The Regenesis Report

National Edition | Innovative Homeowner Association Management Strategies | Priceless

Regenesis means making new beginnings using eternal principles in innovative ways.

Regenesis believes that the goal of every home-owner 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. Help is on the way.

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HOA Resale Revelation

A buyer exploring the complexities of home acquisition is often in for wild ride. It is a place of mystery where few should venture alone. Most opt instead to use a guide called "real estate agent" who is experienced in both hand holding and Dream Home location. To "seal a real deal", buyers typically require financing and the Three Ls (location, location, Location). Yet there is an equally important consideration known as "resale disclosure". Without it, "caveat emptor" (buyer beware) is a frightening reality.

Resale disclosure means a seller divulging information that any prudent buyer would want to know, such as: Are there any known structural, wiring or plumbing problems? Does the basement resemble an indoor swimming pool during the rainy season? At night, does the house have a Chernobyl-like glow? Is there evidence of radon or lead base paint? Was this location ever a "crack" house or meth lab?

In general, single family house sellers are required to disclose a host of information that may result in buyer back out. And no wise real estate agent allows a transaction to close without "full" disclosure because it's often the agent that suffers the buyer's wrath for seller omissions.

Curiously, resale disclosure is alarmingly absent when it comes to most HOA home sales. And this is very disturbing considering the substantial liabilities and financial obligations which are unique to owners of HOA property. In addition, many real estate agents simply aren't educated about HOA issues. And many homeowner associations do not have and maintain the kind of disclosure information buyers need to know.

So what kind of "liabilities and obligations" does an HOA owner have? Here's an example: When a condo buyer gets a prospective unit inspected, the inspection reveals nothing about the buyer's financial responsibility for all the neighbors' condos and the common area buildings, amenities and grounds as well. If the other units are riddled with dry rot, the buyer will have to pony up a share of the repair costs. A unit inspection won't forewarn of any of these problems. If the owner, property manager or board aren't quizzed about known defects, the buyer often won't know until after closing. This invariably results in Unhappy Camper Syndrome. What should be a happy event turns into a disaster. Avoidable? Absolutely!

Another example: HOA owners are personally liable for lawsuits to which the homeowner association is a party. While the HOA should carry both a directors and officers insurance and general liability policy, many don't leaving board members and owners exposed to potentially large personal judgments. Don't you think buyers would like to know about the HOA's insurance and any litigation that is being bandied about?

Here's a **Resale Disclosure Checklist** that an informed HOA buyer should have to reveal a true and complete picture:

- ☺ A statement of any special assessment approved or anticipated;
- ☺ A statement of regarding the status of the owner's account balance;
- ☺ A statement of the status of the Reserve Study for repair and replacement of common elements with useful lives of 2-30 years (aka reserve study);
- ☺ A copy of the HOA's current year's budget, year end balance sheet and income and expense statement for the previous fiscal year;
- ☺ A statement concerning any litigation or judgments to which the HOA is or may become a party;
- ☺ A summary of the HOA's insurance policies that includes the insurance carrier(s), types of coverages, policy limit of each coverage and deductibles;
- ☺ A statement that the unit or home in question and its limited common elements are not in violation of the architectural guidelines due to alteration or addition.
- ☺ A copy of the current governing documents, resolutions, rules and regulations and architectural guidelines
- ☺ Approved minutes to past year's board and owner meetings.

☺ Newsletters for the past year.

Some HOAs are reluctant to provide this information even if they have it as it may be incomplete or inaccurate. Most courts rule that the homeowner association has no financial interest in the outcome of a sale so has no duty to disclose. However, many HOAs, wishing to be helpful, provide certain information to purchasers and their banks. Ironically, once a disclosure is voluntarily made, courts have found that the information provided must be accurate. Therefore, the HOA, legally speaking, is better off providing no information than to provide any. To overcome this problem, some HOAs use a custom disclosure form with a "weasel clause" which states something like "This information is believed to be correct, but the lender/buyer should independently verify all information."

The board is caught between a rock and a hard place: If information is provided to the buyer that causes the sale to fail, it may be sued by the seller to whom it owes fiduciary duty. If it fails to disclose information to the buyer that might have prompted the buyer to back out, the new owner may attack like a rabid pit bull because of omission or concealment. To navigate this fine line, some HOAs provide information only if the seller and buyer authorize the release of it and agree to indemnify (protect and defend) the HOA for any information it releases. If the buyer and seller don't agree, no information is forthcoming. Further, information provided to lenders is on an HOA form and conditioned that the information will not be disseminated to third parties.

Thus, the quandary: How does a HOA buyer get the "straight scoop"? It's wise to talk with several knowledgeable residents about what's going on. Knocking on a few doors will often produce a huge amount of insider information in very little time. Since these folks don't have a direct interest in the sale, they are usually quite candid.

In the final analysis, the better informed a buyer is before closing, the better owner will result. Uninformed buyers become naturally disgruntled when post sale revelation hits. The next time a For Sale sign sprouts up in your community, make sure both the agent and owner are prepared with resale disclosure information.

Ask the HOA Expert

Q We have a board member who is now living at a rehab facility. Eventually, he hopes to return to his home in the HOA but that is uncertain due to his physical condition. We're debating whether to ask him to resign from the board. What would you suggest?

A Directors need to be able to attend meetings, make inspections and take care of routine board business. Unless the prognosis is short term, he should resign his board position and allow another to be appointed. While the reason here is somewhat unusual, the result is the same as a director whose job takes him out of town for extended periods. When circumstances change or prevent continued board service, it's time to bring others in who are able to serve. The board president should ask for his resignation with tact and compassion.

Q I just spent $7000 to install hardwood flooring in my unit and my downstairs neighbor is complaining about noise. Can't I decorate my unit that way I like?

A In common wall communities, noise transmission is a huge issue. Most new construction provides for sound proofing in its design and material by installing double separation walls and concrete floors. Older buildings with single wall construction and wood frame flooring have substantial noise challenges. If these conditions exist, it's best for the HOA to restrict the installation of hard surface flooring which will only exacerbate the problem.

Your neighbor probably has a legitimate complaint which won't go away. Noise is considered a "nuisance" since it won't allow "quiet enjoyment" for your neighbors. You might offer to install soundproofing material on his ceiling at your cost. And walk lightly.

Q If a contractor has been hired by the HOA but will not provide proof of insurance, can the members of the HOA be sued if a worker gets hurt?

A It sounds like one of the board's requirements of being hired was providing evidence of insurance. If the contractor can't produce it, the board can and should terminate the contract. And yes, the HOA indeed could get sued if an uninsured worker was injured on the job. That's why it's so important not to hire anyone that doesn't have the proper licensing, bonding and insurance. The board that ignores this basic puts itself and the other members at risk.

Q One of our unit owners discovered his unit tested positive for radon during a sale related inspection. The results came back at three times above the EPA's recommended level. In order to sell his unit, the buyer required him to install a radon abatement system. The unit owner felt that the HOA should pay the cost since the radon originated from outside of his unit. Is he right?

A Radon is a toxic and radioactive gas which causes cancer and death. The unit owner is correct that this is an issue that the HOA should remediate just as it should with water intrusion, rats, termites and other issues that originate

from the common area. All ground floor units should be tested and the HOA should install whatever abatement solution is indicated. Radon is deadly and the sooner evaluated the better. When it comes to health issues, the board should aggressively respond. See www.epa.gov/radon/nram/public.html

Q Our board billed us for a special assessment to construct a guardhouse and gate. The money was paid but the gate and guardhouse project was cancelled. We have asked for a refund many times. The board responded that the funds will be applied to our HOA fees.

A The purpose of this special assessment was specific. If the project did not take place, the money should be refunded to those that paid it. Applying it to HOA fees is fine as long as each owner approves doing that. The board has no authority to change the use of the funds on its own. And the more time that passes, the higher the likelihood that some that paid the special assessment might no longer be owners. This board needs to refund or credit back the money *immediately*.

Q Who on the board has the authority to sign contracts? Our Secretary recently executed a large renovation project agreement in the president's absence.

A Typically, the President signs contracts. If the President is not available and there is an urgency to get the contract signed, the Vice President can act on behalf of the President. The Treasurer and Secretary are not generally authorized to sign contracts unless the governing documents indicate otherwise.

Q Our HOA's attorney attended our Annual Meeting. We were discussing a matter to be voted upon which had been noticed to all members along the Notice of Annual Meeting. At the meeting, out of the blue, a member said, "I make a motion to table this issue" which was seconded by another member. At this point, the attorney spoke up and said, "a motion has been made and seconded and we'll take a hand vote."
My questions:
1. Should the attorney have acted as he did?
2. If members can make motions from the floor and get a vote, how does a board actually govern? It would appear that the masses are in charge and the board simply executes the process.

A Annual Meetings are different than Board Meetings. Owners are entitled to make motions to be voted on at Annual Meetings as long as the matter is noticed in advance of the meeting to all members so they have an opportunity to attend and vote or give their proxy instructions on how to vote. However, once the issue reaches the Annual Meeting, a motion, second and vote to table it is legitimate. If the required majority votes to table it, so it goes.

That said, the attorney has no right to steer or control the meeting. If he is there to represent the interests of the HOA, he should keep quiet until asked to speak. If, however, he is carrying proxies from one or more members, he is entitled to participate in the discussion and vote on behalf of those he represents.

Q Our HOA newsletter editor has taken to attacking the board by way of editiorials. What should we do?

A An HOA newsletter is much different from a public newspaper where the editor can write anything he wants (as long as he doesn't offend the advertisers that pay his salary). An HOA's newsletter should be factual and not opinions. Expressing opinions in the official HOA publication confuses the members as to what the policies are and undermines the board's authority and credibility. The board should establish a policy for what is and what isn't acceptable content in the newsletter. There is plenty of factual information that the members need to know such as architectural design policy, common rules to heed, pool hours, proper use of clubhouse, etc.

And it is highly recommended that the newsletter be published on an HOA website. The website allows members to self help 24/7 by accessing an archive of newsletters, meeting minutes and other important HOA information. Having this kind of information accessible cuts costs and improves credibility.

It sounds like your editor thinks he owns a bully pulpit for his private use. While free speech is a wonderful thing, it is not appropriate for an HOA's official publication. The board needs to find someone that can stick to the facts and keep his personal opinion out of it.

Securing Your HOA

The history of homeowner security started with a bang in California with the 1986 Supreme Court's decision in Frances T. vs Village Green Owners Association. In that case, a member asked the board to add extra lighting to the complex because of a rash of burglaries in the area. The board refused, and the homeowner put up her own lights, without architectural approval, and using common area electricity. The board ordered her to take down the lights, she did, and was brutally assaulted in her unit immediately after.

Perhaps understandably, she sued the HOA and its individual directors. She alleged the directors were negligent, and that they had breached their fiduciary obligation to her. The court disagreed in an interesting decision that explained there are many ways for an HOA director to run afoul of the duty of care.

The court indicated the directors had actually done their fiduciary duty, because they adhered to the governing documents when they instructed Ms. T to stop tapping the communal electricity. But, said the court, the directors wear several hats in their dealings with members of the homeowner association. As fiduciaries, their duty is to adhere to the governing documents. However, as landlords, they

have the obligation to maintain the property in a reasonably safe fashion.

The case underscores the difficulty a board encounters in security decisions. What kinds of problems create a security need? Should existing security programs be curtailed or accelerated? How about gating the community? Hiring security guards? Should residents be warned about pets or members that have a propensity for violence? The answer is that it depends on the circumstances. Ultimately, only a court or a jury may determine whether the board decided correctly. Fortunately, there are a few cases which offer direction.

One example involves "dog cases". In law, it is usually observed that "every dog gets one free bite". That is to say, that until a dog bites someone, it is not known to be dangerous, and therefore the owner has no liability for preventing the first bite. That venerable rule seems to have bitten the dust in Portillo v. Aiassa. In that case, the landlord of a liquor store was held liable for an attack on a deliveryman, bitten by the tenant's guard dog. Though the landlord had no prior knowledge of the dog's dangerous propensities, he did know there was a dog on the premises, and thus, the court reasoned, the landlord should have inquired about the dog's propensity for violence.

This raises the inevitable question: must an HOA make inquiry about a resident who might have a propensity for violence? Apparently the answer is, for the moment, "no," according to the decision in Sturgeon v. Curnutt. This case concerned a drunken tenant who shot a visitor on the premises. The court found the landlord was not liable even though the landlord (1) knew the tenant drank, and (2) knew the tenant possessed firearms. However, the court reasoned that the landlord didn't know the tenant handled the firearms in an unsafe manner when drinking!

So what do these cases tell the homeowner association? If the board is reasonably aware of the potential for violence, from dog or man, the board probably has a duty to inquire about that possibility.

Moving from dangerous residents to unsafe premises, let's look at the issue of urban violence. In Pamela W. v. Millsom, a small condominium association was relieved of liability for an assault on a tenant in one of the units. The plaintiff had argued that if the HOA had provided certain kinds of security, she would not have been raped. The court disagreed, remarking that the HOA was small and could not have reasonably afforded the devices she suggested. Further, the attack by a stalker, would not likely have been deterred by the devices she suggested. The court also noted that the mere incidence of urban violence in the general proximity of the complex was not enough to put the board on notice of the possibility of an attack, such as that suffered by the plaintiff. For the board to have been required to take greater precautions, the plaintiff would have had to have demonstrated prior, similar instances of violence in the neighborhood of the complex.

In Leslie G. v. Perry, the landlord was held not liable to a tenant who was a victim of criminal assault in a parking facility after the landlord failed to repair the security gate. The court ruled that a victim must prove that it was "more probable than not, but for the landlord's negligence, the assault would not have occurred." In other words, if an HOA has security devices, they need to be well-maintained. Moreover, parking areas are natural havens for the criminal element; they need to be well-lit, and if there are instances of violence within the neighborhood, residents should be warned.

That "causal connection" which is required to hold the HOA liable is always possible: a broken security device permits entry of a rapist, or poor lighting enhances the possibility of a successful assault. However, to find the HOA liable, there must actually be an appreciable causal connection between the unsafe premises and the assault.

What reasonable guidelines can a homeowner association take based on these cases?

1. Regularly inspect the physical premises. Light the corners, repair the fences and gates, locks, parking control devices and automated security systems.

2. Keep up with local events and news. Warn members of any occurrences of nearby crime, particularly those involving assaults.

3. If contemplating hiring a security provider, ask for and check references.

4. Keep a paper trail of security events.

5. Attend industry conferences and classes and become aware of different options for providing security.

6. Investigate "Neighborhood Watch" and "Safe Streets" programs.

7. If you believe you have a dangerous resident, consult with your attorney about restraining orders which require the police to respond to calls of possible attack.

Security is everyone's business. A proactive board involves the entire community by advocating personal responsibility and inter-neighbor concern.

From an article by Mary Howell

Thunder Rolls

Pssst...do you hear the rumor? The board is talking about raising the dues again and everyone's up in arms. They raised the dues last year! And the year before! It's time to fire up the tar and pluck the chicken!

Ever hear this kind of thunder roll through your HOA? At the center of the storm is a contradiction: Members want the property taken care of but expect the board to do it on a slumlord's budget. With too little money chasing too many expenses, maintenance suffers, home values slide and livability diminishes. Yet, year after year, the Spend No Money Drum gets beaten.

But it wasn't always thus. In the beginning, when the homes were new and the future bright, members basked

in the glow of their own ignorance. The developer kept the homeowner fees low and why shouldn't they be? It doesn't cost anything to maintain something that's new. Let's worry about that when the time comes. Well, the time is now, the pot is empty, the assets worn out and recriminations abound. A $3000 special assessment! Who's responsible for this? Why wasn't money being socked away years ago? I can't pay it! I won't pay it!

It's at times like these that outside professionals are called for. The board is authorized to hire the expertise it needs to run HOA business. HOA consultants like managers, lawyers, architects and engineers can assist the board in making its case to the members. In the case of deferred maintenance and inadequate reserves, the board should hire a **Professional Reserve Analyst (PRA)™** to perform a reserve study. A reserve study will consider all the repair and replacement issues, not just the urgent ones. A reserve study looks thirty years down the road and charts a course to proactively deal with these issues. The reserve study will identify priorities which the board can further prioritize according to funding.

Hiring a knowledgeable consultant to supervise each project is a real bonus. For example, roofing projects should have a roofing consultant who can detail the scope of work, draft a contract, gather proposals from qualified contractors, ensure that the project is done to proper specifications and lien waivers executed. Consultant oversight ensures that the material warranty is not voided because of faulty installation. The cost of a consultant is typically only 1-2% of the total project cost. Clearly, this is an investment worth making. The same principle applies to other major projects like
structural repairs, painting and landscape renovation.

Playing catch up on major repairs costs a lot of money over a short time period. In an effort to soften the blow to the members, the tendency may be to piecemeal the repairs over a number of years and break large costs into more manageable chunks. But, piece-mealing causes the costs to go up! The bigger the project, the cheaper the cost per unit. Piece mealing also creates an imbalance in member asset values. If Building A gets new paint this year, those units are more attractive and valuable from a buyer's perspective than those in unpainted Buildings B, C and D. This inequity will lead to resentment among the members that didn't get the benefit of the repairs.

To avoid these costly traps, the board should only perform complete projects. If repairs must be split up by years, do them by type, not location. If painting is to be done, do all buildings at the same time. Same for roofing. Do it all at once, minimize disruption, get it over with and save a bundle.

If your HOA is suffering from deferred maintenance, consider raising the money to do multiple projects the same year. For example, if siding needs to be replaced, those energy inefficient windows should be replaced as well. The improved livability, energy savings and property value increase always far exceeds the cost so this is one of the best investments the members can make. And just consider the advantages to ending the bickering, debate and back biting. The sooner completed, the sooner the community chest will swell with pride and past resentment forgotten.

So, recognize the contradiction when it raises it's ugly head. This is one monster that's best dealt with directly and quickly. The harmony of your HOA hangs in the balance.

Rule Pitfalls

Over the past few years, public sentiment towards homeowner associations has become increasingly unfavorable. Much of it stems from covenant enforcement issues and the steps taken (or not) by boards of directors. This has resulted in legislation to make homeowners associations more "user friendly" regarding restrictive covenants. Consequently, courts can hold HOAs to a strict standard, requiring precise observance of the procedures in the covenants and in rules and regulations.
Some homeowner associations are faced with the reality that at one time or another they will need to take an owner to court to enforce restrictive covenants. Many pitfalls leading to such action can be avoided by using some common sense precautionary measures.

Education. Boards must familiarize themselves with the governing documents so they can properly initiate enforcement. Frequently, homeowner associations lose enforcement efforts because of the failure to follow basic procedures set forth in the documents.

Communication. Governing documents should be available to the member. Recurring rules enforcement can be avoided through reminders in newsletters, flyers, and open forums at board meetings.

Consistency. Board and architectural control committee members should be familiar with how similar covenant provisions have been handled in the past. If a new board decides to embark on a more stringent or less stringent covenant enforcement process, it should thoughtfully articulate the reasons why it is doing so. Those enforcing covenants should be able to justify with objective common sense reasons why similar covenant enforcement actions were or are handled differently.

Compliance, Not Punishment. The purpose of covenant enforcement is compliance, not punishment. A phased approach to enforcement may start with a friendly phone call or personal contact, followed by written communication. If these are ignored, a letter from an attorney is appropriate.

Each step should give a reasonable period of time within which to achieve compliance before the next enforcement step is taken. All steps taken should be carefully documented, so that the HOA can demonstrate all the efforts it made prior to initiating legal action.

Remain Impartial. If a board member has a personal stake in the outcome, that person should not participate in any enforcement steps. Documenting conditions through a written complaint

form, photographs, and personal visits is appropriate and avoids claims that the enforcement action is subjective or one-sided.

If the board makes an effort to establish personal lines of communication with owners during a covenant enforcement process, it usually makes litigation either unnecessary or more successful if the communicative steps can be proven in a court action.

By William H. Short, Esq. of HindmanSanchez P.C.

Signs of Success

When it comes to capturing the personality of a homeowner association, signs offer a large impact for a small investment. By combining color, texture and custom graphic design, signs set the mood for the visitor by personalizing the property.

Sandblasted signs offer a colorful alternative. Using durable materials like redwood and cedar, original designs are sandblasted out to give dimension to the image. Durable exterior paints and stains are applied to create unique visual effects.

High density foam is a new sign material alternative. It comes in a variety of densities and can be sawed, sanded, drilled, blasted and painted just like redwood. With the use of a special attachment, even the grain pattern of blasted redwood can be duplicated. It is particularly useful for very complex graphics, where intricate detail is involved. In addition, it's much lighter than wood making large signs easier to ship, handle and install.

Most signs need repainting in 3 to 5 years, depending on the climate. Properly constructed, installed and maintained signs should last up to 20 years. For maintenance, a good hosing down and brushing with soap and water will keep your sign clean.

Signs can also be used to develop large site directories in communities that are confusing to navigate. Using complimentary building signs, visitors can be guided from the entry to the directory to their address of choice. Modern signs are durable, beautiful and practical. They give each community a special feel that helps build curb appeal and value.

Act or React?

I walked with my friend to the news stand the other night and he bought a paper, thanking the man politely. The man didn't even acknowledge it.

"A sullen fellow, isn't he?", I asked.

"Oh, he's that way every night", shrugged my friend.

"Then why do you continue to be so polite to him?", I asked.

"Why not?", inquired my friend. "Why should I let him control how I'm going to act?"

As I thought about this incident later, it occurred to me that the important word was "act". My friend *acts* towards people while most of us *react* toward them.

He has a sense of inner balance. He knows who he is, what he stands for and how he should behave. He refuses to return incivility with incivility, because then he would no longer be in command of his own conduct.

When we are enjoined in the Bible to return good for evil, we look upon this as a moral injunction -- which it is. But it is also a psychological prescription for our emotional health.

Nobody is unhappier than the perpetual reactor. His center of emotional gravity is not rooted within himself, where it belongs, but in the world outside him. His spiritual temperature is always being raised or lowered by the social climate around him, and he is a mere creature at the mercy of these elements.

Praises give him a feeling of euphoria, which is false, because it does not last and it does not come from self-approval. Criticism depresses him more than it should, because it confirms his own secret opinion of himself. Snubs hurt him, and the merest suspicion of unpopularity in any quarter rouses him to bitterness.

A serenity of spirit cannot be achieved until we become the masters of our own action and attitudes. To let another determine whether we shall be rude or gracious, elated or depressed, is to relinquish control over our own personality.

By Sidney J. Harris

Box of Cigars

A defendant in a lawsuit was talking to his lawyer. "If I lose this case, I'll be ruined!"

"I've done the best I could. It's in the judge's hands now," said the lawyer.

"Would it help if I sent the judge a box of cigars?"

"No! The judge is a stickler on ethical behavior. A stunt like that would prejudice him against you. He might even hold you in contempt of court."

Within the course of time, the judge rendered a decision in favor of the defendant. As the defendant left the courthouse, he said to his lawyer, "Thanks for the tip about the cigars."

The lawyer responded, "I'm sure we would have lost the case if you'd sent them."

"But I did send them.", replied the man.

"What?" shouted the lawyer.

"That's how we won the case. I remembered to enclose the plaintiff's business card."