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# THE Law Journal

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## Amend Your Way to Efficiency and Cost Savings

BY DAVID E. HICKEY, ESQ. – HICKEY & PETCHUL, LLP

Amendments to governing documents can increase the cost effectiveness of an association's operations. Amendments that can create greater efficiency and cost savings are numerous, but are often unique to each individual set of CC&Rs. However, in recent times, a handful of beneficial

amendments have emerged as somewhat universal in their potential applicability and benefit. They include:

### Insurance Provision Amendments

A review of the insurance provisions of the CC&Rs with the association's insurance professionals can often reveal a number of amendments that

would allow associations to benefit from modern insurance concepts while still providing reasonable coverage for the association. The most common is an amendment providing that a condominium association may reduce its coverage to a "bare walls" type policy. A "bare walls" type policy, in general terms, provides coverage for damage

to the common area and extends into the units only to the interior "bare" surface of the units' drywall (in other words, it excludes coverage for unit interior fixtures, floor and wall coverings, or other personal property).

Such an amendment shifts the responsibility to insure unit contents to the homeowner, who can typically

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authorize associations to foreclose on liens for most assessments. However, associations may not foreclose upon assessment liens against a homeowner who is an active servicemember (or within nine months after his/her military service ends) if the homeowner had purchased the home before military service commenced. The only exceptions to this prohibition are upon a court's order for foreclosure or upon the homeowner's agreement that the home may be foreclosed. It is noteworthy that associations are not prohibited from foreclosing upon a lien against an active servicemember homeowner who had purchased the home after military service had commenced.

### **Violation May Subject Association to Severe Penalties**

Associations and their representatives (such as board members and managers) who knowingly violate these protections for homeowners in the military can potentially face criminal prosecution. Further, such violations can potentially result in association fines up to \$200,000, and association representative fines up to \$100,000 and/or imprisonment of up to one year. Finally, if a homeowner in the military prevails in a lawsuit against an association for filing a false declaration about whether the homeowner is in the military, then the association could also be liable for the homeowner's attorney's fees incurred in the lawsuit and for punitive damages. Consequently, the association and association representatives should exercise great care prior to proceeding with default judgments or foreclosure actions against association members who are, or could potentially be, in the military.

# Collections and Efficient Board Meetings: A Primer

BY ROD A. BAYDALINE, ESQ. & JENNIFER M. JACOBSEN, ESQ. – BAYDALINE & JACOBSEN, LLP

### **When Are Assessments Delinquent?**

Generally speaking, unless the documents provide for a longer period, assessments are delinquent 15 days after they become due. As a best management practice, however, do not rely on the statutory period and make sure to routinely check the association's governing documents to make sure they do not provide for a longer grace period.

### **When Is a Notice of Delinquent (NOD) Assessment Mailed?**

An association must provide at least 30 days written notice, through certified mail, of its intent to record a lien for the collection of delinquent assessments. Make sure the written notice contains the disclosures required by California Civil Code §1367.1.

### **When Can a Lien Be Recorded?**

Upon expiration of the 30 days from the NOD, the board of directors will need to decide whether to record a lien on an owner's separate interest for the unpaid assessments. The decision to record a lien must be approved by a majority of the board in an open meeting and recorded in the minutes for that meeting. Remember that in order to maintain the confidentiality of the owner, the minutes should only identify the separate interest to be foreclosed upon by account or parcel number.

### **When Can the Lien Be Foreclosed Upon Through Non-Judicial Foreclosure?**

When the delinquency equals or exceeds \$1,800 or the assessments are more than 12 months delinquent, a majority of the board may approve foreclosing upon the property through non-judicial foreclosure. The approval must be conducted in executive session, but must be recorded in the minutes of the next open meeting by account or parcel number to maintain confidentiality. In order to make a thorough analysis and decision, the board will need to know whether the property in question is subject to a pending foreclosure action by any senior encumbrance.

As of January 1, 2011, Assembly Bill 2016 permits an association to record a single "blanket" request covering all separate interests within the association. This notice requires mortgagees to notify the association of any pending and completed mortgage foreclosure sales that will assist management and the board in monitoring such information.

### **How Does the Board Respond to a Payment Plan Request?**

A delinquent homeowner may, within 15 days of the postmark of the notice to record a lien, submit a written request to meet with the board of directors to discuss a payment plan. Upon receiving such a written request, the association must provide the owner any standards for payment plans that may exist. The board of directors is not required to create standards for a payment plan or even to enter into a payment plan, but they must meet with the owner in executive session to discuss the possibility of a payment plan upon the owner's request. When considering a payment plan, an owner's ability to pay in a timely manner will be paramount; however, the board will also need to consider how it has historically treated other owners who have requested payment plans to avoid claims of preference or discrimination.

### **What About Requests for IDR or ADR?**

An owner, upon receiving the association's notice of delinquent assessment, may request either internal dispute resolution (IDR) or alternative dispute resolution (ADR). Keep in mind that, upon an owner's request, the association must participate in IDR. As a practical matter, any time that an owner is volunteering to meet and attempt to resolve an outstanding debt is a good sign and should be welcomed by the association. Engaging in the process will likely provide the association with an understanding of the owner's financial status and ability to pay. It may also result in immediate cash flow to the association in the form of a negotiated payment plan or lump sum payment.

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This is my first edition of the Law Journal as editor, and I would like to thank some people who have helped make the Law Journal great in the past. First, I would like to thank Tracy Kreiss and the staff at CACM for their dedication and persistence in helping the authors produce a first class publication. Second, I especially would like to thank Sandra Gottlieb, Esq., for her years of dedication to the Law Journal and the guidance she's given to me in this transition. And third, I really appreciate the contributions of the past authors who took time out to help educate us all on new trends in community association law. (And, I would like to personally call on all our community association attorney members to consider writing an article for the Law Journal.)

As we continue on in 2011, managers are busier than ever. The Law Journal provides a quick and easy way to stay abreast of current issues in our industry. Our goal is to provide articles on relevant topics, which can assist with the numerous day-to-day concerns you face from boards, members and service providers. I am honored CACM has chosen me for this task and a look forward to working with great guest editors and authors to provide you, the managers, with relevant and timely information.

Until Next Time,  
Howard J. Silldorf, Esq.

**Collections and Efficient Board Meetings**  
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**Is There a Way to Streamline the Collection Process So It Doesn't Consume the Agenda?**

The collection process may be streamlined by strategically placing the collection tasks that need to be handled on the portion of the agenda where they will least disrupt the meeting. For example, if there is a hot button issue on the agenda (such as new parking rules), the collection items might be addressed after the parking rules have been introduced and discussed by the board and members have been given the opportunity to respond. This way, members who are only interested in the parking issue can leave the meeting after that matter has been completed.

Additionally, as a best management practice, the manager will need to have organized records and charts to aid the board in its decision-making. For example, a chart can be prepared monthly to identify the parcels that are subject to delinquency and foreclosure as action items, with a cross-reference to relevant statutory notice dates. Such a chart could provide an easy and accurate reference guide as to when notices should be sent, when they have expired, and what action, if any, has been or needs to be taken.

The board of directors may also consider providing members with a timed portion of the agenda to provide their comments on association business in order to avoid disrupting a board meeting or getting off topic. If a particular homeowner has a personal debate about his/her own collection experience, he/she should be invited to meet with the board in executive session to discuss that item. Maintaining control of meetings and moving through each item of business with minimal debate ensures that each item is addressed and that tempers or personal criticisms do not distract the board from the task at hand.

**FHA Approval and Your Association**  
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at his/her cost and expense. If the association's units generally do not have a problem with marketability or if only a single homeowner is interested in obtaining FHA certification, unless the association's governing documents impose a duty to do so, the board has little authority to expend the association's resources on this process. Regardless of who initiates the process, the end result, if successful, is that the association becomes certified. The association will be asked to provide certain information to the prospective lender, which it may do. However, the person filling out the paperwork must avoid certifying or guaranteeing information that they are not certain of. Anything other than the most basic facts should be qualified with "to the best of my knowledge."

In order to be eligible for FHA certification, the association must meet certain qualifications. Some are static; for example, no more than 25% of the total square footage of the development can be used for commercial purposes, no more than 10% of the units can be owned by the same investor, and no more than 30% of the owners can already have FHA loans. If an association fails any of these tests, not much can be done.

There are other requirements that the association can actively strive to fulfill in order to achieve FHA certification. One easy requirement is that the association must carry specified insurance. The association's insurance agent can tell you if the association has adequate insurance or what the cost would be of obtaining the required insurance. Another test that is typically not difficult to meet (in a good economy) is

that 10% of the association's regular assessments should be going toward the reserves. Failure to meet this requirement will not necessarily disqualify the association, but it sparks further scrutiny. If there is room in the budget, this is not an unreasonable qualification to meet, and unless the reserves are fully funded, it is not a bad idea, regardless of the association's FHA eligibility.

The requirement that no more than 15% of the association's units can be more than 30 days past due on assessments seems like something that is difficult to change; however, if the association does not currently pursue collections diligently, it will find that through strict enforcement, it can significantly decrease the delinquency rate. Just like reserve fund contributions, increasing collection efforts is a good idea regardless of the association's FHA status. Another more complicated requirement is that at least 50% of the association's units must be owner-occupied.

When faced with the prospect of obtaining FHA certification for an association, there are several questions to ask: Is doing so in the best interests of the association? Does the association meet the basic, unalterable requirements? Is there an owner or prospective owner who is willing to lead and pay for that process, or does the association have a strong reason for initiating the process itself? If the answers are yes, it may be worth putting in the effort to meet the final requirements and achieve FHA eligibility. Of course, it is always advisable to have the association attorney review any documentation you prepare before submitting it to the lender.