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# Community Up-Date™

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CURRENT NEWS FOR COMMUNITY ASSOCIATIONS

## Show Me The MONEY!

By Raymond F. Newman, Esq.

Assessments are the "lifeblood" of every association. Assessments provide the funds for the operation of the association and its amenities. It is not enough to develop and approve an annual budget funded by assessments, which provide for all the needs of the association. The assessments levied must be consistently collected when due. Otherwise, the association will suffer cash flow problems with the attendant inability to pay its bills in a timely manner.



One of the most important elements of collecting assessments when due, or shortly thereafter, is the establishment and strict adherence to a written collection policy. This policy must be established by the board of directors and copies furnished to each member of the association. The policy should contain the due date for payments, what happens if the payments are late, how late payments are to be applied, kinds and timing of notices to owners and timing of referral of delinquent accounts to association legal counsel for further action. It should also state that the delinquent owner

is responsible for payment of the collection costs. Much of the detail of this information will vary among associations in accordance with the dictates of the respective governing documents.

It is important to maintain a list of the correct names and current addresses for all owners. Effective collection cannot occur unless the notices are going to the correct person at the correct address. Having the correct name and address becomes even more important if lien recordation and foreclosure later become necessary. All owners are responsible for payment of assessments. Consequently, each must be named in a claim of lien and in any subsequent foreclosure action.

A sample plan of action for the collection of assessments based upon a written collection policy is set forth below. In this example, assessments are due on the first day of the month and delinquent after the tenth day of the month, if unpaid.

*cont. on page 2*

## TIDBITS Did You Know

*The official records of condominium and cooperative associations are subject to numerous regulations mandated by Sections 718.111(12) and 719.104(2), Florida Statutes, respectively.*

- Official records must be maintained within the State.
- Official Records must be made available to a unit owner within 5 working days after receipt of a written request.
- Official records are open to inspection by any association member or the authorized representative of such member at all reasonable times.
- The right to inspect the records includes the right to make or obtain copies at a reasonable cost.
- Associations may adopt reasonable rules regarding the frequency, time, location, notice and manner of record inspections and copying.
- If an association fails to provide the records within 10 working days after receiving a written request for same, it

*cont. on page 2*

## Money cont.

### Procedure for Assessment Collection

- Mail notice of monthly installment not less than 10 days before the due date.
- Mail second notice of monthly installment with gentle reminder on the 11th day after the due date; add late fees, if any, to the assessment installment.
- Mail third notice of monthly installment on the 21st day after due date with notice that the account will be referred to the association attorney after the last day of the current month for further handling, including the recording of a Claim of Lien.
- On the 35th day after the due date, forward the delinquent account to the association attorney for preparation and recordation of a Claim of Lien.
- Record attorney-prepared Claim of Lien.
- Attorney letter to delinquent owner with copy of recorded Claim of Lien notifying that foreclosure of the lien will be instituted in not less than 30 days. This letter must contain the statements and warnings required by law. This letter must also set out the total amount due for assessments

*(and the respective due dates), late charges, interest, attorney's fees and expenses.*

- Initiate lien foreclosure proceedings after the appropriate lapse of time.

The above plan is for example only. There are circumstances which may slow or alter the process. For example, if the delinquent owner disputes the amount of the debt, written verification of the amount owed must be furnished to this owner before the process may proceed. Before adapting a plan for its association, the board must consult legal counsel to determine that any proposed collection policy not only conforms to existing law, but also conforms to the governing documents of the association.

A criticism of this plan may be that the serious collection efforts begin too soon (35 days) after the due date. The answer to this is that all owners know in advance the amount of the periodic assessments and the due date of each. There are no surprises. Consequently, owners should be prepared to pay the periodic amounts due on their respective due dates.

In order to obtain and maintain the desired results from a collection policy, the contents of the policy must be widely disseminated. Do not assume that all owners are familiar with it. It is obvious that each new owner should be furnished with a copy, but other owners need to be kept aware also. A copy of the collection policy may be included with the copy of the annual budget that is furnished to the owners or it may be published in the association's newsletter on an annual basis. Keeping the owners informed of what is expected of them in this area will cause most of them to pay in a timely manner.

## TIDBITS cont.

creates a rebuttable presumption that it willfully failed to comply with this Statute.

- A unit owner who is denied access to the official records is entitled to the actual damages or minimum damages.
- Minimum damages for failure to provide the official records is \$50 per calendar day up to 10 days, the calculation to begin on the eleventh day after the written request.
- Any person denied access who subsequently prevailed in an enforcement action is entitled to recover attorney's fees from the person controlling the records.
- The association shall maintain a sufficient number of copies of the declaration, or proprietary lease in the case of a cooperative, articles of incorporation, bylaws and rules, and all amendments thereto, as well as the question and answer sheet and year-end financial information on the association property to ensure their availability to unit owners and prospective purchasers and may charge its actual costs for preparing and furnishing these documents to anyone requesting them.

Finally, be consistent in application. Once adopted by the board, the collection policy is a directive to the association manager to carry out its provisions. The board should get regular reports of unpaid assessments and the status of collection efforts for each. It should insist upon close adherence to the requirements of the established collection policy. Effective collection of assessments will keep the "lifeblood" flowing.



# ONE BIG HAPPY FAMILY: The Woes and Realities of Merging Condominiums

By Carolyn Myers-Simmonds, Esq.

Very large communities often consist of several separate condominiums operated by multiple associations. This occurs because the developer created a separate association to operate each condominium, as it was completed. After operating in this fashion for several years, the unit owners and the associations realize that operating as separate entities creates an administrative nightmare with regard to preparing multiple budgets, maintaining separate records and incurring duplicate costs.

The community then makes a decision to merge the two associations, in order to enjoy savings in insurance and maintenance costs, and to encourage consistency in enforcing the rules and regulations. The question becomes: how do they go about merging and becoming "one big happy family?"

There are two ways to "merge" the condominiums. The first is called a "property merger;" the second is called a "corporate merger." In other words, the condominium properties may be merged, or in the case of multiple associations, the corporate entities may be merged.

In a "property merger," the two condominiums would be "merged" into a single condominium. In essence, merging the properties means terminating one or more condominiums, while simultaneously creating or enlarging another condominium. To accomplish this, Section 718.110(7), Florida Statutes, provides:

The declarations, bylaws, and common elements of two or more independent condominiums of a single complex may be merged to form a single condominium upon the approval of such voting interest of each condominium as is required by the declaration for modifying the

appurtenances to the units or changing the proportion or percentages by which the owners of the parcel share the common expenses and own the common surplus; upon the approval of all record owners of liens, and upon the recording of new or amended articles of incorporation, declarations, and bylaws.

Based on Section 718.110(7), Florida Statutes, most property mergers require the approval of one hundred percent of all unit owners and all lien holders of record. However, obtaining the unanimous consent that is necessary is virtually impossible because, in most instances, at least one owner or lien holder may not agree. In some rare instances, property mergers are addressed in the declaration and require less than one hundred percent consent from the unit owners.

Another issue is that a property merger usually involves substantial or complete revision of the condominium documents. Further, a title insurance underwriter should also be contacted to determine whether a new survey would be necessary for a new legal description. It is also a good idea to have an abstract or title company prepare and certify a list of unit owners and lien holders as of the date the property merger documents are recorded. The list should be recorded as part of the merger as proof in the event the merger is challenged.

The second type of merger is called a "corporate merger." In this scenario, two or more separate corporations merge their identity into a single organization. The corporate merger results in a "multi-condominium association." Corporate mergers are governed by Section 617, Florida Statutes, (except when an association is a for-profit corporation, in which case Section 607, Florida Statutes, would control) and do not require unanimous consent of unit owners nor consent of mortgagees. The merger would become effective upon filing the



articles of merger with the Department of State and would require an affirmative vote of a majority of the unit owners (unless the governing documents provide differently).

The issues presented in a corporate merger are fewer than those in a "property merger," however, they can prove to be significant, if not handled carefully. For example, even if you have merged the multiple associations, if you have not also merged the underlying condominiums, then separate budgets and reserves would be required for each condominium. Further, a corporate merger may involve real property transactions if one or more of the merging associations own any interest in real property (This does not include the common elements, as the common elements are owned proportionately by the unit owners.). Other formalities, such as the legal documentation, are also involved. This includes a Plan of Merger, amendments to the governing documents, filing Articles of Merger with the Secretary of State, and filing certain certifications in the Public Records of the County where the condominium is located.

It may take a substantial investment of time and patience to merge your condominiums and/or your associations into a single condominium governed by a single association, but the resulting streamlined procedures may very well make it worthwhile for your community.

# CASENOTES

## The UNLICENSED PRACTICE of CONSTRUCTION

So your community association is having a nightmare with the contractor over some renovations, whether it be for balcony restoration work, re-roofing, or re-surfacing the pool deck. The work is behind schedule, there are numerous cost overruns, and the contractor has filed a lien on the property. The unit owners are on the warpath, and they want someone's head on a silver platter; they don't care whether it's the contractor's head or one of the board members' heads. One such association found themselves in such a predicament and was able to make lemonade out of lemons.

In *R.A.M. of South Florida, Inc. v. WCI Communities, Inc.*, 29 Fla. L. Weekly D761 (Fla. 2d DCA, March 26, 2004), the community association had entered into a contract with the contractor for concrete and masonry work at the clubhouse facility. During the course of construction, a dispute arose regarding the quality and timeliness of the work. The association refused to pay certain

sums and, in response, the contractor recorded a claim of lien and commenced a foreclosure action.

Some two years into the litigation, the association first became aware that the contractor was not licensed for the particular construction work at the time the work was performed, although the contractor had later become licensed for the work.

The association filed a motion with the court to determine the enforceability of the contract pursuant to Section 489.128, Florida Statutes, which reads:

As a matter of public policy, contracts entered into on or after October 1, 1990, and performed in full or in part by any contractor who fails to obtain or maintain a license in accordance with this part [i.e., Part I, Chapter 489, F.S.] shall be unenforceable in law or in equity.

Based upon the statute, the court dismissed the contractor's foreclosure

action and declared the contract illegal. The contractor tried to argue that an earlier version of the statute permitted the opportunity to cure the unlicensed practice of construction by having the license reinstated or otherwise obtaining the valid license for the work performed. The court refused to apply the older statute, leaving the contractor without any remedy.

The statute is very harsh against contractors and strips them of nearly all ability to collect on a construction contract if the contractor was unlicensed at the time construction work commenced. Not clear, however, is whether an association can enter into a construction contract *knowing* that the contractor is unlicensed, and then upon completion, refuse to pay the bill. Also unclear in the statute is whether a subcontractor can maintain its claim of lien performed on the project if the general contractor is unlicensed? For additional clarification on contractor licensing requirements, please visit [www.myflorida.com](http://www.myflorida.com).

In *Torres v. Arnco Construction, Inc.*, 29 Fla.L. Weekly D579 (Fla. 5th DCA March 5, 2004), a contractor sued two defendant property owners, a mother and son, alleging breach of an agreement for the construction of a home in Florida. The mother was a resident of the State of Florida and the son a resident of the State of New York. The mother was served personally at her Florida residence. The contractor attempted to serve its summons and complaint upon the son at his residence in New York; however, after several unsuccessful attempts, the plaintiff sought to effectuate "substituted service," by serving the mother at her residence in Florida, on behalf of the son.

When the son failed to appear and defend the claim, the contractor sought and received a default judgment against him for the sum

of \$59,000. Upon learning that a default judgment had been entered against him, the son retained counsel and filed a motion to vacate the default judgment based on invalid service of process. The trial court denied the motion to vacate and the son appealed. The Fifth District Court of Appeal reversed the trial court, holding that plaintiffs attempted "substituted service" upon the son by serving the mother was invalid. The court stated:

"The purpose of service of process is to advise the defendant that an action has been commenced and to warn the defendant that he or she must appear in a timely fashion to state such defenses as are available. Jurisdiction is perfected by the proper service of process. Indeed, a judgment entered without due service of process is void."

## There is NO SUBSTITUTE

The court reasoned that rules authorizing substituted service of process are the exception to the general rule that requires individual defendants to be personally served. In order to effectuate "substituted service" under Florida law, a defendant must be served at their "usual place of abode" by leaving a copy of the pleading at the residence with an individual residing there who is age 15 years or older. Substituted service of process at a location other than the place where a defendant is living (even if a relative lives there), is not proper service. Because the record demonstrated that the son was a resident of the State of New York when plaintiff attempted to substitute serve its complaint upon the mother at the mother's residence, service was invalid and the default judgment vacated.