

Community Trends®

Community Associations Institute
New Jersey Chapter December 2015

NEW JERSEY CHAPTER
community
ASSOCIATIONS INSTITUTE

INSIDE:

COMMUNITY TRENDS®

A Year in Review

Page 8

Why it Makes “Cents” for Employers to Evaluate Their PERFORMANCE REVIEW PRACTICES

Page 10

THE SOUNDS OF SILENCE

Sound Proofing Floors

Page 18

SUPER-PRIORITY and Community Association Liens Under UCIOA and other Common Interest Acts

Page 20

Year-End Review of IMPORTANT 2015 COMMUNITY ASSOCIATION CASES

Page 42

SHOOT THE COVER WINNERS

Page 50

...and more!

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President's Corner

Courtesy CAI-NJ.



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Hill Wallack, LLP
 2015 CAI-NJ President

"I express my personal thanks to the Chapter Directors for your time and commitment."

I know it is cliché, but time (or at least the perception of time) only seems to move faster. As I am sure all past Presidents have noted, the year did fly by. So this is my opportunity to provide the year in review and to say thank you to all who make this chapter such a success.

Sadly, this year marked the passing of our dear friend and colleague, Jules Frankel. There are not enough kind words that can be said about Jules and anyone who met Jules knows that he never uttered anything but a kind word. In his own words, Jules' dedication to our chapter "was a beautiful thing".

This year also marked the passing of Yogi Berra and I like to think that we all took Yogi's advice — when we came to a fork in the road, we took it.

2014 was a difficult year for the chapter staffing. In 2015, we fully staffed the office, including the hiring of Laura O'Connor, our Director of Membership and Marketing. Filling this position has contributed greatly toward the retention of members and an increase in membership, a trend that we hope and expect to continue. As noted in a prior article, the chapter has started a manager scholarship program and I urge the chapter's managers to review the website for further details. We moved the chapter's office to larger and more centralized quarters, and at a reduced rent. The new facilities on Harding Road in Freehold will accommodate the chapter's foreseeable needs, including committee meetings and training events. Keep your eyes open for an invitation to an open house event in early 2016. I hope you will agree that the transition was seamless to our members. (Thanks to our office staff for this.) The chapter office can be reached at the same telephone and fax numbers. Although the Conference & Expo was successful, the comments of the members and the perception of the committee confirmed that a change was needed and will be made in 2016, with the scheduling of the conference later in the fall and on a weekday.

I express my personal thanks to the Chapter Directors for your time and commitment. As with all associations, difficult issues arise and must be addressed. This Board, like any other, had its differences, but professionally vetted the issues and reached consensus with the interests of the Chapter always at the forefront. My request to the 2016 Board is to continue your good work with the interests of the members, and particularly your constituent groups, front and center. Continue to get the word out to our community association owners that their support will always be needed to protect their interests.

My thanks to Larry Thomas and our staff during a period of significant transition. They have also taken the fork in the road, continuing with what works and suggesting change where necessary. Particular thanks go to Angela Kavanaugh for her assistance during the transition of the CED position coupled with a period of short staffing and new hires. Angela was (and is) our anchor. Good luck to Larry Sauer as he assumes the position of Presidency. Larry has been actively involved in all chapter functions throughout 2015 and I expect a seamless transition to his leadership, providing him with the opportunity to

CONTINUES ON PAGE 54.

Looking Forward

Courtesy CAI-NJ



Larry P. Thomas, PCAM
CAI-NJ Chapter Executive Director

“We had a great year and all of the committees did an outstanding job with their events or missions.”

2015 has been a very interesting year for CAI-NJ. I want to thank the entire Board as well as all of the committees, volunteers and members who made all of our events a success. We accomplished a lot in 2015 with the new office space and the addition of Jaelyn Olszewski and Laura O'Connor to the staff. Jackie works very hard to ensure that all of our events are as successful as possible and is constantly looking for new events for our members. This year we introduced the CAI-NJ Olympics, the inaugural event was a great success and we donated more than \$1,700 to our local Make-A-Wish Foundation. Jackie and the rest of the CAI-NJ team are already planning for the 2016 Olympics. Jackie has already determined dates and locations for several of our 2016 events. Please refer to the save the date section located on page 6.

Our membership has increased every month for the past four months. Laura has done an outstanding job with recruiting new members and working with the Membership Committee to reach out to soon-to-expire members and recently expired members. Laura and the Membership Committee meet monthly and strategize on how to increase and retain our membership. They have done a great job over the past year with their Ambassador and Mentor programs.

By now, I'm sure you are aware that the 2016 Annual Conference and Expo has been moved to a weekday (Wednesday, October 26, 2016). This was at the strong recommendation of the Conference and Expo Committee. The Board of Directors also felt that a change was needed. Angela Kavanaugh has been very busy getting the Conference and Expo plans started. She has already sold several booths and is making plans to meet at the December 9th Annual Retreat with the Conference and Expo Committee to further discuss moving the event forward.

I would like to end my article by thanking all of the 2015 Committee members, especially the Chairs and Vice Chairs. We had a great year and all of the committees did an outstanding job with their events or missions. And please take the time to vote for the several categories that are listed on pages 28-30. The Committee of the Year, Committee Chair of the Year and Manager of the Year will be honored at our Annual Awards Dinner on February 25, 2016 at the Palace at Somerset. ■

Contents

In Every Issue

President's Corner	2	The Sounds of Silence — Sound Proofing Floors.....	18
Looking Forward	3	Super-Priority and Community Association Liens Under UCIOA and other Common Interest Acts	20
Legislative Update	4	Year-End Review of Important 2015 Community Association Cases.....	42
Chapter Trends	6		
CAI-NJ Upcoming Events	6		
CAI-NJ New Members.....	34		
CAI Membership Application.....	35		
CAI-NJ Recruiter Club	36		

FEATURES

<i>Community Trends</i> ® — A Year in Review	8	Extras	
Why it Makes “Cents” for Employers to Evaluate Their Performance		CAI-NJ Managers Leadership Workshop Wrap-up & Photos	16
Review Practices.....	10	CAI-NJ PCAM Gala Wrap-up & Photos ...	26
		CAI-NJ 2015 Awards Nomination Forms	28-30
		Management Trends	40
		2015 Shoot the Cover Winners.....	50

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Legislative Update

Courtesy CAI-NU.



Christine F. Li, Esq., CCAL
Partner, Greenbaum, Rowe, Smith & Davis LLP
Legislative Action Committee, Chair

As each year draws to a close, we tend to look back over the year to review our accomplishments. At the same time, we look forward to the challenges and inevitable frustrations we will confront in the coming year. This is true for the Legislative Action Committee just as it is for all of us in our personal and professional years. This year, the LAC made significant strides towards several of our legislative initiatives and we now look to continue on that path in 2016 with the adoption of S2545, as well as the introduction and passage of several bills on topics of significant importance to our community associations.

S2545 will require lenders to expedite their foreclosures of vacant or abandoned properties. As most of us have seen, lenders are in no rush to foreclose upon these properties and will usually allow them to sit and deteriorate for years without anyone paying maintenance fees to the community association. The LAC was successful earlier this year in getting the bill amended to provide remedies to associations when lenders fail to adhere to the law. We are continuing our collaboration with the sponsors to fine-tune the bill. Under this bill with the LAC amendments, lenders would be required to avail themselves of an expedited foreclosure process designed to complete the process within 90 days. If they fail to do so, they could be obligated to pay the unit's maintenance fees to the association or consent to a rent receivership for the benefit of the association.

The LAC has also drafted nine (9) comprehensive bills designed to bring clarity and support to our industry on a broad range

of issues. After months of working with our friends in the Legislature as well as with our advisors at MBI-GluckShaw, the first of these bills, establishing uniform requirements for how elections are to be run, is expected to be introduced shortly either as a stand-alone bill or an amendment to existing legislation. Since governing documents are sometimes inconsistent or outdated, the bill to be introduced clarifies aspects of the election process such as quorums, the counting of votes, use of proxies, anonymous ballots, disqualification of owners from voting due to maintenance fee delinquencies, and the supervision of elections.

In addition to these bills, the LAC is continuing its efforts to see meaningful legislation adopted regarding the licensing or certification of property managers, and reform to the Municipal Services Act. Of course, the LAC will continue advocating against those bills which would be adverse to our interests, of which there were many in 2015.

CAI National Advocacy Summit

In October, the LAC sponsored a contingent of members to attend the CAI Advocacy Summit in Washington, D.C. to hone their advocacy skills and to engage directly with Senators, Congressmen, legislators and other governmental and political players. This year, the LAC sponsored LAC members Mike Pesce, Jennifer Loheac, Glen Masullo, and James Magid to attend the Summit, who took time out of their busy schedules to attend the well-received event.

The Summit was convened so that CAI representatives from across the nation would

"S2545 will require lenders to expedite their foreclosures of vacant or abandoned properties."

have an opportunity to engage in strategic conversation regarding federal and state legislative priorities; exchange information about technology resources for grassroots efforts, position statements, talking points and model legislation; and meet with members of Congress to provide them with information about important community association issues.

In addition to the programs organized by CAI, Representatives of the LAC also had the opportunity to meet with both Senator Corey Booker's and Senator Robert Menendez' staff, as well as with Congressman Rodney Freylinghuysen and Bill Pascrell and the staffs of Congressmen Leonard Lance and Steve Israel, to discuss the many issues facing our industry. A key priority issue discussed was CAI's opposition to H.R. 1301, entitled the Amateur Radio Parity Act, which would require associations to allow ham radio communications and installation of antennas in the property without regard to architectural review procedures. To remove an association's right to determine architectural guidelines with respect to such equipment on its own common property is a direct attack on the right of associations to govern the look and operation of their own communities.

Other issues discussed were CAI's support of Representative Steve Israel's legislation just recently introduced which would require FEMA to provide assistance to common interest communities damaged by a major disaster; and CAI's support of H.R. 3700, entitled the Housing Opportunity through Modernization Act, which seeks

CONTINUES ON PAGE 55.

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2016 AWARDS DINNER

Thursday, February 25, 2016
The Palace at Somerset Park
Somerset, NJ

2016 SPRING BREAK PARTY

Thursday, April 28, 2016
McCloone's Pier House
Long Branch, NJ

2016 DENNIS R. CASALE MEMORIAL GOLF OUTING

Tuesday, June 28, 2016
Forsgate Country Club
Monroe Township, NJ

2016 CAI-NJ ANNUAL CONFERENCE & EXPO

Wednesday, October 26, 2016
Garden State Exhibit Center
Somerset, NJ

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Jennifer A. Loheac, Esq., CCAL of Becker & Poliakoff

Jennifer A. Loheac of Becker & Poliakoff Admitted To College of Community Association Lawyers

Morristown, NJ — Jennifer A. Loheac, a shareholder at the New Jersey office of law firm Becker & Poliakoff, has been granted membership in the College of Community Association Lawyers. Fellows of CCAL are among the most respected association attorneys in the country; Loheac is one of fewer than 150 attorneys nationwide to be admitted into the organization.

CCAL provides a forum for information exchange among experienced legal professionals working for the advancement of community association governance. It was established in 1993 by the Community Associations Institute, a national organization dedicated to helping homeowner and condominium associations meet residents' expectations. CCAL's goals include promoting high standards of professional and ethical responsibility, improving and advancing community association law and practice, and facilitating the development of educational materials and programming pertaining to legal issues.

Loheac actively volunteers on the CAI's Federal Legislative Action Committee, National Amicus Committee and the New Jersey Legislative Action Committee, and previously served as a member of the CAI's national Government & Public Affairs Committee.

"It is both an honor and a privilege to have been admitted into this prestigious College, and to be a part of the amazing work it

does to advance the ethics and professional practice of community association law," said Loheac. "I look forward to my continued involvement with the organization."

Devoting her practice to community association law, Loheac represents numerous condominium and homeowner associations throughout New Jersey. She provides counsel on interpretation of governing documents, legal analysis of insurance and budgetary matters and conflict resolution through ADR, and also negotiates and drafts amendments, corporate resolutions and agreements with municipalities on behalf of her clients.

Loheac publishes and lectures nationally on community association law on topics such as rental restrictions, fair housing law, aging in place initiatives and free speech case law. Among the many awards and accolades she has received throughout her career, Loheac is a four-time recipient of the Rising Star designation by *Super Lawyers* magazine.

Steven G. Mlenak Joins Greenbaum, Rowe, Smith & Davis LLP

Woodbridge, NJ — Steven G. Mlenak has joined Greenbaum, Rowe, Smith & Davis LLP as a member of the its Community Association Practice Group and Real Estate Department. Based in the firm's Woodbridge



Steven G. Mlenak, Esq., of Greenbaum, Rowe, Smith & Davis LLP

office, Mr. Mlenak will provide strategic guidance and general counseling to the firm's community association clients across a broad range of legal issues, including the interpreta-

CONTINUES ON PAGE 53.

Be a part of the Trend! Submit your company's or association's news, milestones, achievements – including wedding and birth announcements – to us at communitytrends@cainj.org for publication in the chapterTrends section of *Community Trends*®.

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Jules, We Will Always Miss You

From The Wilkin and Guttenplan Family



It was with great sadness that we are writing to inform you of the passing of our partner and mentor, Jules Frankel, this past month. Jules had fought against brain cancer so bravely for these past 15 months.

When we think about Jules, what comes to our minds is how instrumental and integral he was to all of us at W&G, his clients, and the industry in general. We loved his positive energy, his passion for his work, his interest in and compassion for our W&G family, his colleagues and his clients. He was the consummate professional, always prepared and on time for every meeting. He taught us about the industry, how to reach out, connect and teach board members what they needed to know. Jules was a master at association board meetings. He could explain the financial statement in a way that any layman could understand. Who couldn't understand fund accounting once it was explained as three simple envelopes! Every board member longed for him to impart his best blessing for their financial condition — that it brought “tears of joy” to his eyes. For all of us, he was a tough act to follow!

Jules cared about what he did. It wasn't enough to just service his clients to the best of his ability (which was a pretty high standard). He wanted to give back to the industry. Jules was so active in CAI. Some of these contributions include his work as a frequent author and speaker for CAI. He has been honored as CAI-NJ Speaker of the Year and Author of the Year. He was a past chair of CAI's National Accountants Committee, and a past president of the New Jersey Chapter of CAI (CAI-NJ). For all of his contributions and accomplishments the Chapter wanted to induct him twice into the CAI Hall of Fame! Everyone in the business knew and loved Jules. Jules was a trusted resource for all. Everyone knew that if you asked Jules a question, needed help or guidance, he was there for you. He would give advice that you could rely on. We could always trust what he said.

Of course, we also knew another side of Jules. He was so active in the other communities he cared about. He was very involved in Jewish music and sharing his joy and musical gifts with children and adults alike and had earned so many accolades for these contributions. He was an avid bicyclist, loved being in Manhattan and all that Manhattan had to offer. We could always count on him for a review of any Broadway show we may be interested in. Jules was also a world traveler. We so enjoyed sharing in his pictures and stories and all of his travel advice for us after he returned from his many trips. And of course, he was our friend. We will miss him and carry his memory in our hearts forever. His friendship, presence and memory in our lives “is a beautiful thing.” ■

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Community Trends® — A Year in Review

By Angela M. Morisco



2015 was a busy year for the CAI-NJ Editorial Committee. The committee members, along with the staff of CAI-NJ, worked diligently to ensure that *Community Trends*® was edited and published in a timely fashion. Thanks to the efforts and the commitment of the committee members, content was provided every month. The committee in-person meetings were generously hosted by Wilkin & Guttenplan, P.C. We are grateful and thankful for the support.

As 2015 draws to a close, the CAI-NJ Editorial Committee decided to get nostalgic and explore how *Community Trends*® has evolved and grown over the years. As we looked back to an edition from as early as 1996, we discovered that, at that time, the magazine was merely a short three-ring-binder type publication. The covers from 1996, 1998 and 1999 were photographs of the chapter leaders. We chuckled at the sight of the big mustaches and the puffy hairstyles. These covers were barely in color!

Each edition contained a legislative update and a president's message along with few advertisements. One of the legislative initiatives cited in the January 1996 edition was the hope that the New Jersey Senate would act on a bill that established a six month limited lien priority for condominium assessments! In 1996, Dennis R. Casale, Esq. was the chairperson of the Legislative Action Committee. His memory lives on through the annual CAI-NJ Dennis R. Casale Memorial Golf outing.

The president's message from 1996, included the following goals for membership services: enhance the appearance of *Community Trends*®; continue publishing an annual membership directory; provide timely educational seminars and enhance the annual conference and expo. There is no doubt these goals have been achieved and exceeded and continue to develop every year.

Although the content and appearance of *Community Trends*® has changed, one trend is glaring throughout each edition. The chapter leaders, the community association professionals and the business partners from twenty years ago continue to be actively involved in the New Jersey Chapter of CAI. We recognize and applaud these veteran professionals for their unyielding commitment to the enhancement of community association living through legislative monitoring, membership education, recruitment and member services.

We congratulate Larry Thomas, the Executive Director, for leading the New Jersey Chapter through a successful year. We trust that the momentum will continue as we welcome 2016. ■



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Why it Makes “Cents” for Employers to Evaluate Their Performance Review Practices

By Susan L. Swatski, Esq.,
Hill Wallack, LLP

“Wrongful termination lawsuits brought by former employees may be bolstered by evidence trails laid by subjective performance reviews not grounded in facts.”

Soon it will be that time of year again; time to prepare annual performance reviews. A common problem for employers that is frequently unaddressed, is how to effectively write those reviews. Although many supervisors and human resource professionals have no problem giving verbal feedback, when the time comes to translating and transmitting the feedback into a written, constructive evaluation, they often find themselves at a loss for words. That loss has a variety of sources, including neglecting to record feedback given throughout the year, not wanting to hurt an individual’s feelings, and feeling overwhelmed by not knowing how to write an effective review because of lack of training. Ineffectively written performance evaluations can impact an employer’s bottom line since evaluations often play a significant role in determining employer liability and mitigating damages should a disgruntled employee decide to sue.

For example, an employee receiving an unfavorable performance evaluation may claim that the evaluation is a pretext for discrimination. Circumstantial evidence derived

from a performance review to support that claim may take the form of recent reviews showing a dramatic, yet unexplained, change from earlier reviews, statements which contradict prior reviews or poor word choices, all of which may suggest bias or discriminatory intent where none existed. Inappropriate observations and unjustifiable criticisms made to an employee during the assessment can also form the basis for harassment, discrimination, and defamation claims. In addition, performance reviews are commonly used as evidence in fair labor standards and wage and hour actions to establish whether the employee had supervisory responsibilities, functioned as a manager, and whether the employee commonly worked hours beyond those minimally required to perform his or her job. The foregoing information is critical to determine whether an employee is exempt from overtime requirements. Employers with an informal evaluation program are particularly vulnerable to these types of pretext arguments and wage claims.

Following these practice tips will help improve the quality of your evaluations and strengthen your defenses to a termination should a former employee cry foul.

Preparing the Written Review

1. Maintain a Clear Policy: A clearly written policy addressing the timing, scope and purpose for conducting performance evaluations should be set forth in your employee manual. How an evaluation is used by the employer may vary, depending on the type of employee being reviewed. For example, if an employee is subject to a written employment contract, the employer may be limited in how the review can be used to affect the employee’s compensation and job status. By contrast, an employer of an “at will” employee (meaning he or she can be terminated at any time for no reason) may use the review for any purpose, including changes in compensation, demotion, transfer or discipline. Employers should also consider which workers should be reviewed, because the act of evaluating a consultant’s performance may be used as evidence that an employment relationship exists between the employer and that consultant.

2. Keep a Dedicated File for Performance Notes: Preparing performance evaluations should be an on-going process

CONTINUES ON PAGE 12.



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EMPLOYEE REVIEW...from page 10.

of gathering feedback from supervisors and managers. Supervisors and human resource professionals should keep notes on employees so they can quickly record when an employee has an achievement or falls short of an important objective. Such notes should include the date and how the action benefited the employer or hampered productivity. Performance notes should indicate whether the employee is satisfying the qualifications of his/her job. If a disgruntled employee claims that the reason he/she was not promoted is for some discriminatory reason, the employer should be able to rely upon an updated file of performance notes to support its decision.

3. Be Consistent: Consider prior performance evaluations; if the current review procedure is more stringent than that previously utilized, explain why there has been a change and update the employee handbook to reflect it. This becomes particularly important in the case of an employee returning from a family or medical leave. An employee who is subjected to a more rigorous review process without explanation upon his/her return may have a claim that he/she has not returned to a comparable position or that he/she is being retaliated against for having taken a leave. Consistency is also important because reviews often provide the basis for compensation decisions. For example, if an employee received a favorable review,

CONTINUES ON PAGE 14.

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but no raise due to undocumented performance deficiencies, the employer would be hard pressed to argue in litigation that the employee was not eligible for a raise or was not qualified for her job. For this reason, reviews should provide ample information to which the employer can cite to explain why a raise was given or denied.

4. Stick to the Facts: Giving employees constructive feedback is fundamental to ensuring a company's smooth operation. Avoid subjective descriptions and vague terms such as "good." Explain why/how a behavior or course of action rendered positive results or why it didn't. Include measurable terms that describe how the employee's performance measured up to the employer's expectations; use words such as "surpassed," "excelled," "achieved," "exceeded" and "disappointed."

5. Distinguish Between Performance and Personality: Efforts should be taken to describe performance deficiencies using examples that are related to preferred practices and are couched in professional, rather than personal or emotional terms. If an employee's personality impacts his/her performance, it should be addressed

objectively by linking his/her personality to specific incidents.

6. Avoid Stand-Alone Rating Scales and Checklists: Checking a box "good" or "fair" does little to assess an employee's performance, let alone provide constructive feedback. A good rule of thumb is that if the evaluation form takes less than 5 minutes to complete, the form is either too simplistic or the reviewer has not provided adequate information. Checking a box that an employee did a "great job" is meaningless without telling the employee "why" he/she did a great job. For example, was there one stellar incident or a series of positive outcomes? Discuss how that achievement impacted the department or company and how the employee should build on that achievement going forward.

7. Take Time to Think it Through: An effective evaluation conveys enough information for the employer to assess the value that employee brings to the company. A fair review generally requires multiple drafts to tighten language, revisit word choices and add examples.

Meeting with Employees

1. The Setting and the Procedure: Select a quiet office where the review will not be interrupted and the meeting will not be on display, rendering the meeting fodder for office gossip. Provide ample time for the employee to read the evaluation and to discuss it, but, at the outset, be clear about what time the meeting will end. An employee need not be provided a copy of the evaluation. The employee should be asked to sign the evaluation at the conclusion of the meeting. The employee should be told that signing the evaluation does not mean that the employee agrees with its content, only that the employee confirms that she read it and had the opportunity to ask questions about it.

2. How to Begin: Refer to the employer's objectives and goals and what role the employee has played in helping the employer achieve them. Address each area in which the employee has been involved and connect the employee's performance and the employer's bigger picture.

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3. Be Fair: Although the reviewer should take care to avoid criticizing an employee in general, the reviewer should not sugar-coat any problems. Employers must be upfront about areas that need improvement in a manner that lets the employee feel respected, even if the employee is a poor performer. An employer's best defense to a claim of discrimination involving a negative performance evaluation is sufficient evidence of poor performance.

4. Set Performance Objectives and Goals: Discuss areas that need improvement by offering strategies to improve performance and set concrete goals. Institute a monitoring process that focuses on specific future outcomes so that the employer is not waiting a year to find out whether the employee's work habits have improved or whether the employee used the assessment to address problem areas.

In sum, taking the time to write detailed performance evaluations may help to build the paper trail that can be the key to defending a wrongful employment claim. If your process for reviewing employee performance needs an overhaul, an employment law specialist should be your first call to help make your annual reviews the constructive process they are intended to be. ■



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The 2015 Managers Leadership Workshop was held on Thursday, October 22nd at Rossmoor Community Association in Monroe, Twp. With nearly 30 attendees, presenters engaged the group with dynamic topics and an interactive Q&A.

Thank you to the presenters for their hard work and dedication to providing the group with these important discussions.

Topics and speakers included:

Hiring, Assessing and Retaining the RIGHT Staff

Presented by: Ed Guttenplan, CPA, CGMA, MBA, Wilkin & Guttenplan P.C. and Nancy Martin, Esq., Martin Melody, LLC

Hunter vs. Farmer; The Distinction Between Managing and Leading

Presented by: Mark Alper, The Gershen Group and Chuck Graziano, CMP, PCAM, Association Mid-Atlantic- Saddle Brook

Strategic Planning, Time Management, and Staff Efficiency

Presented by: Scott Bresnick, FirstService Residential, AAMC and Jennifer Nevins, DW Smith Association, LLC.



A Very Special Thank You to the CAI-NJ Managers Committee for Making This Workshop Possible! Also, thank you to the Rossmoor Community Association Board of Directors for hosting the event!



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THE SOUNDS OF SILENCE...



Sound Proofing Floors

By Dan Fusco, CMCA,
Vice President
Community Management Corporation

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We've all received the calls, "My upstairs neighbor is playing his TV too loud, letting her kids run around late at night, walking with high heels at 5:00 a.m., etc.

And so you begin your investigation to determine if the neighbor has 80% of the flooring carpeted & padded (as is required in upper floor units in most associations) only to discover due to an allergic condition, the neighbor has removed or never installed the carpet or padding. The downstairs neighbor can't sleep without carpeting above and the upstairs neighbor can't breathe with it present. You're in the middle.

Fortunately, there is floor soundproofing that treats two types of noise, (impact and

airborne). Impact results from walking or running or other activity causing vibrations in the floor. Airborne refer to talking, loud TV, stereos, etc.

There are subfloor soundproofing options for all types of flooring, hardwood, laminate/composites, ceramic tile & stone and even under for carpet / padding, when there is a need for extra soundproofing.

The various underlayments usually come in rolls, such as ("Floor Fighter Sound Barrier Underlayment, which is sold in 4' x 25' rolls) and thickness options. Floor Fighter has ¼ inch for residential and ½ inch commercial grade if desired. The ¼ inch and ½ inch cost per roll is \$240.00 + \$480.00 respectively.

"Fortunately, there is floor soundproofing that treats two types of noise..."

While installation is relatively easy, installing a hardwood, ceramic or tile floor above is better left to a licensed, insured contractor.

There are numerous options in addition to Floor Fighter, such as Proflex 90 MSC Flooring Underlayment, Step Above Flooring Underlayment & Impact Barrier Flooring Underlayment.

As we all will continue to be presented with legitimate health related requests to allow the removal of carpeting, sub floor sound proofing will remain a viable alternative, which can appease all parties involved. ■

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Super-Priority and Community Association Liens Under UCIOA and other Common Interest Acts

By Melissa A. Clarke, Esq.,
Davison, Eastman & Muñoz, P.A.



Imagine an association foreclosing a lien for unpaid assessments totaling a few thousand dollars, and in the process extinguishing a first position mortgage on the property, with the purchaser (perhaps the association itself) taking the property free and clear of any encumbrances. If you are the manager or a member of a financially beleaguered association, this scenario might sound too good to be true, but it is not so far-fetched. In fact, this very situation has unfolded in Nevada and in the District of Columbia in recent years, and it could happen in New Jersey.

“...the association liens at issue were true super-priority liens which extinguished the lender’s mortgage lien.”

To understand how the foreclosure sale of an association’s lien could wipe out a lender’s prior-recorded security instrument, one must look to the statutes that afford a “super-priority” to community association liens.

Super-Priority Statutes

Association “super-priority” lien rights originated in the Uniform Condominium Act (“UCA”), adopted by the Commissioners on Uniform State Laws in 1980, the Uniform Common Interest Ownership Act (“UCIOA”), adopted by the Commissioners in 1982, and the Uniform Planned

Community Act (“UPCA”), also adopted in 1982. The common thread of these statutes was to provide an association’s lien with a limited priority over the lien of a first mortgage, thereby securing the six months of common expense assessments due immediately preceding the institution of an action to enforce the association’s lien.¹ At present, twenty-three states afford a super-priority to the liens available to community associations, including New Jersey.² Although this State has not specifically adopted UCIOA, the New Jersey Condominium Act does provide associations with a six month priority over prior mortgage liens.³

Super-Priority Case Law: What Happened in Nevada and the District of Columbia?

Courts in both Nevada and the District of Columbia have concluded that the association liens at issue were true super-priority liens which extinguished the lender’s mortgage lien. While the Nevada and District of Columbia cases below involved non-judicial foreclosures and varying notice requirements, both courts ultimately focused on an interpretation of governing documents and the plain language of the statutes affecting priority, not unlike what the courts in New Jersey might do.

Nevada is one of eight states that has adopted a form of UCIOA. Although one provision of Nevada’s super-priority statute⁴ states that an association lien is subordinated behind a first security interest, another provision grants the association a super-priority lien position for the limited amount of nine months of assessments and enables an association to recover those amounts by foreclosing on its lien. Since late 2012, hundreds of lawsuits have been litigated in Nevada’s state and federal courts over the proper interpretation of the statute, specifically whether an association’s foreclosure sale can legally extinguish a prior mortgage.

In *SFR Investments Pool 1, LLC v. U.S. Bank*,⁵ the seminal case in Nevada, the dispute centered on property located within a common-interest community. The homeowners further encumbered the property by a note and deed of trust in favor of U.S. Bank (the lender by assignment) in 2007. By 2010, the homeowners were delinquent on their HOA dues and had also defaulted on their obligations to U.S. Bank. Both the HOA and U.S. Bank initiated non-judicial

foreclosure actions, but the HOA proceeded to foreclosure sale first. The purchaser at the HOA's foreclosure sale, SFR Investments, received and recorded a trustee's deed and then brought an action to quiet title and enjoin U.S. Bank's foreclosure sale, alleging that the HOA's foreclosure sale had extinguished U.S. Bank's first priority lien.

After looking to the drafters' comments to UCIOA and the laws of other states, the Nevada Court held in favor of SFR Investments, concluding that Nevada's super-priority statute creates not just a payment priority between the HOA and the beneficiary of a first deed of trust, as U.S. Bank had argued, but a true priority lien. The Court observed that, "as a junior lienholder, U.S. Bank could have paid off the [HOA] lien to avert loss of its security; it could have also established an escrow for [HOA] assessments to avoid having to use its own funds to pay delinquent dues."⁶

Similarly, in *Chase Plaza Condo. Ass'n, Inc. v. JPMorgan Chase Bank, N.A.*,⁷ the District of Columbia's highest court considered the D. C. Condominium Act⁸ and determined that a homeowners association's non-judicial foreclosure extinguished a first deed of trust. The D.C. Court also concluded that the association's statutory "super-priority" lien for unpaid assessments took priority of position, not just priority of payment, over the lender's mortgage lien. Notably, there is no requirement in the District of Columbia to provide notice to the lender of an association's lien foreclosure.

Super-Priority and FHA Loans

The federal courts have considered association lien super-priority in the context of a residential mortgage loan insured by HUD. In *Washington & Sandhill Homeowner's Association v. Bank of America and HUD*, a federal court in Nevada held that the foreclosure of an HOA lien did not extinguish the lien of the first priority deed of trust securing an FHA insured loan.⁹ Federal, not state, law applied in cases involving FHA insured mortgages "to assure the protection of the federal program against loss, state law to the contrary notwithstanding."¹⁰

Impact on UCIOA

In response to the above decisions, the Joint Editorial Board of the Uniform Laws Commission (JEB) proposed amendments to

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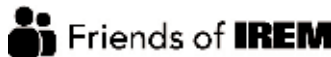


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Section 3-116 of UCIOA to “clarify that the association’s lien has *true priority* over the lien of an otherwise first mortgage lender to the extent of the super-lien amount.” Under these amendments, “if the association conducts a foreclosure sale of its association lien and the otherwise first mortgagee does not act to redeem its interest by satisfying the association’s limited priority lien, the mortgagee’s lien would be extinguished by the sale.”¹¹ The JEB revisions do require notice

to the mortgagee for an association’s lien foreclosure to extinguish an otherwise-first mortgagee’s lien, but as the cases discussed above make clear, the laws of each jurisdiction differ with respect to such notice.

Could this Happen in New Jersey?

It is possible that a mortgage lender who ignores an association’s notice of lien and fails to redeem the lien after the foreclosure sale could find its lien extinguished by an

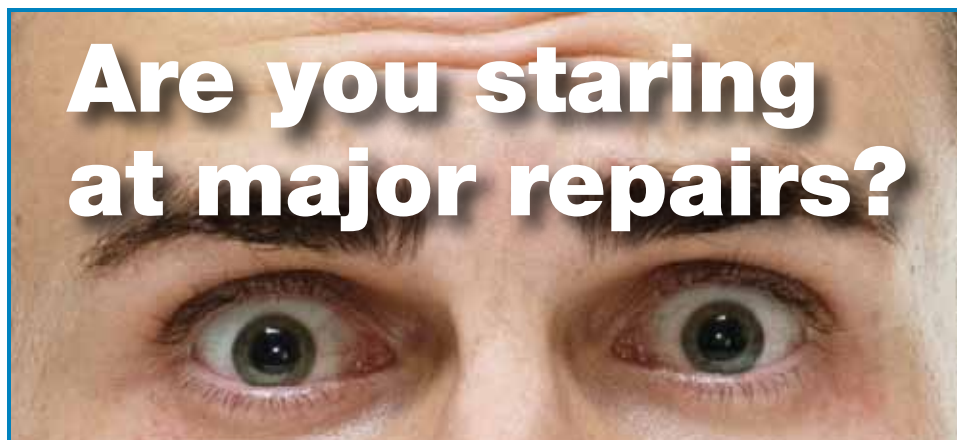
“...it is possible that a mortgage lender who ignores an association’s notice of lien and foreclosure pleadings and fails to redeem the lien after the foreclosure sale could find its lien extinguished by an association’s foreclosure.”

association’s foreclosure. There are, however, some key differences between the process in New Jersey and what transpired in Nevada and the District of Columbia.

In New Jersey, written notice to the lender of the filing of the association lien is a requirement for the association’s lien to be afforded priority.¹² In addition, New Jersey, unlike Nevada and the District of Columbia, is a *judicial* foreclosure state. This means there are increased opportunities to provide notice to the mortgage lender, as well as additional avenues for the lender to intervene. Nevertheless, it is possible that a mortgage lender who ignores an association’s notice of lien and foreclosure pleadings and fails to redeem the lien after the foreclosure sale could find its lien extinguished by an association’s foreclosure. The opinions of the JEB, the amendments to UCIOA, and the case law in Nevada and the District of Columbia, while not binding upon New Jersey’s courts, provide arguments upon which a court in this State could base its conclusion that New Jersey association liens also have true priority over a lender’s mortgage lien. ■

Notes:

- 1 UCIOA, § 3-116, UCA § 3-116, and UPCA § 3-116.
- 2 Hugh Lewis, “National Matrix of Association ‘Super-priority’ Lien Legislation,” Oct. 25, 2013, available at <http://www.uniformlaws.org/shared/docs/jeburpa/CAlienprioritymatrix2013.pdf>.
- 3 N.J.S.A. 46:8B-21.
- 4 Nevada Revised Statute 116.3116 et seq.
- 5 334 P.3d 408 (Nev. 2014), reh’g denied (Oct. 16, 2014).
- 6 Id. at p. 414.
- 7 98 A.3d 166 (D.C. 2014).
- 8 D.C. Code § 42-1903.13.
- 9 2014 WL 4798565 (D. Nev. Sept. 25, 2014).
- 10 Id. at *6 (citing United States v. Stadium Apartments, Inc., 425 F.2d 358, 362 (9th Cir.1970))
- 11 Memorandum from Joint Editorial Board of the Uniform Laws Commission dated June 11, 2014, available at: http://www.uniformlaws.org/shared/docs/common%20interest%20ownership/2014AM_UCIOA_3-116_Issues%20memo.pdf
- 12 N.J.S.A. 46:8B-21(b)(6).



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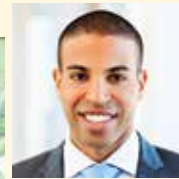
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- » For a \$300 donation, we'll display your 10" x 10" picture.
- » For a \$500 donation, we'll display your 12" x 12" picture.

Your pictures will be showcased at the 2016 CAI Annual Conference and Exposition and at the Foundation headquarters.

Submit your picture and donation by March 31 at www.cairf.org/BigPicture.



The Foundation provides research you need to make educated decisions. We are affiliated with CAI, but our work is funded through tax-deductible contributions, grants and sponsorships. The Foundation for Community Association Research is a registered 501(c)(3) entity, and gifts are tax deductible to the full extent of the law.

How to Be Part of the **BIG PICTURE**

Step 1. Visit www.cairf.org/BigPicture

Step 2. Click the "Donate Now" link

Step 3. Enter your donation amount of \$40, \$80, \$180, \$300 or \$500.

In the "Designation (Optional)" field, please enter "Big Picture."

- » For a \$40 donation, we'll display your 3"x 3" picture.
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- » For a \$300 donation, we'll display your 10"x 10" picture.
- » For a \$500 donation, we'll display your 12"x 12" picture.

Your pictures will be showcased at the 2016 CAI Annual Conference and Exposition and at the Foundation headquarters.

Step 4. E-mail your picture or logo to jgold@caionline.org with the subject line "Big Picture." We recommend sending any files larger than 4MB via FTP, such as www.hightail.com.

File Specifications

- » Image files must be JPEG, TIFF or EPS formats.
- » Images may be color or black and white.
- » Please send images at the highest possible resolution. Images must have a minimum resolution of 300 dpi at 8"x 8" size.
- » Keep file names to a minimum.
- » Images containing a photographer's watermark or other copyright may NOT be submitted.

For More Information

Please contact Director of Development Melinda Kelejian at (703) 951-7611 or mkelejian@caionline.org if you have questions or need additional assistance.

**Pictures and
donations must
be submitted by
March 31**

2015 ANNUAL PCAM GALA

On Thursday, November 5, 2015, CAI-NJ Platinum Plus, Platinum and Silver Sponsors came together to honor and congratulate the CAI-NJ members who received their PCAM designations in 2014 and 2015 at the Madison Hotel in Morristown. We also honored the decades of CAI-NJ members who have maintained their PCAM's as well as those members who have worked to obtain their CMCA and AMS designations in the past two years.

A special congratulations to the 2014 & 2015 recipients of the PCAM designation:

Mr. Ray Barnes, PCAM
Mr. John J. Boselli, CMCA, AMS, PCAM
Ms. Mary Caporaso, CMCA, PCAM
Mr. Jeff Cirkus, CMCA, AMS, PCAM
Ms. Stephanie Harmon, CMCA, AMS, PCAM
Mr. Michael H. Sutterlin, CMCA, PCAM





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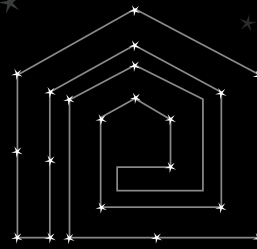
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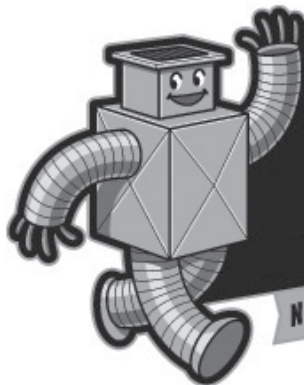
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**ALL AWARD NOMINEES MUST BE MEMBERS IN GOOD
STANDING IN CAI-NJ, INCLUDING EACH COMMITTEE MEMBER
NOMINATED FOR COMMITTEE OF THE YEAR.**

Manager Name: _____

Your Name/Organization: _____

1. What has this manager done to earn this award? (250 words or less)

2. What has this manager done to support the goals and objectives of CAI-NJ? (100 words or less)

3. Please submit any documentation that further supports your nomination.

Awards will be given out at the 2016 Awards Dinner
on Thursday, February 25, 2016.

An independent panel of judges (non-CAI-NJ)
will make the award selections.

NOTE: Self-Nominations will be accepted.

Please return as a scanned email or regular mail:

Attn: CAI-NJ Award Nominations
CAI-NJ

500 Harding Rd.

Freehold, NJ 07728

or e-mail to: jaclyn@cainj.org

All submissions must be received by Monday,
February 8, 2016 to be considered.

2015 COMMITTEE CHAIR OF THE YEAR AWARD

N O M I N A T I O N F O R M

**ALL AWARD NOMINEES MUST BE MEMBERS IN GOOD
STANDING IN CAI-NJ, INCLUDING EACH COMMITTEE MEMBER
NOMINATED FOR COMMITTEE OF THE YEAR.**

Committee Chair Name: _____

Your Name/Organization: _____

1. What has this committee chair done to earn this award? (250 words or less)

2. What has this committee chair done to support the goals and objectives of CAI-NJ? (100 words or less)

3. Please submit any documentation that further supports your nomination.

Awards will be given out at the 2016 Awards Dinner
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2015 COMMITTEE OF THE YEAR AWARD

N O M I N A T I O N F O R M

**ALL AWARD NOMINEES MUST BE MEMBERS IN GOOD
STANDING IN CAI-NJ, INCLUDING EACH COMMITTEE MEMBER
NOMINATED FOR COMMITTEE OF THE YEAR.**

Committee Name: _____

Your Name/Organization: _____

1. What has this committee done to earn this award? (250 words or less)

2. What has this committee done to support the goals and objectives of CAI-NJ? (100 words or less)

3. Please submit any documentation that further supports your nomination.

Awards will be given out at the 2016 Awards Dinner
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All submissions must be received by Monday,
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WEDNESDAY

The Annual Conference & Expo is on a Wednesday in 2016!



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WEDNESDAY, OCTOBER 26, 2016
2016 CAI-NJ Annual Conference & Expo
at the Garden State Exhibit Center, Somerset, NJ

Article Submission Guidelines

Community Trends® is a monthly publication of the New Jersey Chapter of the Community Associations Institute (CAI-NJ). It is sent to approximately 2,000 community association members, attorneys, accountants, insurance agents, engineers, property managers, other service providers and interested citizens of community associations.

The purpose of this magazine is for the dissemination of informative and noteworthy information that is relevant to the lives of every person living in or working with community associations throughout New Jersey. Conversely, we sway from providing the kind of authoritative and comprehensive information that must be tailored to serve individual needs when legal, accounting or other professional advice is required.

CAI-NJ encourages interested persons to submit articles for consideration by the Editorial Committee. Publication in *Community Trends*® is a wonderful opportunity to write about an issue relevant to community associations and to gain notoriety in your community and/or field of expertise.

We appreciate your interest in writing for *Community Trends*®. Before you begin your

article, please take a few minutes to review the following submission information and guidelines:

Purpose

Articles published in *Community Trends*® have the same goal: to inform and educate CAI-NJ members on community associations. They should not serve as flagrant marketing pieces for a company's services.

Content

The author of the article is considered the expert, and all content should be original content, or cited appropriately. Authors must verify the validity of all statements made in the manuscript. Credit quotes, documents, and personal observations in your writing.

Article Specification

If possible, please send your article via e-mail to the chapter office at jaclyn@cainj.org. Microsoft Word documents only.

A Rule of Thumb for Word Count

Generally an article should not exceed 1500

words. 250-300 words of double-spaced text fits onto one 8 1/2" x 11" page; therefore, a 500-word article usually fills two pages, double-spaced; a 750-word article usually comprises three pages, double-spaced and so forth.

Language

The following words shall be in lower case, except for at the beginning of a sentence: board, board of directors and association. All articles should be written in the third person.

Limit Your Subject

Be cognizant that readers need specific advice about specific issues. Articles in *Community Trends*® are most useful if they clearly explain why the subject is important to the reader. For example, an article discussing proposed legislation should clearly explain its ramifications. Keep this in mind as you formulate your article and focus your piece.

Craft a Good Lead

Hook your readers right away with a creative lead that lets them know why they should spend time reading your piece. Let your read-



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ers know if the information you are going to share will save them time, money or help solve a problem. Anecdotes, quotes and questions are some examples of ways to end an article on a memorable note. Like the rest of the article, conclusions should never be self-serving.

Writing Recommendations

Express your ideas with words that you are comfortable using. When in doubt about the rhythm of your words or cadence, read the sentences out loud. Ask someone who is not in your field of expertise to critique your article.

Formulating an outline is one of the best ways to start an article. First, list all of your ideas on paper, then organize them in a manner that allows for logical transition from one paragraph to the next. Use an active voice whenever possible. For example, instead of "The documents were filed by the association" write, "The association filed the documents". Shorter, concise sentences are more readable than long, run-on sentences. Add imagery to your story with anecdotes and memorable quotes.

Deadlines

All articles are due in the chapter office 30 days prior to the month of publication, unless you are informed otherwise.

Editorial Policy

The Chapter/editor reserves the right to omit and/or condense information as necessary to accommodate the layout. We recommend that the author indicate which text could be omitted or condensed if need be. The author will be notified of changes when possible. We do not accept multiple submissions per issue. Please let us know if your article was submitted to other publications and if so, which one(s).

Authors may submit a photograph with their article. Please note CAI-NJ has the exclusive right to refuse to publish any photograph for any reason.

Plagiarism/ Commitment to Originality

The submission of an article by an author implies that the article is the original work of the submitting author, and the submitted article has also not been published in any other publication or online previously. Authors found to be in violation of these policies can be subject to discipline by the CAI-NJ Board of Directors, which may levy penalties including the following:

A. Temporary or permanent ineligibility from authoring articles for *Community Trends*®;

- B. Temporary or permanent ineligibility for membership on CAI-NJ Committees and Work Groups;
- C. Referral to CAI National for review and possible further sanctions; and/or,
- D. Suspension of any and all chapter privileges as determined by the board.

Permission to Duplicate/ Reprint

Permission to reprint any article first published in *Community Trends*® is subject to the single condition that all reprints must include the following ownership acknowledgment, "Reprinted from the <<Month>> 20__ issue of the CAI-NJ's *Community Trends*®."

Disclaimer

The CAI-NJ Editorial Committee carefully reviews all submissions. When an article is published, the opinion of the author and accuracy of the facts presented in the article are not specifically endorsed by either CAI-NJ or the Editorial Committee. Neither CAI-NJ nor *Community Trends*® guarantees a placement of any submitted article, and any article can be rejected or modified for any reason at any time by the Editorial Committee or CAI-NJ.

Questions

Should you have any questions, contact the chapter office:

Phone: (609) 588-0030
Fax: (609) 588-0040
e-mail: communitytrends@cainj.org ■

**Interested in submitting
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NEW MEMBERS OF THE NEW JERSEY CHAPTER

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Business Partners

Alternative Utility Services, Inc.
Fritz Kreiss

Environmental Designers Irrigation, Inc.
Samantha Virone

GAF
Edward Small

Community Association Volunteer Leaders

Antoinette Spiotta

Arnold Riback
Greenbriar at Whittingham Community
Association

Chris Morano
Tower Hill Condominium Owners
Association

Managers

Marianne Powers
Admiralty Condominium Association

Lauren Broome
Capital Realty Management

Charles Alderman
Century 21 Pacesetter Realty, Inc.

Michael Alejandro, CMCA
FirstService Residential

Nicole Camarota, CMCA
FirstService Residential

JaNe' Tobias
Regency Towers Condominium Association

CAI MEMBERSHIP APPLICATION

Community Associations Institute, New Jersey Chapter
 500 Harding Road
 Freehold, NJ 07728
 Phone: (609) 588-0030 Fax: (609) 588-0040
 Web: www.cainj.org
 Email: membership@cainj.org

MEMBERSHIP CONTACT (Where membership materials will be sent):

Name: _____

Title: _____

Association/
 Company: _____

Address: _____

City/State/Zip: _____

Phone: (W) _____ (H) _____

Fax: _____

E-Mail: _____

Select your Chapter: NEW JERSEY

Recruiter Name/Co. Name: _____

CATEGORY OF MEMBERSHIP: (Select one)

- Community Association Volunteer Leader (CAVL) *Dues vary**
- Manager \$129
- Management Company \$410
- Business Partner \$565
- Business Partner Affiliate (CAI-NJ only) \$100

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Important Tax Information: Under the provisions of section 1070(a) of the Revenue Act passed by Congress in 12/87, please note the following. Contributions or gifts to CAI are not tax-deductible as charitable contributions for federal income tax purposes. However, they may be deductible as ordinary and necessary business expenses subject to restrictions imposed as a result of association lobbying activities. CAI estimates that the non-deductible portion of your dues is 2%. For specific guidelines concerning your particular tax situation, consult a tax professional. CAI's Federal ID number is 23-7392984. \$39 of annual membership dues is for your non-refundable subscription to *Common Ground*.

Complete only the portion of the remainder of the application that applies to your category of membership.

For CAI-NJ use only:	_____ BP
	_____ CAVL
	_____ MGMT
	_____ MGR

COMMUNITY ASSOCIATION VOLUNTEER LEADER (CAVL):

Billing Contact: (if different than Association Address on left):

Name: _____

Home Address: _____

City/State/Zip: _____

Phone: (W) _____ (H) _____

Fax: _____ (Cell) _____

E-Mail: _____

***TOTAL MEMBERSHIP DUES (as of January 1, 2015)**

- Individual Board Member or Homeowner \$120
- 2nd Board Member \$210
- 3rd Board Member \$285
- 4th Board Member \$375
- 5th Board Member \$425
- 6th Board Member \$480
- 7th Board Member \$535

For 2-3 Member Board applications, please indicate below who should receive membership renewal information. Please contact CAI National Customer Service at (888) 224-4321 for Board memberships exceeding 7 individuals.

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Fax: _____ (Cell) _____

E-Mail: _____

Name: _____

Home Address: _____

City/State/Zip: _____

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Fax: _____ (Cell) _____

E-Mail: _____

**Total Membership Dues above include \$15 Advocacy Support Fee.

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(As of October 31, 2015)

One New Member Recruited

Leonard Barber, CMCA, PCAM

Lawrence N. Sauer, CMCA, PCAM

Lisa Vitiello

Gus Meitzner, CMCA, AMS

Marie D. Mirra

Barbara Smith

Richard Pucciarelli

Bruce Phillips Young, CMCA, AMS

Christopher Tensen, CMCA, AMS

Joyce A. Gilbert

Two New Members Recruited

Graceanne Welsh, CMCA, AMS

Three New Members Recruited

Scott T. Dalley, CMCA, AMS, PCAM

Denise Becker, CMCA, AMS, PCAM

Four New Members Recruited

Jeffrey M. Logan

Five New Members Recruited

Vincent Rapolla, CMCA, AMS

Six New Members Recruited

Dawn Mackanic

Seven New Members Recruited

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Help CAI's Amicus Effort

The CAI Amicus Program is looking for your help. For years, CAI has participated in New Jersey court cases involving significant community association issues. We do this through our "Amicus" or "Friend of the Court" Program. With the court's permission, CAI files briefs in court cases advocating the interests of our members. CAI has successfully appeared in a number of important New Jersey cases, including *Twin Rivers*. It is important for our members to let CAI know when they are involved in, or become aware of, a lawsuit which may have an impact of general concern to the industry. We can only participate and have our views expressed when we know about these cases when they first arise. So, this is an important request on behalf of both the National and Chapter Legislative Action Committees to please advise the Chapter office of any litigation involving community association issues of potential importance to the entire industry. For any such notices, please contact Larry Thomas, PCAM at (609) 588-0030 or at larry@cainj.org. ■

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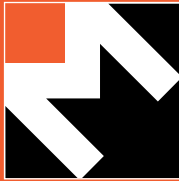
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“Going Green” and Saving Money

By Lori Kenyon, CMCA, PCAM, and Beth Duffy, CMCA, AMS,
Premier Management Associates

We all hear the buzz words, “Going Green” everywhere. Whether we are watching television, walking through the mall or driving down the street we are reminded of the things we can do to help our environment. The concept is now being used as a marketing tool by many service providers to sell their products and to have us think we are doing our part towards the, “Going Green” campaign.

The question for us as managers of community associations is, how can we encourage our associations to start taking steps within their communities that will not only help preserve our natural resources, but to reduce their costs in the future. Over the last few years, we have all attended seminars about this very subject. I wonder how many of us have actually implemented changes.

Most often, Boards are more interested in the cost savings associated with changes that will also help our environment. As Managers, you must be creative in finding ways to propose these changes while demonstrating the cost savings benefits as well as the potential environmental benefits. The challenge will likely be the up front costs that may be incurred to implement the changes.

For those of you that would like to propose some ideas to your Boards, here are some projects to consider:

Lawn Watering

Many communities were given an underground irrigation system at construction

that waters the turf areas. Typically, these systems are somewhat effective, but usually have flaws in the placement of the heads, types of heads and the design of the zones. Inefficient watering of turf areas creates wasted water and improperly watered areas. There are clocks available now that better regulate the flow of water to each zone on a clock with use of sensors that measure the moisture levels of the soil. These clocks, along with some adjustment to types of heads and head placement can provide a cost savings in water consumption and conserve water.

Lighting

There are often common areas within community associations that have lighting. Simply switching from incandescent lighting to fluorescent lighting can reduce the electric bill and save electricity. Again, there will be a cost associated with purchasing and installing these bulbs, but their life expectancy, savings in electric usage and labor replacing bulbs more frequently should eventually offset the initial cost.

Email

With the use of technology in many homes, condominium associations are moving towards email communication as a green alternative. Paperless billing is becoming the norm in many communities, along with blast emails and websites for notification and sharing of important communications. ■



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“Over the last few years, we have all attended seminars about this very subject. I wonder how many of us have actually implemented changes.”



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Steven G. Mlenak, Esq.

Year-End Review of Important 2015 Community Association Cases

By Steven G. Mlenak, Esq.,
Greenbaum, Rowe, Smith & Davis LLP

In 2015, the community association industry bore witness to several legal developments related to issues such as sidewalk liability, stripping-off of association liens in Chapter 13 bankruptcy proceedings, obligations of developers for unbuilt units, and the ability for unit owners to waive certain rights under the Condominium Act. As the year comes to a close, let's look back to some of the cases affecting our industry that were handed down this year.

Chapter 13 Debtors Strip-Off Majority of Association Lien as Unsecured Debt

In a Chapter 13 bankruptcy action entitled *In Re Rones*, decided June 11, 2015, delin-

quent unit owners sought to confirm a plan in which six (6) months of maintenance fees would be listed as secured debts (those that are paid in full through the plan) with the remainder of the Association's lien being "stripped off" as unsecured debts (paid off at cents on the dollar).

The debtors argued that the Condominium Act only protects six (6) months of maintenance fees with the remainder of the Association's lien being "wholly unsecured" debt as the unit was "under water" from the first mortgage. As a result, the debtors claimed the lien was eligible to be stripped. The Association objected to the plan citing a provision of the Bankruptcy Code known as the Anti-Modification Clause which prohibits debtors from "stripping-off" any portion

of a lien if the lien was secured in the primary residence of the debtor. The Association argued that because the Condominium Act provides a limited priority to condominium liens over mortgages, the lien was "secured" and protected from being "stripped".

In a 20-page published opinion, the Bankruptcy Court found in favor of the debtors, holding that the Condominium Act merely provides a method for payment, rather than a true priority which would protect the lien pursuant to the Anti-Modification Clause. The Association has appealed the decision to the Federal Court and CAI has submitted an amicus brief in support. The case is currently pending before Judge Freda Wolfson in the District Court of New Jersey.

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Community Associations Liable for Personal Injury Caused by Private Sidewalks

In *Qian v. Toll Brothers, Inc.*, decided August 12, 2015, the Supreme Court held that community associations are not immune from injuries caused on common sidewalks. In *Qian*, the association sought to rely upon the 2011 case, *Luchejko v. City of Hoboken*, to claim that it was immune from liability for injury on a public sidewalk. The association argued that because the sidewalk was used by unit owners and non-unit owners alike, the sidewalk should be considered public and, therefore, immune from liability. The Supreme Court disagreed, holding that it is the actual ownership of the sidewalk which determines whether the sidewalk is public or private. As the sidewalk here was a common element, the association was not immune from liability.

Unbuilt Condominium Units Subject to Tax and Foreclosure

In *Highpoint at Lakewood Condo. Ass'n v. Twp. of Lakewood*, decided on August 14, 2015, the Highpoint association sought to quiet title over unbuilt condominium units foreclosed upon by the Township of Lakewood in 1980. The units that were foreclosed upon were units recorded in the Master Deed of the property, but were never built. When the sponsor did not pay taxes on these units, the Township foreclosed and acquired title to the units. The Township asserted that the property was removed from the condominium complex and the Township owned a separately deeded parcel of property.

The Superior Court dismissed the association's action and the association appealed. The Appellate Court affirmed, holding that unbuilt, or "phantom", units were still subject to tax and foreclosure once those units were legally established. Without a deed of revocation approved by the members of the association, however, the Township holds title only to the units and their proportionate interests in the common elements, not the underlying property. The Court remanded the case to the Superior Court for determination of whether the Association could seek collection of maintenance fee assessments against the Township for those units.

Nonsponsor Owners May Waive Provision of Condominium Act in Settlement Agreement

In *Christine Gurriere v. Bloomfield Condo. Assocs.*, decided August 28, 2015, the Appellate Court upheld a settlement agreement between the nonsponsor unit

owners and a sponsor-controlled association which would require that the nonsponsor owners waive their rights under N.J.S.A. 46:8B-12.1(a), a provision of the Condominium Act which permits the nonsponsor owners to take control of the board

when the sponsor no longer wishes to construct or sell the remaining units "in the ordinary course of business". The matter arose when several nonsponsor owners sued the sponsor, who owned 310 of the 392 units in the complex and controlled the board, seek-

CONTINUES ON PAGE 44.

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YEAR END REVIEW...from page 43.

ing to avail themselves of the aforementioned provision and take over the Board.

After 15 years of class-action litigation, the matter settled with the nonsponsor owners agreeing to sell their units to the sponsor at above-market prices. To do so, the nonsponsor owners needed to waive their rights under the provision. The Appellate Court held that the waiver was permissible. Further, the Court held that if the Master Deed was amended to include a provision regarding the control structure of the association, future owners would likewise be bound by the Order.

Post-Judgment Attorneys' Fees Only Awardable if Spelled Out in Documents

In *Sylvan Glade Condo. Ass'n v. Braude*, decided October 7, 2015, the Appellate Division affirmed an Ocean County Special Civil Part Judge who held that an association's documents must explicitly empower the association to collect "post-judgment" attorneys' fees if it wished to amend its judgment against a unit owner to include such fees. Post-judgment fees are typically incurred by efforts to collect upon the original judgment, such as drafting and serving information subpoenas, performing asset, rent levies, or wage garnishments, etc. Some associations have successfully had their judgments amended post-judgment to include these fees.

In this case, the defendant objected and the Court, relying on the 1999 Appellate Division case of *Hatch v. T&L Associates*, found that a general provision in the documents stating that the association may collect "reasonable attorneys fees" is insufficient to amend a judgment to include post-judgment fees. The Appellate Division upheld the ruling. As a result, an association seeking to amend its judgment to include post-judgment fees should now consider whether the language in its documents would empower it to collect these fees.

If you wish to obtain a copy of these decisions, please feel free to contact me at smlenak@greenbaumlaw.com. ■

Steven Mlenak is an attorney with Greenbaum, Rowe, Smith & Davis, LLP. Mr. Mlenak concentrates his practice in the area of community association law.

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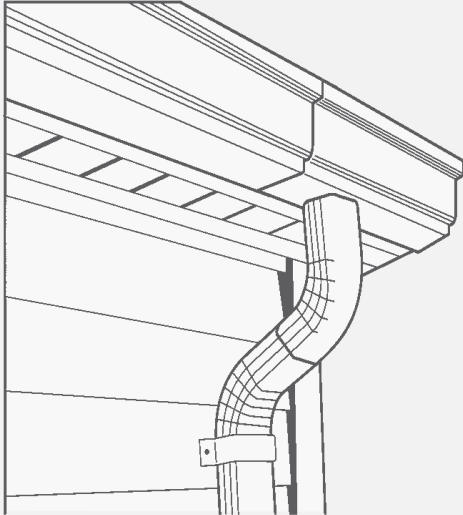
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Community Trends®,

Angela Morisco, Esq.,
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PRESIDENT'S CORNER...from page 2.

continue to enhance the Chapter's services to its members. My personal thanks also to Larry Thomas, who assumed the position of CED in the fall of 2014, at a time of transition and short staffing. Larry brought stability, calm and good humor to our Chapter. Larry, if times get tough, for protection for you can always don the "tools of ignorance" that Yogi Berra wore with pride and humor.

Finally, thank you for the opportunity to serve the Chapter as your 2015 President. I hope that I have been a good steward of the Chapter in the fulfillment of its purposes, namely, providing needed services and training to our members and protecting our community associations in serving and governing their communities.

Best wishes for a healthy and happy Holiday season and blessings to you all. ■



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The LAC looks forward to continuing its relationship with these representatives to address matters such as the Ham radio, FEMA and FHA issues, among others. We also encourage all CAI members to visit www.caionline.org/Advocacy/TakeAction to contact their representatives today on these important federal issues.

Jules Frankel

I close this column and this year with a tribute to Jules Frankel, a past president of CAI-NJ, and a long-time member of the LAC. Jules was a shareholder of Wilkin & Guttenplan PC and was someone we knew we could always count on to come through with a smile and a kind word. A fellow LAC member said it best: "Jules was such a gentleman and a gentle man."

Those of us who knew Jules know that one of his favorite expressions was "It's a beautiful thing." Jules always managed to recognize and bring beauty, respect and sensitivity to all that surrounded him. We will miss him deeply. ■



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Conserv Construction.....15
Cowley's Termite & Pest Services48
Diversified Property Management, Inc49
Doody Calls56
Duct Dudes.....27
DW Smith38
Environmental Landscape Design, LLC.....33
Executive Property Management, AAMC27
The Falcon Group - Engineering, Architecture & Energy Consultants..... 13
Felsen Insurance Services, Inc.52
FWH Associates, P.A.34
Garden State Gutter Cleaning46
Growing Concern, Inc.....57
Gutter Master.....23
High Tech Landscapes, Inc.....36
Hillcrest Paving & Excavating, Inc.51
Homestead Management Services, Inc., AAMC.....23
Hueston McNulty, Attorneys at Law.....53
Integra Management Corp., AAMC44
JGS Insurance.....21
Kipcon, Inc..... Back Cover
M. Miller & Son39
mem property management9
Morgan Stanley - John Busco45
Mutual of Omaha - Community Association Banking & CondoCerts.....32
National Cooperative Bank.....42
O & S Associates Consulting Engineers19
Onorati Construction, Inc.....41
Popular Association Banking.....22
Premier Management Associates, AAMC.....17
Prime Management, Inc.....38
Project Support Services.....54
RA Landscaping & Design, LLC.....54
Rapid Pump and Meter Service Co., Inc.52
The Regency Management Group, LLC, AAMC43
Servpro of Freehold, Middletown, So. Jersey City/Bayonne.....56
Specialty Building Systems55
Star Building Services27
Taylor Management Company, AAMC, AMO.....55
Tri-County Construction Services / Total Plumbing, Heating & Air Conditioning.....37
Union Bank.....46
Wilkin & Guttenplan, P.C.....51
Young & Associates.....14

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"Take them down? I just got them up! It's nearly 12 months to Christmas. I'll take them down after that."

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