



COMMUNITY MATTERS

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News and Trends in Community Association Law

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It's In The Budget: Planning For Bad Debt In Uncertain Times

by | **Stephen A. Finamore, Esq.**

The board of directors for a community association is charged with ensuring that the association's budget sufficiently covers the expenses for maintaining amenities, providing

services, and building adequate reserves for future projects. Regardless of whether a community has suffered a financial impact from the pandemic, the board of directors should plan on budgeting for assessments that may not be collected within a year or, possibly, ever. For budgeting purposes, this is often referred to as "bad debt." In planning budgets for 2021, it would be prudent for most communities to increase the line item for "bad debt" along with an increase of assessments to offset any deficit.

Perhaps surprisingly, many associations did not experience any issues collecting assessments in 2020. Communities with an annual assessment due in January of 2020 were, generally, able to collect the assessment in full prior to the first impact of COVID-19, which occurred in March. While the economic impact of the pandemic has been well publicized, the financial impact has not been the same for every individual. Some industries, such as hospitality have suffered, while other industries, such as technology, have thrived. As such, many communities with quarterly or monthly assessments still did not experience an increase in delinquencies, due to the overall financial stability of its members.

These fortunate communities were able to continue business as usual in 2020 and will begin 2021 in a better position than communities that had difficulty collecting. It would be naïve, however, to simply

assume that this good fortune will endure and that the number of members suffering hardship will not increase. It is also plausible that the cost of goods and services will increase over the next year. Even if the community does not experience difficulty collecting in 2021, an increase in the budget for "bad debt" with a corresponding increase of assessments would still be a reasonable measure to ensure reserves for the cost of future projects.

By contrast, some associations experienced difficulty collecting assessments in 2020 and decided to enforce collections through legal channels. Although there have been delays in legal proceedings, by and large, collection efforts have remained effective in 2020. For communities that have had delinquencies and have addressed them proactively, it is safe to assume that there will be more delinquencies in the upcoming year and an ongoing need to address them in the future. Increasing the budget line-item for "bad debt" as well as the line-item for "legal" would be reasonable measures.

Some communities that experienced difficulty in collecting assessments in 2020 did not actively pursue collections. Some of these associations may have grappled with the scruples of engaging in collection efforts to compel payment during the pandemic and delayed collection efforts in favor of deferment or forbearance. With the end of the year in sight, these boards must

evaluate any losses suffered in 2020. Not only should these communities evaluate whether revenue will be sufficient to cover expenses in 2021, but also whether the impact of any deficit suffered in 2020 will have a ripple effect on reserves and the ability to cover future projects. An increase of assessments to cover "bad debt" and for "legal" is a forgone conclusion for these communities. A more proactive approach to collections is also recommended.

Although it is possible that pandemic-related delinquencies may be a short-term problem, it is important to adequately project "bad debt" into the budget for the foreseeable future. This is because, even if a delinquency is collected from the owner, it may not be recovered in time to pay expenses that become due to the association during the coming year. An increase in the budget for "bad debt," along with a corresponding increase in assessments, is a prudent measure to help limit the risk of a budget deficit. In summary, it is better to have the additional revenue and not need it than its converse: to need it and not have it.

There are procedural mechanisms provided in each community's governing documents for preparation of the budget and for levy and collection of assessments. If your community is facing a budget deficit and an increase in delinquencies, please reach out to your association's attorney for assistance.



Dealing With Troublesome Tenants

by | **David C. Boy, IV, Esq.**

While the majority of tenants are good neighbors and comply with community guidelines and rules, from time to time associations encounter tenants who cause a disproportionate share of

community disruptions and violations.

The first option for most associations will be to impose fines against the property owner. Property owners who rent their properties are typically doing so to derive income, and fines provide a financial incentive for the owner to ensure that the tenant complies

with restrictions and rules. An owner will also likely not renew a lease with tenants causing fines on the owner's account.

While many governing documents allow fines to be imposed against the owner or tenant, we ordinarily advise fining the owner first. This allows the fine to be assessed

against the owner's account, which usually affords the best opportunity for collection. An exception to that general rule is a situation where the owner is out of state or cannot otherwise be located. It is also important to review fining procedures, as some governing documents require that notice be provided

to the “violator,” which is the tenant.

For maintenance violations, exercising the right of abatement (“self-help”) is a more practical option for a rental property. While performing self-help on an owner-occupied home could result in a confrontation with the owner, tenants usually have the expectation that contractors regularly come to the property to perform maintenance work for the owner. The cost of the work can then be assessed to the owner’s account.

Now, what about more serious violations of the governing documents by tenants? Well-drafted governing documents provide that a violation of the community’s declaration, bylaws, or rules and regulations constitutes a breach of the lease and entitles the owner to evict the tenant. Those documents will also provide that if the owner fails to evict the violating tenant, the association may evict the tenant on the owner’s behalf, with all attorney’s fees and costs charged to the owner.

A few years ago, for example, a tenant assaulted a female front desk worker late at night at a condominium that our firm represents. Criminal charges were filed, but in the meantime the association wanted the tenant immediately removed from the

condominium. Our firm demanded on behalf of the association that the owner initiate eviction proceedings. The owner responded and promptly filed an eviction action to remove the problematic tenant.

In a more recent case, an owner was leasing without submitting a copy of a lease or any other information regarding the tenants to the association. The tenants repeatedly violated numerous provisions of the rules and regulations and were reportedly involved in criminal activity occurring in the community. After the owner failed to respond to the association’s demand that he evict the tenants, our firm filed an eviction action against the tenants in magistrate court. Even though the tenant claimed to be current on the payment of rent, the violations of the association’s rules and regulations constituted a default under the terms of the lease. While many courts are delaying eviction actions due to the COVID-19 pandemic, we informed the court that this case did not involve the non-payment of rent. Within a month of the case being filed, the court scheduled a hearing (via Zoom), and after strong words from the judge, and a breakout meeting with the tenant, an agreement was reached whereby the tenant voluntarily agreed to

move out by a certain date. That association then assessed the costs of that eviction action to the owner’s account and is pursuing collections.

Note that although a landlord/tenant case in magistrate court can be a cost effective and efficient means of addressing tenant violations, it can also come with challenges. Virtually all cases filed in landlord/tenant court involve non-payment of rent and are filed by a landlord/owner. By contrast, an association would be filing the case as attorney-in-fact for the owner due to violations of the governing documents. In one case we handled, the owner showed up to court and objected to the eviction of the tenant. While we explained to the magistrate court judge that the declaration authorized the association to act on behalf of the owner, the judge ultimately decided to transfer the case to superior court. That case was eventually resolved, but superior court meant more time and expense to litigate.

When your association finds itself dealing with a troublesome tenant, make sure to review the governing documents and consult with your association’s attorney to develop a strategy for addressing those issues in an effective manner. ❖



A Board Divided Cannot Stand

by | Jesse M. Cox, Esq.

One of the most important aspects of making decisions as a board of directors (or “board”) is often the most overlooked. Namely, that members of the board should ideally have similar goals,

ideals, and objectives to implement in the community. This does not mean that everyone should think the exact same way; after all, having diversity of opinion is an advantage for a board and in life, in general. However, if board members have drastically different ideas, these differences can often cause long-term issues if they are not resolved. For example, if approximately half of the members of a board want to allow short-term leasing and the other half are adamantly opposed, what ends up happening? In disputes like this, the short-term outcome is often a continuation of the status quo with no changes in policy or the governing documents. The result can be that homeowners become thoroughly unhappy with the board and their association.

One way to help avoid these issues is for the board to focus primarily on what it and the community want to accomplish. Once it has a goal in mind, if questions come up, the association’s attorney and property manager can help figure out how to get there. For purposes of this article, I will address when this comes into play for covenant violations

and covenant enforcement litigation.

Covenant Violations:

Occasionally, even the best community will have problems with covenant violations. Whether it is a homeowner allowing an aggressive dog to run outside without a leash, or a homeowner paints her house some obscure color, issues at some point crop up. Many times, the violating owner will make a settlement offer, but the board cannot decide on whether or not to accept it, and the matter drags on; or worse, the previously amenable homeowner no longer wants to fix the violation because the board is perceived as being unreasonable. The best way to avoid these issues is for the board to determine three things prior to taking action on a covenant violation. First, what the perfect result would be. Second, what an acceptable result would be. Lastly, what an unacceptable result would be. This ultimately makes the decision process faster and less complicated when homeowners make a settlement offer. This also avoids the last minute issues raised by a divided board that previously took action on the violation.

They may have all agreed that a violation was ongoing, but not on what a good resolution looks like. By resolving these issues ahead of time, these cases are resolved faster, easier, and with less discord. Another important area where these issues should be discussed ahead of time is when a board needs to make a decision is in litigation.

Litigation:

Many times, the same issues with covenant violations happen in litigation. Immediately before a court hearing, a homeowner may make a settlement offer. However, if no one has the authority to accept the offer right there, the case cannot be resolved, and a judge may issue a ruling that neither party wants. While it is natural for a board to want an ample amount of time to weigh relevant issues, at certain points, this may not be an option. Because of this, if the board does not delegate some authority, it may not end up with an optimal solution. As with covenant violations, the best way to avoid these issues is for the board to determine what the perfect, acceptable, and unacceptable results would be. Then, the

¹This article specifically addresses assistance animals, which are distinguished from “service animals” as that term is defined under the American with Disabilities Act (ADA).

board may give the association's attorney the authority to accept either of the first two results that it would be happy with in the event the board cannot be consulted prior to the offer expiring. While last minute phone calls can sometimes work, it can also

lead to misunderstandings and less optimal resolutions. Resolving these issues ahead of time results in better outcomes for the association and the community.

These are just two mere examples of how a

divisive board can hinder moving a community forward. Should you believe your board is heading down this path and need assistance, please contact your association's attorney. ❖



Responding To Home Improvement Violations

by | **Dwayne D. Kinney, Jr., Esq.**

One of the most important aspects of making decisions as a board of directors (or "board") is often the most overlooked. Namely, that members of the board should ideally have similar goals,

With more people staying home and an abundance of beautiful weather this past summer, many community associations saw a dramatic increase in the number of home improvement projects occurring in their neighborhoods. While many such projects focused on needed maintenance, some communities are now dealing with unapproved modifications and new covenant violations.

No one likes being the bearer of bad news; however, one of the most important duties an association's board of directors has is enforcing the covenants. When homeowners violate the covenants, it is important that the board of directors address the violation as soon as possible.

One of the most useful tools the board has for covenant enforcement is letter writing. Homeowners are often unaware that they have violated the association's covenants. Therefore, sending a friendly letter to the homeowner will many times result in the violation being quickly abated.

Unfortunately, some homeowners will inevitably choose not to respond to the association's friendly letter or outright refuse to abate the violation at issue. So what does the board of directors do when a homeowner refuses to comply with the covenants? The answer is covenant enforcement.

If a homeowner refuses to remove or alter an unapproved modification or refuses to abate a violation, many community association's governing documents authorize the board of directors to impose fines and other sanctions. However, not every community

association has the authority to impose these sanctions for covenant violations. Therefore, it is of paramount importance that the community association's board of directors confirm that it has the authority to impose fines and other sanctions before doing so. If your community association does not have the authority to impose fines and other sanctions, our firm has significant experience in helping associations make the changes needed to provide the board of directors with such authority.

Let us assume the board of directors has the authority to fine. Now what? First, the board must verify whether it is required to comply with a fining due process procedure before imposing fines. Many community association's governing documents require the board to send written notice to the violating homeowner with specific information detailed. If the community association's governing documents have a fining procedure and the board does not comply with it, the fines imposed by the board may be subject to challenge. This is also true for the imposition of other sanctions such as suspending a homeowner's voting rights or suspending their right to use the common areas.

While a friendly letter and fines will often result in a homeowner abating the violation at issue, some homeowners may still refuse to comply with the covenants. So what can the board of directors do if their prior letters and fines have not worked?

Depending on the type of community, the violation at issue, and the language in the governing documents, the board may

consider self-help as a covenant violation remedy. In such cases, the association (or its agent) will have the authority to enter onto the homeowner's property to abate the violation directly. In addition, the association may be able to impose all costs associated with self-help against the homeowner's property as a specific assessment. However, self-help can sometimes be fraught with a myriad of unintended consequences. Therefore, we recommend contacting our firm to discuss the appropriateness of self-help and the best course of action.

Sometimes self-help isn't an appropriate remedy and homeowners continue in their refusal to abate a serious or ongoing violation despite receiving prior letters and fines. In such cases, the board of directors can consider directing our firm to file an enforcement lawsuit. Courts often grant community associations equitable relief, which requires a homeowner to comply with the governing documents and resolve all of the violations at issue. In addition, courts often award the community association the reasonable attorney's fees and costs it incurred to enforce the covenants.

Covenant enforcement can seem daunting when a board of directors is facing a homeowner who refuses to comply. However, whether your community association wants to proceed with letters, fines, sanctions, self-help, or the filing of a lawsuit, contact your association's attorney to discuss covenant enforcement and they will help guide you through the legal process. ❖



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