

apm NEWS

A Publication of Associated Property Management - Summer 2007

Reserve Studies for Community Associations

BY JOHN R. MATH, LCAM

Since the year 2000 we have experienced rapid increases in housing values and building materials. Most associations are sorely under-funded in their Reserve Accounts due to using inadequate or unrealistic assumptions for their reserves. This is not anything that has been done on purpose but rather, it has crept up on most associations that have not had reserve studies done in the last few years.

Increases in the cost of oil, building materials, labor costs, insurance, and overhead and inflation factors have all contributed to major increases in roofing, painting and paving. In addition, most other major components that may make up an association reserve fund have also experienced major increases. Elevators, pools, decks, fencing and landscaping have had large increases as well.

The purpose of performing a reserve study is to provide a

basis for the funding of the repair, replacement and maintenance of the components that the association is responsible for. We strongly suggest that an association have a professional reserve study performed on the major components that make up their reserve fund.

For condominiums Chapter 718 defines the minimums for the association to follow. This includes roofing, painting, paving and any other component that costs more than \$10,000.00. In today's market, that includes most items for a building.

For an association that is governed by Chapter 720, the documents and common business sense will dictate the minimum amounts and components that should be reserved.

The scope of a proper reserve study will contain the following information:

1. Will identify the components which should be included in the reserve study.

2. A physical inspection of the buildings, mechanical systems, common elements, including paving.
3. Field measure the components that have been identified.
4. Current cost estimates for replacement for each component will be established using various nationally accepted cost estimators and local contractors, if necessary.
5. Each component will be evaluated in order to determine their normal life expectancy.
6. The normal remaining life needs to be estimated for each component. This estimate will be based on normal usage, with normal maintenance.

The normal annual contribution will be calculated for each component, based on a normal life expectancy.

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Based on all of the information above, calculate and establish the current reserve deficit or surplus. Further calculations will be made to fund the deficits, if necessary.

As a Board member I would want to have this information in order to proceed with presenting a proper and accurate budget to the membership. As a member I would want to have this information in order to see if the reserves have been or will be properly funded. With this information, if not fully funded, I would then be able to calculate the cost of a special assessment if a component had to be replaced prior to its scheduled time. In addition, as a member, if the reserves were funded properly or over-funded, I would definitely point this out to a potential buyer, thus showing evidence that the association is managed well and that special assessments will probably not be necessary in the future.

A unit in a well-run, properly funded community or in a building is worth much more in the marketplace than a unit in a community that will have to have special assessments to fund any repairs.

When hiring a service to provide a reserve study, make sure that the company has a proven track record. Get and check references from other associations. Also, we suggest that you see a sample of their reports prior to hiring them. A reserve study will help to show the long term financial health of your association.

Ask The Attorney

By Edward Dicker, Esq.

Q. *Our Board had a special assessment for insurance and they collected too much from the owners. We would like to have the money back. The Board said they will give it back to the owners next year with a reduced assessment. Can they do this? Do we have to wait that long?*

A. Under the Condominium Act, the Board of Directors has the option of refunding the surplus to the membership, or it may retain the surplus to be used for any proper common expense of the Association. There is no requirement under the Homeowners Association Statute to refund the remaining surplus of a special assessment.

Q. *Our Board insists on sending out violation letters to owners that have brown yards due to the drought and water restrictions. Is this right when we are only allowed to water our grass once a week?*

A. Generally, Boards should pursue an owner who is violating a restriction. However, Boards are also required to be reasonable. Due to the drought and water restrictions, it would not be reasonable to pursue the owner at this time. The Board should re-evaluate the situation after the drought is over and the restrictions are lifted.

Q. *We have changed to a new management company and they are trying to set up our books and records. Our former*

management company will not release the records without paying them a "transfer fee." There is nothing in our management agreement covering this charge. Is this right and do we have to pay it?

A. The former management company is not permitted to insist on a transfer fee prior to releasing the Association's books and records. In fact, even if the management company contract provided for a fee, the management company would still be required to release such records, pursuant to the Florida Administrative Code.

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REMINDERS!

In anticipation of the hurricane season which began on June 1, review all insurance policies to make sure they are in order. Make copies of all contracts, warranties and unit owner roster sheets for storage in a safe deposit box or other safe place. Back-up any data on computers.

Make sure all of your Board of Directors and Members Meeting agenda, minutes and notices are up-to-date and in order, stored properly with separate copies.

Review your association's emergency evacuation procedures with all committee persons, residents and selected professionals.

COLLECTIONS OF DELINQUENT ASSESSMENTS

by John Sheppard, Esq.
Dicker, Krivok & Stoloff, P.A.

At some point, most Associations face the issue of collecting delinquent assessments from an owner. If an assessment is not paid after the Association sends one or more late notices, it is generally advisable for the Association to begin collection proceedings. Typically, the Association should be successful in recovering the delinquent assessments, since there are very few defenses an owner may legitimately raise for not paying assessments. Additionally, the Condominium Act, and most Homeowners Associations' Governing Documents, provide for recovery of attorneys' fees and costs associated with collection of past due assessments. Particularly if the Association's counsel looks to the delinquent owner for payment of the attorney fees (and does not bill the Association), there is no disadvantage in initiating collection proceedings. Another reason for initiating the collection process is that it is important to demonstrate to all owners that the Board will take appropriate action against owners who do not pay assessments. If owners perceive the Board to be lax in this regard, it will likely lead to other owners not paying their assessments timely. Such laxity can also result in a defense of selective enforcement that hinders an Association's ability to collect other past due assessments.

Typically, the Association attorney will initially send a letter to the owner, advising him of all amounts owing (assessments, interest, late charges, attorney fees, and other costs) and providing the owner 30 days during which to make payment. This letter is required by and must conform to the requirements of the Federal Fair Debt Collection Practices Act, which has been applied by courts to Condominium and Homeowners Association assessment collection. This initial letter resolves most delinquencies. However, if an owner does not pay during this period, the second step is filing a Claim of Lien against the property. A copy of the lien, along with another letter, is furnished to the delinquent owner, advising him that if payment is not made within a 30-day period, the Association will file a lawsuit foreclosing the lien. Most remaining delinquencies are resolved during the 30-day period subsequent to filing the Claim of Lien. However, for those who have not made payment, it is generally advisable to file a lawsuit foreclosing the Claim of Lien. Typically, most of these lawsuits are resolved without the necessity of a trial.

For those lawsuits in which the Association obtains a Final Judgment, there will be a foreclosure sale (public auction). If there is a bidder at the sale who bids more than the judgment amount, the Association will receive funds to satisfy the Association's judgment, and that bidder will become the owner of the unit. If there is no bidding, the

Association will become the owner of the unit, subject to any superior interests such as mortgages or tax liens on the property. However, the Association will not have to actually bid any money; the judgment the Association has may be used for bidding at the foreclosure sale. If the delinquent owner has a mortgage on the property, he will likely stop paying that mortgage (if he has not done so already), upon losing title to his home. Therefore, at some point, the lender will likely foreclose. Since the lender generally has a superior interest to that of the Association, the lender will eventually take title away from the Association at the mortgage foreclosure sale. However, during the period of time the Association does own the home, it may attempt to rent the home and recover some, or perhaps all, of the assessments which are owed to the Association. Or, depending on the amount of the mortgage, and whether there is any equity, it may be possible for the Association to sell the home. Regardless of the outcome, the Association will be in a better position than having a delinquent unit owner who refuses to pay assessments, so foreclosure is almost always in the Association's best interest.

Depending on when an owner stops paying his mortgage, the lender may foreclose at any time during the collection process. Under the Condominium Law and most governing documents for Associations, the first mortgagee has a superior interest to that of the Association. This means that even if the Association has filed a lien, or has a foreclosure lawsuit pending, the lender will have a superior interest and will be able to wipe out the Association's claim. Typically, when an Association is served with the mortgage foreclosure lawsuit, it is advisable to stop collection activity, other than filing an Answer and an appropriate claim on behalf of the Association, in the mortgage foreclosure lawsuit. By filing this claim, the Association may recover any surplus which may exist after the mortgage foreclosure sale. Although the Association has the right to continue pursuing its own collection efforts and may file a Claim of Lien and a foreclosure lawsuit, it will not be any better protected by doing so, since the same result should be achieved by filing an Answer in the mortgage foreclosure lawsuit.

By filing an Answer in the mortgage foreclosure action, the Association will preserve its right to seek any surplus after the mortgage foreclosure sale. However, these days, it is rare that there is surplus. Fortunately, under the Condominium Act, if a first mortgagee obtains title at the foreclosure sale, the lender is obligated to pay six (6) months delinquent assessments, or one percent of the original mortgage amount, whichever is less (pursuant to

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Section 718.116, Florida Statutes). In addition, the lender is obligated to pay all assessments coming due subsequent to acquiring title.

The Association also has the ability to pursue a judgment against the former owner who remains personally obligated to pay the assessments which came due, while he owned the unit. Typically, it may not be advisable to pursue such an individual, unless the Association is aware of the individual having sufficient assets.

Finally, delinquent unit owners may seek relief by filing bankruptcy. However, the Bankruptcy Code provides a number of protections for Associations in securing collection of their assessments, so a bankruptcy filing should not be viewed as a time to give up. The Bankruptcy laws are complex and ever changing and Associations wishing to maximize their recovery in the event of a unit owner bankruptcy should discuss the matter with their Association attorney.

When the Association acts timely, it should generally be successful in recovering delinquent assessments. However, due to mortgage foreclosures, there will likely be some loss to the Association from unrecovered assessments. For this reason, it is prudent for the Board to take this into account when adopting a budget.

Associated Property Management of the Palm Beaches, Inc., is a nineteen-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 assocpropmgt@bellsouth.net 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