

apm NEWS

NEWS, ISSUES & INFORMATION FOR COMMUNITY ASSOCIATIONS - WINTER 2001

ESSENTIALS OF AN ASSOCIATION SERVICE CONTRACT

By John R. Math, LCAM

Contracts for goods, services and repairs are a common occurrence for community associations. Yet, even with this common occurrence, there are always problems and disputes that are associated with a contract. Many times, the contracts do not spell out enough of the details that are essential in a fair agreement. In all cases, the association's attorney should review all details and contracts prior to the association executing a contract.

By taking your time and making sure that the following elements are integrated into any contract that the association enters into, it should help to eliminate many of the common problems associated with service contracts.

1. Changes to the contract, should be spelled out as to how they will be handled, how they will be executed and paid for by the parties involved with

the contract.

2. Who is the point of contact for the parties involved? This should be spelled out in order to eliminate people not in power from interfering.

3. Any details that will help to delineate exactly what should be maintained or repaired should be included as an exhibit to the contract. This would include any pictures, maps, photos and drawings helping to clarify the written word.

4. How will any disputes be handled. Will they be addressed through litigation or arbitration? How will pay for the expense of this procedure?

5. Proof of insurance should be provided in a prescribed form prior to any work being performed. Also, as a precaution, the association should be named as an additional named insured in order to be notified immediately of any change of status in the contractors/vendors insurance

status.

6. Both the contractors and association's responsibilities should be spelled out in detail. This may include a minimum amount of men or equipment that is required to be on the job. Maybe it includes certain times and days that the association must allow the contractor on the property or certain preparation that the association perform prior to the contractor starting their work.

7. The contract should provide details and specifications in enough detail in order for the work to be accomplished to both parties satisfaction. This would also spell out any alternates to the work being performed in cases there could any delays in materials.

8. There should always be a start date and a completion date stated in the contract and what the penalties would be to either party if there was a problem with the start or end performance.

9. The termination of the contract should always be defined by both parties and made a part of the contract.

10. The terms of the contract should always be spelled out and defined. This would include any billing procedures, when any payments are to be made and when any extras to the contract should be billed and paid.

11. All warranties should be detailed and spelled out and agreed to. In addition, how quickly will the warranty work be performed. How should the warranty item be declared to the contractor. Any manufacturer warranty information should also be attached.

By addressing the above issues and agreeing to the various items with your contractor, an association can eliminate most of the potential problems in your next service contract.

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Ask The Attorney

By Jay Steven Levine, Esq.

Q. *Can the Board of Directors require owners, who hire outside contractors for their own work, be licensed and insured?*

A. The answer to this question depends on whether the requirement is imposed by the governing documents or instead by board rule and regulation. It is the opinion of this author that such a requirement is questionably reasonable because the association does not have a direct interest in whether an outside contractor retained by an owner is licensed and insured. The reported court cases have held that in order for a board rule to be enforceable, it must be reasonable. However, the issue of reasonableness is generally not a consideration where a restriction is found in the governing documents. Therefore, a governing document provision mandating licensure and insurance would be enforceable.

Q. *When we bought our unit 15 years ago the association had a heated pool, pool table and TV in our clubhouse. Over the years, the Board has chosen not to heat the pool and the pool table has been removed and the TV has been stolen. The board refuses to repair or replace these items. Shouldn't they be*

replaced and repaired?

A. To the extent that any of these items is specifically referenced as an amenity in the governing documents, then the amenity must be repaired/replaced. If not specifically referenced in the governing documents, then the removal or nonexistence of any of these items would constitute an alteration to the properties. Most governing documents address this subject and typically require a specified vote of the membership. Therefore, the board should seek and obtain the membership approval to permit nonreplacement.

In a condominium, where the declaration does not specifically address the issues of alterations and improvements, then 75% of the voting interests of all members must approve.

REMINDERS !

1. Be sure to update your files to include a new Question & Answer Sheet as of January 1, 2001.

2. Fees to the Division are coming due and are late if not paid by March 1, 2001. The amount is \$4.00 per unit, for all condominiums and cooperatives.

3. Corporate Annual Reports will soon be mailed and must be filled out and received by the Secretary of State by May 1, 2001. The Fee is \$61.25 for Not-For-Profit Corporations.

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COLLECTION OF DELINQUENT ASSESSMENTS

BY Jay Steven Levine, Esquire

Boards of directors oftentimes do tend to take a neighborly and therefore casual attitude toward collection of assessments, forgetting that the association is a business which depends upon owners' timely payment of assessments. Bank foreclosures and bankruptcy filings compete with associations and typically preempt the association from recovering all or any of its past due assessments. To maximize successful collection, the association should adopt a strict policy of collecting assessments.

The association should provide at least one reminder letter, and perhaps a second demand letter, but should be prepared to turn over the collection of the account to its attorneys within forty-five days after the due date of the oldest assessment installment.

There are a number of non-court remedies available to a community association which could prompt payment without the need to file a claim of lien and institute foreclosure proceedings. These remedies are as follows:

Charging of interest. Interest is due and owing at the rate set forth in the governing documents. If there is no rate set forth in the governing documents, then interest shall accrue at the statutory prejudgment rate of 10% per annum. The association might consider amending the governing documents to increase the interest rate to 18% per annum.

Imposition of late fees. In order for late fees to accrue, they must be so authorized in the governing documents. If the governing documents fail to provide for a late fee, the documents should be amended to add this remedy. The late fee in a condominium cannot exceed the greater of \$25.00 or 5% of the late installment.

Acceleration of assessments. Acceleration of assessments is a process whereby the association accelerates and calls due, all remaining installments of the annual assessment for the balance of the budget year. This right exists only if provided for in the governing documents. In a condominium, the due date for the accelerated assessments is the date on which a claim of lien is recorded. In homeowners' associations, the due date depends upon the wording of the governing documents.

Denial of lease application. If an association has the authority to reject a lease application, then the association does have the right to deny the application if there is a delinquency in the payment of assessments and the owner does not make arrangements suitable to the association to bring the delinquency current. A landlord who is delinquent in the payment of assessments and is seeking approval of a lease application will have to reckon with the delinquency in order for the application to be approved by the association.

Denial of voting rights. Unfortunately for condominium

associations, the voting rights of a condominium owner cannot be suspended or denied because the owner is delinquent in the payment of assessments. In a homeowners association, if the governing documents so provide, the association may suspend the voting rights of an owner who is delinquent in the payment of the annual assessment only, and only provided that the delinquency is over 90 days old.

Once the association is faced with the prospect of forwarding a collection account to the association's attorneys, the attorneys will threaten the filing of a claim of lien if payment is not received (together with any interest, late fees, costs and attorneys' fees) within a 30 day time period. Some associations prefer to begin the process with the filing of a claim of lien, in which case the attorneys will prepare and record the claim of lien and then threaten foreclosure proceedings if full payment is not received.

The association should take caution in accepting partial payments while an account has been turned over to the association's attorneys. A condominium association must ultimately accept a partial payment, but is encouraged to contact its attorneys for direction. A homeowners association should not accept partial payments unless counsel directs otherwise. In any event, associations receiving partial payments should save the postmarked envelope and all contents and await direction from counsel.

Associations too often invoice owners for the payment of assessments when the collection account has been turned over to the association's attorneys. If the association fails to mention in the invoice that additional sums such as interest, late fees, costs and attorneys' fees are also due and owing, the association might compromise its ability to recover those amounts later on.

In the event that non-court remedies and perseverance by the association fail to provide payment, and demands from counsel for the association are likewise unsuccessful, then the association is ready to authorize the filing of a foreclosure action. Because of the perceived expense, associations are sometimes reluctant to authorize the filing of such an action. Associations should be aware that this is a powerful remedy that does gain the attention of most owners, who for the most part end up paying all costs and attorneys' fees in order to settle the matter. Once in a while, the association obtains a foreclosure judgment with the result that the clerk of the court conducts a foreclosure sale. The association would be present at the foreclosure sale and could bid up to the amount of the foreclosure judgment without having to pay any money toward the bid. If the association is the high bidder at the foreclosure sale, the association would be obligated to pay the clerk's fee which is currently \$40.00 and documentary stamps on the amount of the bid plus any mortgages

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which may exist on the property. (The existence of mortgages in a priority position is not reason for an association to decide not to pursue a matter to a foreclosure judgment). As high bidder at the sale, the association would obtain title to the unit. The association could then rent the unit without any liability for the mortgage payments or real estate taxes. The association would simply carry insurance on the unit's contents and for liability. The association would continue to receive rent until the mortgagee forecloses. This author has found from experience that the association's ability to rent the unit may be the only way to reimburse the association for its expenses in the foreclosure process and to pay toward delinquent assessments.

The most typical defense raised by an owner to nonpayment is the owner's dissatisfaction with the association's policies and maintenance. The reported case law recognized that such dissatisfaction is not a defense to payment.

A strict policy of collecting delinquent assessments, together with the proper remedies in the governing documents, improves the prospects that all assessments will be collected, thereby improving the cash flow position of the association.

Jay Steven Levine has been practicing law since 1976 and specializes in community association law. Jay Steven Levine, P.A. has offices in Boca Raton, Palm Beach Gardens and Vero Beach. Jay can be reached at 800-260-0226 or jayslevinepa@aol.com

LANDSCAPING & WEATHER NOTES

Keep an eye on how wet or dry your plants get throughout the next few months. Depending on the how cool the weather remains, watering needs may be reduced or increased, as cold weather slows the metabolism of plants. Do not fertilize or prune any shrubs or trees at this time! Wait until April to do any pruning or transplanting. Young and newly planted trees are susceptible to stress during cold weather. Same applies to the root pruning of trees and shrubs, as it takes at least six weeks for new roots to develop outside the root ball to ease the stress of transplanting or root pruning. Otherwise, it is a good time to enjoy our beautiful, mild winter weather and the time of the year when we do not have to work as hard to keep our gardens and landscapes looking good.