Nevada ASSOCIATION OF COMMUNITY MANAGERS

May 2019

## Being "OK".... Is it really OK to be "Just" OK?

Many of us have seen the commercial where the man is in the hospital and asks the nurse how his surgeon is, only for her to say "he's Ok," which then makes the man genuinely concerned since nobody wants an "Ok" surgeon. Nobody wants an "Ok" manager, either. Being "Ok" is not stellar. It's not thorough, and it doesn't make our Board members feel comfortable, protected, and safe.

While the commercial was meant to be funny, the message itself is extremely true. Being "ok" means on average, as many good things that are done are neutralized by the same amount of not so good things. None of us are perfect, and mistakes are bound to happen. But the more we as an industry focus on being better than OK, the more we as managers can begin self-governing ourselves. And by being better and doing better, we as managers then earn the respect of our clients, bosses, peers, and most importantly, our legislators. We have all watched legislation get proposed (and even passed) that was a knee jerk reaction to an isolated bad act or issue. If we as managers were to self-govern ourselves at a company and industry level, we can essentially avoid some of the potential blowback from "bad" legislation.

This is one of the reasons that NACM is such an important piece of that puzzle. Whether at luncheons or breakfasts or mixers or classes, managers being able to bounce scenarios and hypotheticals off each other is undeniably one of the most significant benefits of being a NACM member. Having that "safe place" for managers to converse with each other and trusted Affiliates to ensure we're moving in the right directions as managers is paramount to not only the overall industry, but for us to protect our own licenses and livelihoods. *Continued on back page*

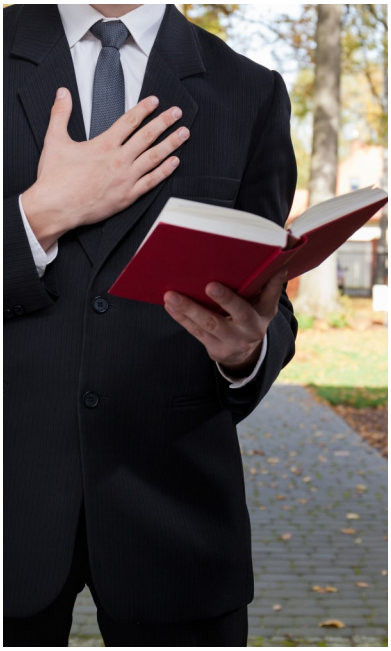
## NACM IS NOW IN NORTHERN NEVADA !

While NACM has always been a statewide organization, we are excited to have launched a full calendar of Northern Nevada NACM events with even more to come! If you wish to join NACM or have questions, please call:

Lara Knipmeyer Garrell at 775 - 502 - 6097 or via email at:

larakgarrell@outlook.com

**5th Annual Education Expo & Tradeshow—see inside for more details!**



# PROSELYTING (RELIGIOUS SOLICITATION) IN YOUR COMMUNITY

*Michael W. McKelleb | Partner*

Recently, I had cause to consider whether a gated common-interest community could prohibit religious solicitors from proselyting within their boundaries. The association I pondered is smallish, but gated and the association owns the roads. The governing documents prohibit soliciting and the association has signs posted on both gated entries. A religious group was proselyting recently, prompting the board to question whether the association's private property rights allowed it to enforce its exiting prohibition. The board expressed concerns with enforcement violating the Jehovah's Witnesses' constitutional rights. Further, one board member had heard of a case involving the Jehovah's Witnesses, where the court ordered they be allowed access to gated communities. I believe the case the board member referred to above is *Watchtower Bible and Tract Society of New York, Inc. v. Sagardia De Jesus,* 634 F.3d 3 (1st Cir. 2011). In that case, the Jehovah's Witnesses sued for access to gated communities in Puerto Rico.

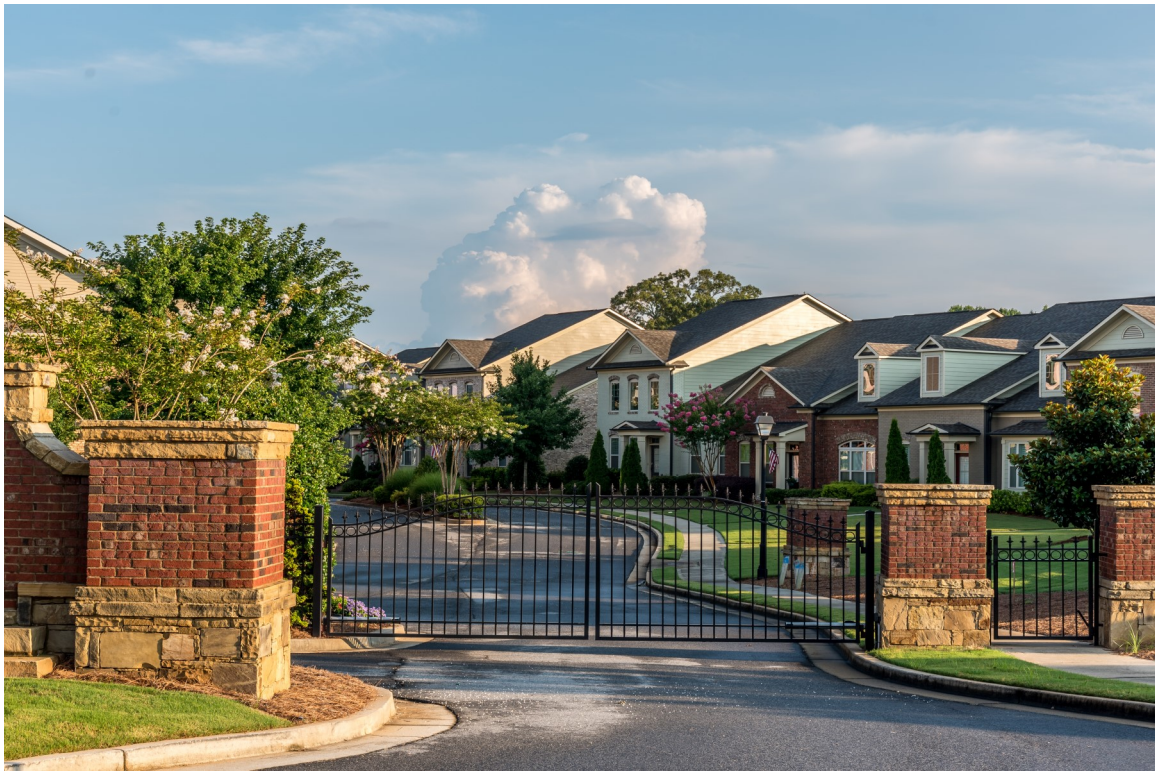
*The board expressed concerns with enforcement violating the Jehovah's Witnesses' constitutional rights.*

Looking to reduce severe crime, the Puerto Rican government passed an ordinance that allowed communities to form into associations and request a permit to gate their communities. *Id.* The so-called "urbanizations" paid for the gates and their ongoing maintenance; yet, the roads remained dedicated public property. *Id.* at 7 ("In some respects, the controlled access regime is a counterpart to the private "gated" residential communities that have developed elsewhere; but in Puerto Rico the streets within the area were and remain public property"). The 1st Circuit Court of Appeals found the government's retained ownership of roads was dispositive because it meant the roads remained a traditional public forum, meaning religious expression could only have reasonable restrictions on time, place, and manner. *Id.* at 11. The Circuit Court then, somewhat surprisingly, declared the law met this test, finding the ordinance facially constitutional because it was narrowly tailored to serve a significant government interest ("crime control"). *Id.* at 8-9, 12. However, the Court then swiftly pulled the rug from under the Commonwealth by declaring the law was nevertheless unconstitutional as applied because it unreasonably bore on the Jehovah's Witnesses' access to the traditional public forum (i.e. public streets). *Id.* at 13. As such, the Court ordered the Jehovah's Witnesses be given access.

The *Watchtower* case, while germane to a discussion of restrictions in ungated HOAs, nevertheless does not apply to a gated HOA that owns its roads. As the *Watchtower* Court noted, "[t]his case would be different if the Commonwealth sought to alter the physical character, principal uses, or public ownership of the streets within the urbanizations". *Id.* at 11. The Court then noted the city was free to convey the roads to the urbanizations. *Id.* ("The government can dispose of its property"). Given this, by implication, the holding indicates restrictions are permissible when the entire community is private property.

That conclusion, however, fails to address another line of cases, which attack an HOA's right to enforce speech limitations on the grounds the Constitution applies to HOAs because they are quasi-governmental agencies. This line of cases relies on the holding in *Marsh v. Alabama,* 326 U.S. 501 (1946). In *Marsh*, a corporation owned an entire town (called a "company town").

When a Jehovah's Witness was found guilty of trespass related criminal charges for proselyting in the town, he appealed his conviction on the grounds the conviction was unconstitutional because the corporation could not restrict constitutionally protected speech rights in the town.



According to the defendant, the company town was indistinguishable from any other city in the area. As such, the defendant argued the corporation was required to meet the same standard as any municipality when it restricted protected speech. The *Marsh* Court agreed, stating, "because the company town had characteristics similar to a municipality and functioned like a municipality, it should be held to the same standard," *Id.* Some argue this holding means that HOAs are quasi-governmental entities because they also have "similar characteristics to a municipality". Fortunately, the U.S. Supreme rejects such broad interpretation. In *Hudgens v. NLRB*, 424 U.S. 507 (1976), the U.S. Supreme Court held that *Marsh* should be narrowly interpreted to require an entity to assume nearly all aspects and functions of a municipal government before it should apply. Because HOAs do not assume nearly all aspects and functions of a municipal government, they are not quasi-governmental entities. Nevertheless, it should not be surprising if this argument is increasingly popular over the coming years.

Based on the foregoing, if an HOA does not own the roads, it appears settled that it may not restrict proselyting. For condominiums, the question has additional factors to consider that are beyond the scope of this article. However, under certain circumstances, a gated HOA that owns all the property within its borders, including the roads, may – under certain conditions – restrict proselyting. Nevertheless, prudence mandates associations first meet certain prerequisites, especially if current restrictions on solicitation are insufficiently broad to restrict proselyting. Thus, before an association determines to enforce a restriction on proselyting, it should consult with its legal counsel before proceeding.

1 The Commonwealth of Puerto Rico is subject to the United States Constitution and Puerto Ricans may seek redress in the federal courts.

2 Solicitation and proselyting are not equal. Solicitation, unlike proselyting, is a purely commercial endeavor. Meanwhile, proselyting, unlike solicitation, is entitled to a higher level of scrutiny before a restriction may infringe on a Constitutional right. *See e.g. Int'l Soc. for Krishna*

*Consciousness, Inc. v. Evans*, 440 F. Supp. 414, 424 (S.D. Ohio 1977).

## THE 2019 LEGISLATIVE SESSION IS UNDERWAY

It's without a doubt that anybody reading this article is already tired of hearing about politics (as I think we all are to some degree), but these politics we're talking about today are on the state level and part of the backbone of what we do as Community Managers. NACM's lobbyist, Bryan Gresh, has been in Carson City since before the session began, preparing for whatever is going to come our way. Also in Northern Nevada is our newest Legislative Committee member (and NACM Board member) Lara Garrell, a Reno local who has been instrumental in helping NACM launch more focus and events to the managers in that area.

This year, the Legislative Committee (LC), has been reviewing and providing input on multiple bills that affect HOA's and Community Managers. NACM will not be proposing any legislation this session, but has been in close contact with multiple NACM Affiliates who were attempting to propose legislation that we would be in support of. With the amount of hot topics in the state government right now combined with the national politics, there is a chance (and hope) that bills affecting our industry may be minimal this session as cyclic pattern of focus may shift from HOA's to other issues such as gun laws, marijuana-related topics, education and health care or other topics that are always being discussed here in the state. That said, we're of course providing input and carefully tracking the bills attempting to modify the SPL language, but beyond that things have been relatively quiet with just spurts of chaos.

Whether quiet or not, the LC is prepared and ready to be that continued fair voice of reason in legislation. While NACM's focus is to be a voice for the managers, NACM also prides itself on being a fair and honest voice in our state capital. If a proposed bill generates a little more work but has a lot more benefit, the honest answer will be given to continue to give us the credibility needed to continue to build the trusted relationship with lawmakers. We strive to be sought out by interested parties as relevant discussions are taking place in the hallways and offices of the Legislative Building, and we continue to build on our past efforts.

The LC is excited for the session, and as relevant updates are provided or action is needed, we will communicate that to you, our members. Last, but certainly not least, is that the best advice NACM or any organization can give its members is that the best way to avoid difficult legislation and laws is by proper self-governance. Having those difficult conversations with Boards to avoid being the writer of a Case Law Seminar is never easy, but it's what keeps our noses clean and prevents us from having to contend with some of the hurdles we as managers have been faced with. By being a member of NACM, you already show that you care about your license and your industry, and that is more than half the battle. Thank you to all of our manager members and affiliates for supporting this amazing organization!

***Eric Theros, SCM, CMCA®, AMS®***

*HOA Director | Supervising Community Manager*

***Community Management Group***

## NACM'S NEWEST BOARD MEMBER :

## LARA KNIPMEYER - GARRELL

Lara started her career in community management over fifteen (15) years ago. Lara received her Community Association Manager license in March of 2006 and her Supervising Community Manager license in March of 2010.

In the last fifteen (15) years, she has worked for two management companies as well as Gayle Kern, & Associates. While working for Gayle Kern, Lara specifically worked in the collection areas of Gayle's firm. Lara has extensive knowledge in the collection of delinquent assessments, insurance claims within an HOA, aging properties and overall unique issues that present themselves in this industry.

In January of 2016, Lara co-founded the Builders Association of Northern Nevada HOA Council. The HOA Council is a local resource for education and networking professionals in the community management industry.

In September of 2018, Lara was appointed the Board for Nevada Association of Community Managers (NACM). Lara was the first ever board member from Northern Nevada, to serve on the Board. In early 2019, she joined the Legislative Action Committee for NACM. Lara is an instructor with Key Realty and the Nevada Real Estate Division. Most recently, Lara joined the CAMCO North team as a Supervising Community Manager.

In her spare time, Lara enjoys redecorating her home she shares with her family, as well as reading books, gardening and finding time to golf.


## Your NACM Board of Directors:

**CHAIR** - Eric Theros, *CMG*

**VICE CHAIR** - Mozell Williams, *CAMCO*

**TREASURER** - Anne Calarco, *LEVEL*

**SECRETARY** - Adrien Barker, *FSR*

**DIRECTORS:**

Joan Ernst, *LEVEL*

June Heydarian, *CLG*

Michelle Carrero, *CAMCO*

Phil Michaelson, *GRISWOLD*

Lara Knipmeyer Garrell (No. NV)

*Executive Director—Keri Hawkins*

## PLAYGROUNDS AND SAFETY IN NEVADA

**By: Sara E Barry, CAM - UNLV Certified Paralegal, UNLV Certified Legal Secretary and Nevada Licensed Insurance Producer. Former CMCA & PCAM**

Several Classes have been developed to help the members of the board and the licensed Community Manager understand what happened on the $20 million dollar playground lawsuit and what are the association's duties when it comes to child safety and these "fun" structures that are installed in many common areas.

As readers may or may not know, I owned a community management company and managed in the San Francisco Bay area for almost 20 years and was fortunate enough to work with a very good developer. I learned early on that each set of amenities that were installed by his company came with manufacturer recommendations on how to care for the structures in order to promote safety and longer use. Was I going to be responsible to make sure that those recommendations were followed? Absolutely, *however*, I was not going to be the only one to physically perform those inspections and any required servicing or adjustments, etc. A checklist was created including the manufacture's requirements as well as what I and my staff had learned over the years that needed to be looked at.

Most of the larger landscaping companies that were used by my clients had a general contractor, GC, on staff. That company, using their GC, was required in their contract to complete the inspections of any "play" structures' **monthly** and turn them into our office before they got their monthly service payment. The checklists were kept in a binder as proof of our due diligence in trying to keep the kids safe. Could the recommendations have been stated as quarterly in the manufacturer's recommendation? Possibly, but I wanted my company covered with monthly inspections. Was it an inconvenience? Yes, but I felt it took away some of the liability from the board and my staff by having someone else responsible to make sure it happened. Do you have to do it monthly? At times, you may need to have the inspections performed more frequently if you have very heavy use of the structures. Kids can find all kinds of creative ways to break, damage, and of course play hard on all of the equipment. Hopefully, it has been built to withstand this use, but someone needs to make sure. As my hubby has done a lot of reserve studies for HOA's, he has seen the damage that can be done to these structures and has reported to management immediately if he saw something concerning on his site inspection.

Even though these inspections were done monthly by the GC, when I was out on property, I got out of my car and walked the areas making sure that I didn't see any issues as well. These types of things are common. If someone is not looking carefully, this could get covered up and a child impaled easily.

In most associations, there are routinely many other types of contractors out on the property. Letting them know that you expect them to report any issues that they see even if outside of their contractual responsibilities. Show them that it was really appreciated and made them part of a very valuable team. This was discussed with each contractor at contract start or renewals with reminders.

In contacting the State of Nevada Contractor's Board, I was somewhat shocked to learn that they do not have any requirements for an inspector of these play structures to have a license through them. There is only one for installation of these structures.

The National Recreation and Park Association has a Certification program for Playground Inspectors that follows the National Standards, but I feel very strongly that the manufacture's guidelines need to be found and ensured to be part of those inspections as well as the national standards. They certify the inspectors world wide. Here is the link to their website: https://www.nrpa.org/certification/CPSI/ There is a list of the certificate holders on this site, but most of them show private, which means that they work for the public entities. There are a few, however who have their contact information should you be looking for someone.

How do I find these required guidelines if it is an older association? I decided to see if it could be done and actually went out to a structure in our master association to see what I could find. I found the manufacture, looked them up on line, contacted their contact shown on line and had a return phone call within 2 days from a marketing person. I asked her where I could find the guidelines and was instructed on where to find them. Maybe I was just lucky, but don't make assumptions.

Keep reading on next page

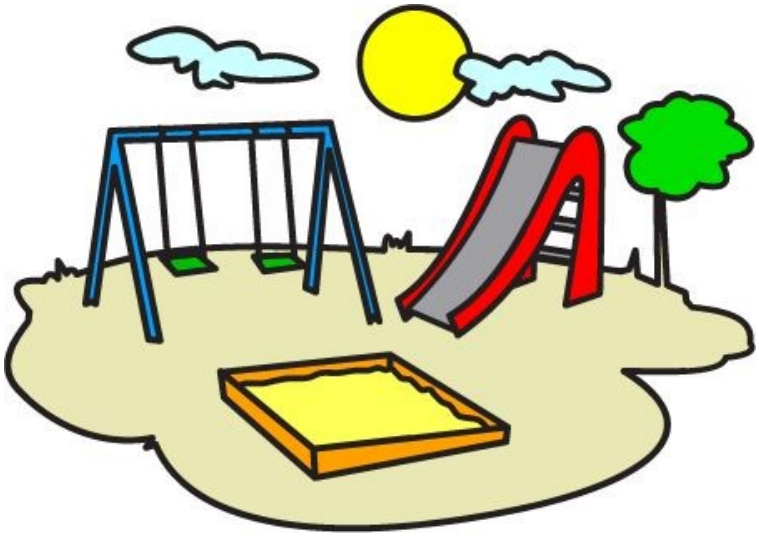
## PLAYGROUNDS AND SAFETY IN NEAVDA (CONTINUED)

Let's talk about insurance now. With this type of verdict, $20,000,000 worth of awards to the child, do you not think that the insurance carriers are now going to find a way to not have to pay if that happens to one of their clients? I think so. I haven't seen any evidence, but the exclusion would not necessarily be in the exclusions now but buried in the Endorsements or somewhere else like they are doing with the Collections issues in Nevada.

I have a $50,000 Loss Assessment inclusion on my homeowner policy that would kick in should something like this happen in my community and a special assessment has to be paid by owners because the HOA didn't have enough liability coverage. My understanding, however, is that this type of coverage won't pay for any *punitive damages.*

In the long run, the case is being appealed because of that $20 Million dollars, $10 Million was in punitive damages and NRS 116 does not allow that. We will see what happens, but it sure was a learning experience for Community Managers to ensure that they have a CYA letter on file if the boards are not willing to pay for the proper inspections and maintenance.

Protect yourself, the HOA, the Board and the homeowners by ensuring that these inspections are done properly by a licensed and qualified company and that any required remedies or alterations are quickly completed to ensure that they are safe.



# FILL YOUR HEAD WITH EDUCATION

## Southern Nevada:

- 6/28 - Expo / 7/18 - Luncheon / 8/8 - Breakfast / 9/13 - Glow Golf / 9/26 - Luncheon / 10/24 - Breakfast / 11/15—Bury your Budget

## Northern Nevada:

For a list of classes please contact Lara at: larakgarrell@outlook.com for more information

# Mark your Calendar!

## 5th Annual Education Expo & Tradeshow

June 28, 2019
Tuscany Suites & Casino
255 E. Flamingo Road | Las Vegas, NV 89169

*8am - Registration & Breakfast*
*9am to 12 noon - Continuing Education Classes*
*12 noon - 2:30pm - Affiliate Tradeshow & Lunch*
*2pm - 5pm - Continuing Education Classes*
*4pm - 7pm - Cocktail Reception*

During the Education Expo & Tradeshow, you will be able to obtain up to ***6 of your 18 CE credits in one day!*** This "CE Buffet" will have multiple classes during the day for you to pick the topic(s) that interest you the most.

Lunch will be provided during the break while you take some time visiting with vendors at the Affiliate Tradeshow portion of the event. Visit each booth to be entered into the raffle drawing to win one of three amazing raffle prizes.

After a day of learning; a cocktail reception will be held for managers and affiliates to mingle, unwind, and celebrate the completion of the event. The raffle drawing will take place during our cocktail reception (must be present to win).

All of this is ***FREE*** to NACM Members. Annual Membership is $60. As a special "Thank You" to our members, if you refer a *New Manager Member* to NACM and they sign up before or on the day of the EXPO; we will give you a $15 gift card. The new member needs to let NACM know at the time of sign up who referred them, referring members may pick up their gift card at the NACM Booth during the Trade Show.

**Northern Nevada Managers:**

NACM and our wonderful Sponsors, will be providing a charter bus from Reno to Las Vegas at no cost to you so you may attend this event. The bus will depart from Reno on Thursday, June 27, 2019 and will be head back to Reno on Saturday, June 29, 2019. If you want to reserve your spot on the bus, please let us know when you RSVP. More details will follow.

## ARC is Key

Architectural review disputes are among the "top 10" director and officer insurance claims. As a manager, you can help your clients avoid litigation by encouraging the board or architectural review committee ("ARC") to be clear and precise in its communications with owners.

Typically, there are 3 major points of communication during the architectural review process: (1) the application and review process, (2) the approval letter, and (3) the violation letter when owners fail to install as approved.

Many CCRs include a time frame of 30-60 days in which the board or ARC must respond to an application for a proposed improvement. Keep in mind that, in many associations, the consequence of missing the 30-60 day review deadline is automatic approval of the owner's application. Therefore, it is important communicate clearly and immediately if the owner fails to submit a complete application so that the "review clock" does not start running.

As an initial matter, the association should have a checklist of what an owner must provide in order to submit a proposed improvement for architectural review. If the owner fails to submit everything on the checklist, then the association needs to timely notify the owner as to what is missing. This letter must include notice that the timeframe for reviewing the application will not begin to run until the owner has submitted all the missing information.

In the event that the board or ARC begins reviewing an application but cannot reach a decision within the time allotted in the CCRs for review, then the association should deny the application and ask the owner to resubmit.

> It is never a good idea to let the clock run out on the review period and hope that the owner does not notice.

When the board or ARC completes its review, it must issue an approval letter or a conditional approval letter. Of course, if it finds the proposed improvement completely unacceptable, it will issue a denial letter. Precision as to the conditions of approval could not be more important.

Similarly, if the board believes that an owner has ignored the conditions of approval and issues a violation notice, the same statutory requirements for clarity and detail apply as if the association issued a violation notice for something commonplace like weeds. NRS 116.31031 requires an association to provide a written notice that:

(1) Includes an explanation of the applicable provisions of the governing documents that form the basis of the alleged violation;
(2) Specifies in detail the alleged violation and the proposed action to cure the alleged violation;
(3) Provides a clear and detailed photograph of the alleged violation, if the alleged violation relates to the physical condition of the unit or the grounds of the unit or an act or a failure to act of which it is possible to obtain a photograph; and
(4) Provides the unit's owner or the tenant a reasonable opportunity to cure.

Keep Reading

While this may seem like "HOA 101", managers would be surprised at how often one or more of these communication points fall short. Recently, a board found itself in a dispute with an owner over his installation of an accessory structure in the side yard of his home. Dissatisfied with the architectural style, the finished height of the structure, and the color of the installed structure, the board asked what we could do to make the owner fix these problems. The unfortunate answer was "not much" because the association failed to clearly communicate with the owner at almost every point in the approval and violation enforcement process. In reviewing the file, the association's conditional approval letter provided as follows:

- The height must not exceed the roofline of the house.
- The color must harmonize with the color palette of the home and architectural style of the community (no pure white or black color)

The courtesy and hearing notices provided specified the alleged violation as the accessory structure "exceeding the top of the roofline" and referenced a provision in the CCRs which provided that "no building or other structure shall be erected in excess of one-story". There was no proposed cure, although the violation notices did include a photograph which showed the structure as being higher than the roof *eaves*, but well below the top of the roof.

The owner's application included several photographs and professional drawings of the proposed structure. He had circled the colors selected from the manufacturer's standard color palette (which were not white or black) and specified the finished height of the structure. On those facts, the owner had a strong argument that having submitted all this information, he was entitled to rely on the board's conditional approval letter which offered no specific objections to the style, proposed color, or finished height.

This is where an informed manager can help the board or ARC avoid problems. If you are unsure of the definition of "roofline" or how tall "one-story" is, then chances are that at least some directors, committee members, and owners are also unsure. Adding definitions of common architectural terms to the architectural guidelines is an easy solution.

Take a minute to review the application and the board or ARC's minutes or notes to see if anything appears to be missing. Did the reviewing body fail to address the color selection? If yes, then ask the board or ARC to state whether or not that color selection is approved. Were there concerns about the architectural style? If yes, then ask the board or ARC to give some guidance on what specifically was objectionable and what must the owner re-submit that would be more in keeping with the architectural guidelines. The response letter does not need to solve the owner's problem, but it should provide clear guidance on what the owner needs to do to solve his own problem and thereafter obtain board or ARC approval.

With violation notices, you must ensure that the description of the violation and the "applicable provision of the governing documents" actually go together. In this example, the CCRs limited height to "one-story" while the description of the violation referred to the "roofline". If you google "how tall is a story", the search results inform you that a story is the height from floor to ceiling taking into account the thickness of each. In contrast, one dictionary definition of "roofline" is "the uppermost edge or outline of a roof". "One-story" and "roofline" are interchangeable terms. Local development codes or even development agreements may have a more precise height limitations applicable to the community which can help avoid these conflicts.

Your attention to detail on architectural matters can save your clients a great deal of time and money otherwise spent on dispute resolution and differentiate your services from the competition.

*Article by:* Donna Zanetti, Esq,
Attorney with Leach Kern Gruchow Anderson Song

LKG
LEACH | KERN | GRUCHOW
ANDERSON | SONG

## Being "Ok".... Is it really OK to be "Just" Ok? *(continued)*

I know how hard it is to be a manager. Working until 9pm or later to get a Board pack done, night meetings, emergency calls, etc... It's extremely easy to get into the spinning plates and putting out fires mode. But remember that if we take that extra few minutes where it counts, we can save ourselves hours, days, and months of headaches down the road when that issue may blow up. Simple things like pulling all of the documents related to an issue and scanning and including them in our Board packs is a prime example of time saving down the road. Taking a few extra minutes to search for and print that extra email and tidbit that goes with it and having everything related to an issue in the scanned Board pack while it's fresh in our minds can save us the drama and hassle of having to try and locate everything and pull it from filing a year or two later when an issue arises from it. Being able to pull the memo about the entire issue and all of the backup at your fingertips is just one example of how we can go beyond "ok" with only a few extra minutes of time; and those minutes will pay off later. Not only will our Boards appreciate how thorough we are, we are able to save ourselves time down the road. One less plate to spin. One less fire to put out. One more way to be more than just "Ok."

***Eric Theros, SCM, CMCA®, AMS®***

*HOA Director | Supervising Community Manager*

***Community Management Group***

Thank you to our newsletter sponsors: