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Community Associations Newsletter

Books, Records, & Document Retention. Oh My!

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For many community associations retaining records and keeping up with paperwork is a unique challenge. Associations' budgets are limited, volunteers have varying bandwidth, community managers usually have more on their plates than most people, and the board composition changes regularly. Records-related questions that lawyers routinely receive are: How long should we retain records? How do we respond to this book and records request? What is a "book and record"? This article will briefly address these questions.

1. How long should we retain records?

As usual, it depends; however, there are reliable best practices, and litigation realities which may help answer the question.

Keep it forever. Some documents should be kept indefinitely, these are: warranty documents; as-built plans; permits; licenses; un-expired agreements; legal memos; important letters; court orders; meeting minutes; records of actions or consents of the board/membership; certain financial records (like annual budgets); governing documents; and unit files including applications and decisions.

Litigation. Plaintiffs in a case have a limited amount of time in which to file a lawsuit. When going to court, equipping the lawyer with as much

information as possible is wise. This could mean retaining and retrieving emails, texts, posts, letters, and paper files that are five years old. Certain records may contain relevant evidence pertaining to the subject matter of the litigation, and an association may be required to, or wish to, disclose such records during discovery. If an association has a defined record retention policy, it supports the validity of any records disclosed during discovery as it establishes that such records are kept and maintained during the normal course of business in a systematic, defined manner.

On the other hand, a defined record retention policy can also protect the association if a document is destroyed before a legal dispute arises. But, please note that if the association becomes aware of a legal dispute, any material related to the dispute must be preserved until the matter is resolved (including any appeals period) and for at least three years after – regardless of the association's records retention policy. The custodian of records may be held civilly or criminally liable for damaging, destroying, or losing such material.

2. How should we respond to a "books and records" request?

DC, Maryland and Virginia have laws related to what owners are entitled to seek in terms of

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association books and records. In Virginia, for example, among other things, document requests must be written, state a proper purpose for seeking the documents related to the owner's membership in the association, and be made by a homeowner in good standing.

In Maryland, books and records are required to be made available for examination or copying, or both, by any owner, an owner's mortgagee, or their respective duly authorized agents or attorneys, during normal business hours, and after reasonable notice. In addition, upon written request, a unit owner is entitled to receive copies of financial records and meeting minutes between 21 and 45 days after receipt of the request.

In DC, books and records are required to be made available for examination and copying by an owner in good standing or such owner's authorized agent so long as the request is for a proper purpose related to the owner's membership in the unit owners' association, and not for pecuniary gain, commercial solicitation.

Also, DC, MD, and VA allow associations to withhold from inspection certain documents, such as those related to pending litigation, contracts under negotiation, or personnel matters. Each jurisdiction's statute lists documents that can be withheld.

All three jurisdictions also permit associations to collect a fee for books and records requests. The Virginia Code permits a board to charge for costs associated with copying and redacting records to be reviewed by an owner, provided the costs are established and published by the board in advance. If an association plans to collect charges related to copying, redacting and retrieving documents in response to a proper document request, the association must define such costs.

In Maryland, associations can only charge the person requesting a review of documents for reasonable copy charges subject to limitations set by the court, and of course those limitations are what the court refers to as "reasonable charges."

In DC, associations may impose a fee prior to providing copies and those fees must reflect the actual costs of materials and labor. Unlike Maryland, there is no reasonableness standard for costs, and like Virginia, the charges may be imposed before providing copies. We generally recommend that our clients adopt a fee schedule and procedures for requesting and reviewing association books and records. If you already have such a resolution in place, make sure it gets updated regularly to reflect any increased management costs and includes attorneys' time for document redaction.

3. What is a "book and record"?

The question of what constitutes a book or record varies based on the description of the record being sought, the relevant jurisdiction, and common sense. A few points that help associations answer the question include: Is the item reduced to paper form at any time? Is the information directly related to an association matter or association business? Is the item something that the Board and/or management would refer to after it was created.

The take away - we recommend that each of our community association clients adopt a record retention policy. Such a policy defines which documents to retain and how long they should be retained. The policy should also clarify how electronic data is stored, backed up and otherwise made available when a request for documents is received. Please contact our office if you need assistance drafting such a policy.

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