

apm NEWS

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Amendment Changes That Your Association Should Make

By John R. Math, LCAM

We still see many associations with poorly written or inadequate documents. Today, more than ever, Associations need the ability in and through their documents to be able to collect monies that are owed to them, enforce the association rules and to maintain the association for the betterment of the majority.

We are seeing associations that are unable to collect assessments quickly and unable to enforce the rules, regulations and documents due to their poorly written documents. This article is from a management point-of-view in that a lot of associations do not have the tools or ability to collect assessments and enforce rules due to their inadequate documents.

In many cases Chapters 718 and 720 will provide for the ability of the association to be able to enforce their documents "if the association's documents so provide". This is the problem with many associations and their ability to enforce, simply because there is language missing from their documents.

The following are only suggestions and we would like to stress that the association should get additional information and advice from their association's attorney to implement any of these ideas:

Assignment of Rents, Vacant Units & Eviction of Tenants

If an association has the ability to approve and screen potential new purchasers and tenants, it will improve the chances of the association to collect assessments from an owner/investor. Nowadays, we see many investors who are delinquent on their assessments, yet are still collecting rents from their tenants. We suggest that the association have an amendment to their documents that allows the association to have the rents assigned to the association if and when the owner is delinquent in their assessments. Through the documents, the sale/rental application and any acknowledgement by all parties to abide by the documents and rules and regulations, the tenant would be put on notice by the association that all future rental payments be assigned and disbursed to the association when

the owner/investor is delinquent on their assessments. These funds would then be deposited and credited to the delinquent owner's account for any and all past due amounts and costs to collect. A word of caution, this procedure and act may help the owner to allow for his mortgage to fall into delinquency more quickly.

Associations are now considering the ability to rent units that are vacant. The owner/investor for all purposes has walked away from their investment and the bank is not pursuing their foreclosure in a timely manner. The association should be allowed to pursue the rental of the unit to help defray the loss of maintenance revenue and other costs to collect. In some cases, due to the condition of the unit, the association may not want to refurbish and rent the unit, as the costs and initial outlay of money would be prohibitive for a cash strapped association. Check with your association's attorney for guidance in this matter.

When an owner/investor has tenants in the unit and is collecting rent, yet not paying their assessments, if the association has the ability to evict the tenant through the documents it is another tool for the association to get the owner to bring their assessments current. The idea that the owner will lose that income stream and then not have the ability to rent the unit again until the account is paid in full may be enough to get him to pay.

Withholding Use Facilities & Services

If an owner or investor is delinquent on their assessments and the documents and corresponding Florida State Statutes so provide, there is no reason that the association cannot consider withholding the use of common area facilities, such as the pool, clubhouse, tennis courts, etc. Why should a delinquent owner or their tenant have use of the facilities if they are not contributing financially? However, this would not be allowed in a condominium association.

In addition, if the law allows, the association may want to withhold membership voting and the ability to serve on the Board of Directors as well. If an owner is serving on the Board, and is not paying his assessments it then calls into question that Directors ability to uphold and administer the association's documents. Also, if the

Board of Directors was sending delinquent owners to the attorney for collections, yet the delinquent Board member was not included, this would be "selective enforcement" and in the future would be disastrous for the association.

The association, if their documents and the law allows, may also want to consider disabling any automatic gate opening device from a delinquent owner/investor. Though you could not block an owner from entering the association property, why make it easy for the owner or tenant to gain access until they are current with their assessments?

If the documents and the law allows and the cable company is agreeable, when an owner is delinquent, the association may want to consider having their cable shut off until their assessments are paid. Over the years we have seen that this is a very effective way of collecting past due assessments quickly. This is especially true if a tenant is paying for cable in their lease but the owner/investor is not paying the association their assessments. The tenant will want the services that is his due to the conditions of the lease and the owner/investor will want that income stream to help pay his mortgage, taxes, insurance and assessments. These are desperate times for associations and they need to use every tool available to collect assessments and in order to ensure the economic viability of the association.

The Ability to Fine for Violations

If the documents so provide, the association is allowed to fine owners for violations of their documents. This provision of the law is very specific as to how this is to be accomplished in terms of notices, time to comply, maximum amount to fine and who may administer the fines.

We have always taken the position that the reason to have this provision in the documents is to get an owner to comply with the documents, not to collect money. Now with the mortgage crisis, homes are being abandoned, foreclosed on and their property maintenance is neglected. The poor condition and maintenance of the homes is affecting the values of our neighborhoods and I believe that these are fineable offenses against the unit/home. Though this will not help keep the unit maintained, at some point prior to or after a

transfer of the unit, the association will be compensated not only for the violations but also for a portion of the past due assessments. Please check with your association's attorney prior to administering any fines against a unit of this type.

The Ability to Maintain a Unit

An association should have the ability to maintain a unit that requires maintenance, repairs and care. Some documents are vague on this issue and we also believe that with your association's attorney's guidance provisions should be made to allow the association to gain access to the unit or the property in order to make repairs or maintain the property. There are liability and trespassing issues that need to be addressed and provisions made for these in the documents. In addition to the maintenance, the association may want to take care of an "Attractive Nuisance" where someone could get hurt, such as an open pool or hole on the abandoned property. Any costs should be well documented and billed to the owners account and would be paid at the time of a transfer. This allows the association to maintain the property and upholds the value of the community, but also be reimbursed at a later date.

We also suggest that associations become very aggressive in their collection methods and philosophy as a means to potentially collect lost revenues. Specifically, the association should consider foreclosing on their lien prior to the first mortgage holder foreclosing on their lien. Today, it is taking a very long time for the banks to foreclose and this is causing the association to lose even more assessments, as no one is paying their fair share of the maintenance. However, because of this, it is providing a window of opportunity for the association. If conditions were favorable, the association may want to take title and then be able to rent the unit in order to help offset the loss of revenues and the costs to collect. In many cases, the association would be able to receive rents on a short-term basis that would more than exceed the lost income. Please consult with the association's attorney prior to taking this type of action.

Today, an association has a myriad of problems to contend with while trying to maintain and administer the operations of an association. The most serious problem we see happening is the loss of revenue and the ability to collect past due sums in a timely manner. If not a part of their documents, associations should also consider making changes to their documents that allows them to accelerate and collect assessments when late. For instance, if an owner is late in the first 3 months of the year, besides that amount, you would be able to collect for the remainder of the year. A lot of documents are silent or have negligible late fee provisions. State statutes spell out the maximum amount allowed to be charged. The same holds true with interest penalties as well. Have your association attorney guide you on how these amendments can be written in such a way that avoids future amendments, as the state statutes change these amounts from time to time.

Overall, these are demanding and tough times for all of us and Directors of an association need to rethink and change the way they used to operate for the welfare of the majority of the community.

Special thanks to Edward Dicker, Esquire who helped us with this article. Ed can be reached at 561-615-0123 for any legal questions contained herein.

Ask The Attorney

By Jay Steven Levine

Q. Our documents say that we should have the Annual Members meeting in November but every year they have the meeting in February. The Board says that they do this in order to get more participation. Is this legal? Should not the association change the documents to allow this?

A. The association should amend the document which establishes the date for the annual members meeting if the association wishes to have the meeting occur in a different month. In connection with such amendment, this author recommends that the particular document not actually establish a particular day in the month, but instead should specify that the meeting shall be any time in the particular month, on such date and at such time as is set by the board of directors from year to year. Notwithstanding this, should the board decide to have a meeting in a different month than that set forth in the documents, it is the opinion of this author that decisions made at the meeting would not be set aside if challenged in a court of law; this is because of F.S. 617.0701(2), which is applicable to all not-for-profit corporations, and which provides that the failure to hold an annual meeting does not affect otherwise valid corporate acts; this protection should equally apply to a deviation from the annual meeting date set forth in the documents.

Q. Our Compliance Committee runs their group with an "Iron Fist." They give the offending owners unrealistic time tables in which to comply with their rules and documents. Are there any laws that govern this activity? Some people cannot get their house painted in 2 weeks! Please help.

A. A court ruling from many years ago held that in order for an association to be successful in a court or arbitration proceeding with respect to violation of a use restriction or rule or regulation, the association must provide a reasonable notice and opportunity for the owner to cure the violation before the association proceeds forward with the legal pro-

ceeding. The arbitration rules also require such notice to be in writing as a condition precedent to the filing of an arbitration petition in a condominium dispute. What is reasonable will depend upon the circumstances. For instance, the notice time period for the violation of a rule requiring that a dog be leashed would be much shorter than the time frame required to remove a child, tenant or maintain the exterior of the unit. There is no bright line test as to the appropriate length of notice. We typically recommend that the association provide as much time as possible to ensure that the association does not lose the proceeding based on the inadequacy of the notice provided.

The association should review its governing documents, since some do present time frames for compliance, particularly in connection with a maintenance deficiency. Those time frames must be strictly observed.

The association should ensure that the owner actually receives the notice and should not presume that a letter which is mailed by regular mail is actually received.

This article was prepared by Jay Steven Levine, P.A., which represents more than 300 community associations. The firm has dedicated its practice to the financial health of the association and has developed a niche practice in the area of casualty and insurance law, including hurricane law.

REMINDERS!

1. Be sure to update your files to include a new Question & Answer Sheet as of January 1, 2009.
2. Fees to the Division are due, and are late if not paid by March 1, 2009. The amount is \$4.00 per unit, for all condominiums and cooperatives.
3. Corporate Annual Reports must be filled out and received by the Secretary of State by May 1, 2009. The Fee is \$61.25 for Not-For-Profit Corporations.

KEEPING UP APPEARANCES

By Zimmerman Tree Service

We're well aware of the value of a tidy, disease-free and beautiful landscape. It enhances the value of our properties, makes our residents happy and keeps us smiling. The key is to find the balance in making the landscape look good without spending hundreds of hours or breaking the budget. How do you view the landscape? What do you notice from a window, as you stroll or drive through the community, or relax in your yard or by the pool with friends and neighbors?

The major component of what you see is the intangible value of the trees in your community. Shade, color, texture, diversity and interest all play major roles in your view of the trees on a daily basis. How do you enhance and protect the value of your landscape? Treat the trees properly and they will be a true asset to the community.

As we enter the warmer months of the year, our focus of activities shifts. Spring brings the advent of growth and summer doubles it. Our lawn, shrubs and trees all begin their growth cycle as the temperatures rise and the rains begin. This is a good time to address how our trees look as we view the interaction with the landscape and the community around them.

Too much sun or too much shade directly effects the growth of the landscape. Lots of sun encourages growth resulting in overgrown tree limbs, unbalanced trees, dead palm fronds, dropping coconuts and falling fruits making the landscape unkempt and unsafe. When the foliage gets too thick, it blocks out the sunlight, inhibits the grass and can act as a sail in high winds. Trees are slow growing compared to your lawns or annuals, and therefore are relatively easy to keep healthy, beautiful and safe for your residents.

There are methodical steps to this process. First and foremost a comprehensive inventory of all the trees serves as a starting place. Once you understand what trees you have and what they need, a comprehensive game plan can be designed and tailored to serve both the needs of the trees and your budget. A Certified Arborist will look at your trees individually; will understand their natural structure and potential for beauty or disaster. They should be happy to work with you to help determine priorities and develop protocols to meet the arboreal needs of the community this year and for years to come. Together you can form a one, two or five year plan.

Proper pruning is much more than cutting branches off a tree. There should be a reason for every cut. Properly executed tree pruning reduces the risk of branch and stem breakage and provides clearances for vehicles and pedestrians. Properly done, it improves tree health and appearance, increases flowering and can enhance a view. Improper pruning can cause a number of negative consequences. Weak and dangerous branching, accumulated deadwood, poor

stability and an undesirable appearance are only a few of them.

There are numerous ways and reason to prune a tree, so it is important to understand what can be done and why. Establishing priorities will dictate the type of pruning determined and agreed upon by property manager and the Certified Arborist. Once you are clear about what is most important to you, the process of a contract and getting exactly what you want and what the trees need, will be attainable. Most trees will need one or a combination of the following pruning operations. *Thinning* of a tree will selectively remove live branches to reduce the inner density, increase sunlight penetration, reduce wind resistance and provide even distribution of foliage throughout the crown. A tree needs to be thinned if it has become too dense because of neglect or poor trimming practices in the past. The goal is a well-balanced look throughout the tree allowing sunlight to penetrate to the ground underneath and allow the winds to pass through the branches. *Cleaning* involves the removal of dead, diseased, detached or broken branches. This will reduce the risk of falling branches and will stop decay or disease from an unhealthy branch moving to other parts of the tree. *Raising* selectively removes branches or shortens them to provide vertical and horizontal clearance from buildings, lights, pathways or electrical wires. *Restoration pruning* selectively removes branches, sprouts and stubs from a tree that has been topped, severely reduced, vandalized, over thinned or otherwise damaged.

Palm pruning is another matter entirely. Since palms technically are grasses, have no branches and are dependent on their few fronds for nourishment, their pruning needs are specific. Aesthetic pruning of a palm tree eliminates lower fronds and seed pods. Healthy fronds lying at or below the horizontal plane should be removed only if necessary to facilitate the removal of the seed pods. Fronds should be removed close to the petiole base without damaging the live trunk tissue. If they are cut too close, the palm will be damaged. Do not mechanically remove palm tree boots. This ill advised process has the potential to create wounds in the tree where insects and disease can enter and harm the tree.

People ask when is the best time to prune, my stock answer is not when, but how. Removal of dead, dying, diseased, broken, rubbing or decayed limbs can be performed at any time. The area we live in, South Florida, tends to focus attention on tree pruning as we approach the hurricane season. There is a very good reason to focus our attention during this period. If you have procrastinated and not taken care of the trees prior to this season it is now time to focus.

Following the proper pruning protocols and selecting and utilizing a professional tree care company will reduce the

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risk of losing or severely damaging your trees if we experience severe weather conditions. If keeping the trees healthy and happy isn't reason enough, remembering the disasters wrought in the last big storms is a good motivating factor to care for the trees on a regular basis.

Finding the right tree-care service is critical. Make sure the work is overseen by a Certified Arborist. Certified Arborists are specialists dedicated to excellence. There is also an accreditation program for tree care companies administered by the Tree Care Industry Association (TCIA). Companies awarded this approval have gone through a rigorous qualification process. They have risen to the top in their field because of their attention to ethical business practices, employee training, safety, compliance with industry standards and customer satisfaction.

The landscape is a living and ever evolving entity that requires constant monitoring to be its most beautiful. Your diligent efforts can create the finishing brush stroke to your landscape for this year and future years. Treasure your landscape and treat it with respect through proper maintenance. The rewards will be many, and recognized by all who pass through.

Zimmerman Tree Service was founded in 1980. An accredited tree health care firm in Palm Beach County, Zimmerman Tree Service provides professional care and maintenance of shade, fruit and ornamental trees. Some of the services offered include Tree pruning and removal; fertilization insect and disease control; cabling and bracing; and installation of lighting protection systems. The company's nursery division grows, sells and transplants large trees. They can be reached at 561-968-1045 or gogreen@zimmermantreeservice.com

Associated Property Management of the Palm Beaches, Inc., is a twenty one-year-old full-service association management firm. APM serves more than 130 associations in Palm Beach County. If you have any questions or comments, you may contact us at 1928 Lake Worth Road, Lake Worth, Florida 33461. Please call us at 561-588-7210, or you may email us at apm@assocpropmgt.com at any time.

USEFUL WEBSITES FOR YOUR ASSOCIATION

Associated Property Management
561-588-7210 or www.assocpropmgt.com

Florida Department of State
904-487-6000 or www.sunbiz.org

South Florida Water Management District
561-686-8800 or www.sfwmd.gov/index

Palm Beach County Property Appraiser
561-355-3230 or www.pbcgov.com/papa/

Florida Division of Emergency Management
850-413-9900 or www.floridadisaster.org

Palm Beach County Div. of Emergency Mgt.
561-712-6400 or www.co.palm-beach.fl.us/eoc