a homeowner association roof's weakest links, solar effects also have a profound impact on a roof's longevity and performance. When it comes to flat roofs, "Cool Roof" technology uses reflective roofing materials to improve useful life, reduce solar heat and increase energy savings. Cool Roofs normally stay up to 50-60 degrees F cooler at peak times than dark roofing. Cooler roofs mean less building cooling and related maintenance expense.

Examples of Cool Roofs are white PVC (Poly Vinyl Chloride) and white TPO (Thermoplastic Poly Olefin) roof systems. These systems carry the Energy Star label. The U.S. Environmental Protection Agency's Energy Star labeling program identifies roofing products that can reduce energy consumption and reduce problems associated with heat build-up, smog and air pollution.

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If your flat roof is due for a makeover, take the time to investigate the many advantages of Cool Roof technology. Reducing heat build up extends roofing life and reduces maintenance. Too cool!

Healthy Insanity

Here are some creative ways to maintain a healthy level of sanity and to keep your neighbors off balance:
1. Sit in your parked car with sunglasses on and point a hair dryer at passing cars. See if they slow down.
2. Page yourself over the intercom. Don't disguise your voice.
3. Every time someone asks you to do something, ask if they want fries with that.
4. Put your garbage can on your work desk and label it "IN."
5. Put decaf in the coffee maker for three weeks. Once everyone has gotten over their caffeine addictions, switch to espresso.
6. In the memo field of all your checks, write "For Smuggling Diamonds."
7. Finish all your sentences with "In Accordance with Prophecy".
8. Don't use any punctuation
9. Skip rather than walk.
10. Whenever you go out to eat, order a diet water with a serious face.
11. Specify that your drive-through order Is "To Go."
12. Sing along at the opera.
13. Go to a poetry recital and ask why the poems don't rhyme.
14. Put mosquito netting around your work area and play tropical sounds all day.
15. Five days in advance, tell your friends you can't attend their party because you're not in the mood.
16. Have your co-workers address you by your wrestling name, Rock Bottom.
17. When the money comes out of the ATM, scream "I won!, I won!"
18. When leaving the zoo, start running towards the parking lot, yelling "Run for your lives, they're loose!!"
19. Tell your children over dinner, "Due to the economy, we are going to have to let one of you go."
20. Send this list to someone who won't "get it".

Dave Barryisms

If a woman has to choose between catching a fly ball and saving an infant's life, she will choose to save the infant's life without even considering if there is a man on base.

You can say any foolish thing to a dog, and the dog will give you a look that says, "My God, you're right! I never would've thought of that!"

Regenesis Service Directory January 2006

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Homeowner Association Developer Services

Regenesis offers specializes consulting services to homeowner association developers. Our nationally recognized expertise will provide a marketing edge when applied in these areas:

- **Concept Stage Value Engineering** Selection of materials, design and amenities has a huge impact on market value, durability and the homeowner association fee charged. Using the latest homeowner association strategies, construction costs can be reduced, the structures cheaper to maintain and lower homeowner fees. This will help the homes sell faster and increase your profitability.

- **Budgeting Expertise** Regenesis has a long track record of crafting Operating Budgets and Reserve Studies for new homeowner associations. Putting the developer arms length from the budget adds credibility and reduces liability.

- **Maintenance Planning** A Maintenance Plan will provide the details the new homeowner association needs to properly care for the assets placed in its care. We take the maintenance funds provided in both the Operating and Reserve Budgets and instruct how to use them effectively to better preserve the assets.

- **Transition Coordination** A successful developer to owner turnover requires planning. Regenesis will assist in the scheduling, selection and training of future board members and after turnover consulting to ensure the new homeowner association get off on the right foot.

- **The Regenesis Report** A monthly newsletter distributed free to Portland area homeowner associations. It has timely articles of interest to developers, board members and property managers. It is widely regarded as the best publication of its kind in the nation.

- **Regenesis.net** The largest homeowner association information resource in the world. It includes articles, newsletter, books, videotapes, software, statutes, cost cutting techniques and numerous other resources to assist the Board manage the association better.

- **Regenesis Seminars** are held through out the year in Portland to instruct on critical issues like Budgeting, Insurance, Maintenance Planning, Working With Contractors, Legal Issues, Construction Defects, Developer Turnover Meetings and Reserve Planning.

MAKE YOUR HOMEOWNER ASSOCIATION ALL IT CAN BE. FOR MORE INFORMATION, CONTACT:

Richard L. Thompson
HOA MANAGEMENT CONSULTANT

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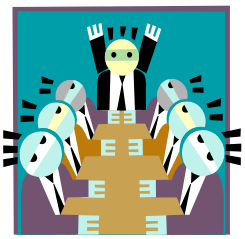

Guaranteed Replacement Cost Coverage

Directors & Officers (D&O) Liability

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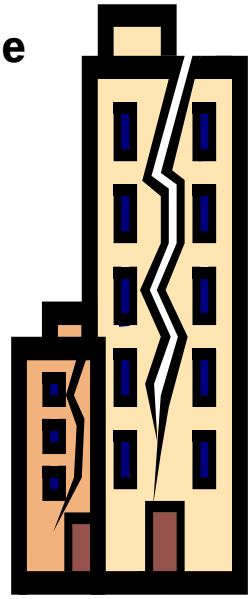

For a quote, contact:

Vern Newcomb

Phone 503 292-1580

vernnewcomb@abipdx.com

We have partnered with CAU to offer a program that specializes in COA & HOA insurance policies. It eases the effort of tracking multiple policies with multiple carriers. We provide competitive pricing, multiple lines of coverage on one policy and excellent customer service. All applicants are subject to CAU underwriting approval. If an applicant falls outside company guidelines we have many other markets available.