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Community Association Success: Practical Tips for Collections, Compliance, and Meetings

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April 17, 2025

Roadmap for the Training Seminar

- Topics to be covered:
 - Basic Introduction to Community Associations
 - » Duties and responsibilities
 - Collections Overview
 - » Memorandum of Lien, Collections Lawsuits, and other Collections Options
 - Covenant Violations Overview
- 1. Q&A

HOA 101 - Fiduciary Responsibility

- Trustee-like relationship
- Act in best interest of community as a whole
- Duty to treat all owners equally without regard to self interest
- Duty not to self-deal (avoid conflicts of interest)
- Enforcement of Covenants (including covenant to pay assessments)

HOA 101 - 3 Main Legal Duties of Directors

- Duty of Care
- Duty of Loyalty
- Duty of Confidentiality

Legal Obligations to Pursue Collections

- Boards of Directors owe fiduciary duties in carrying out their roles
 1. These duties include the duty of care, duty of loyalty, and duty of confidentiality
- Association Boards have a legal duty to pursue delinquent assessments
 1. Duty to do so uniformly
 2. Duty to do so within the applicable statute of limitations
 3. Diligently pursuing collections is likely part of their duty of care
- The failure to diligently pursue collections could open Directors up to potential litigation for breach of fiduciary duty

Collections Basics

- Basic Collections Procedure Overview
 - What happens once account is turned over to counsel?
 - Initial review of account statement to review assessments
 - » 3 year statute of limitations for assessments
 - Initial demand letter to owner
 - PACER bankruptcy search of owner
 - » Automatic stay of bankruptcy law

Options if owner still doesn't pay:

- Warrant in Debt (Lawsuit)
- Memorandum of Lien
- Memorandum of Lien Foreclosure
- Judgment Creditor's Suit
 - » Recent Virginia law prohibits creditor's ability to proceed with these suits in many circumstances now

Assessments and Charges

- Virginia law changed relatively recently to provide that any charge or assessment (unless related to common area usage or disclosure packet) must either be authorized by the POA act, the Declaration, or by law.
- Virginia Code Section 55.1-1805
 - Cannot rely on Bylaws or Rules alone
 - Look out for late fees, administrative charges, etc.
- Many associations charge certain “late fees” or “administrative fees” that may not be enforceable
- It is important to watch out for these

Memorandum of Lien

- If owner does not pay after a demand letter, POA Act gives associations the ability to record a memorandum of lien.
- Virginia Code Section 55.1-1833.
- The association, in order to perfect the lien given by this section, shall file, before the expiration of 12 months from the time the first such assessment became due and payable in the clerk's office of the circuit court in the county or city in which such development is situated, a memorandum, verified by the oath of the principal officer of the association or such other officer or officers as the declaration may specify.
- Condominium Act permits memoranda of lien to go back and capture 90 days worth of delinquent assessments.
- Must also include certain information such as the name of the development, a description of the lot, the owners' names, etc.
- Once recorded, it is valid for 120 months

Warrant in Debt

- A warrant in debt is a lawsuit in a Virginia general district court
- General district courts in Virginia have jurisdiction for claims up to \$25k for matters such as delinquent assessments
- Once filed, Court will set a return date hearing about a month out
- At that hearing, Court will want to decide if matter is contested, if there will be a trial, and if pleadings will be ordered
- The case in general district court usually concludes within about 3-6 months
- Discovery is very limited
- Cost varies depending on how much resistance the owner puts up
- At trial, Association would need to produce records relating to account and assessments, as well as have a live witness to testify and authenticate those records.

Judgment

- If the Association wins at trial, it is awarded a monetary judgment
 - This is a judicial record that states that the debtor owes the creditor a certain amount of money
 - This does not mean the owner will pay right away
 - This does not mean that the court has ordered them to pay in any set amount of time
- Sometimes owners will pay judgments voluntarily
- If not, Association has to “enforce” its judgment through judicial remedies
- Post-judgment options commonly include garnishment and debtor’s interrogatories

Debtor's Interrogatories

- What happens if you don't know the debtor's assets/employment situation?
- Debtor's interrogatories is a statutory proceeding whereby a judgment debtor may request the issuance of a summons by the court to the debtor. The summons will direct the debtor to come to court to answer financial inquiries under oath in order to facilitate collections
- The Owner must appear and answer questions under oath
 - The attorney can ask about employment information, bank accounts, assets, etc.
- This information helps the collections process, especially garnishment
- This process may also spur some payment as owners typically don't want to come to court

Garnishment

- Garnishment may be used whenever any third party owes money to the judgment debtor
- Garnishment often takes the form of a bank account, wage, or rent garnishment
- Garnishment is a post-judgment proceeding in court
- Procedurally, this requires the filing of a request for garnishment summons (called a suggestion)
- Most garnishments may last up to 90 days
- Wage garnishments may last up to 180 days
 - Wage garnishments have significant limits on the amount that may be garnished
 - Most lower wage earners are significantly or entirely exempt
- Debtor has right to assert various exemptions and have a hearing on the same
 - Social security, public assistance, etc. are exempt by statute

Memorandum of Lien Foreclosure

- Begins with Written Notice of Foreclosure
- Once served, by statute, the owners would have at least 60 days to “redeem” and pay that amount secured by the memorandum of lien.
- Note: the foreclosure process is limited to recovering the amounts secured by the memorandum of lien, not the full amount due and owing.
- Should they fail to do that, the Association would have the right to proceed with a nonjudicial foreclosure against the property.
- The nonjudicial foreclosure is a statutory procedure by which the Association, in order to satisfy its lien, could force the sale of the property.
- Assuming the owners still did not pay after the notice period, the Association could then seek to appoint a foreclosure trustee to oversee the sale (typically a local lawyer).
- Notice of the sale would need to be given in a local newspaper for several weeks.

Memorandum of Lien Foreclosure - Continued

- Notice must be given to all lienholders (mortgage lenders, etc.).
- Sometimes purchase money lenders institute foreclosure proceedings of their own after receiving the Association's foreclosure notice (as failing to pay assessments in a timely manner constitutes default under many mortgage notes/deeds of trust).
- The owner would have up until the time of sale to "cure" - pay off the full amount plus all attorney's fees and costs.
- Should the sale go through, the proceeds would be paid out according to statute.
- Whether the Association receives any proceeds would depend largely on the existence/amount of equity in the home.
- The foreclosure notice can sometimes generate a positive response from an owner who is refusing to pay.

Judgment Creditor's Suit

- Virginia General Assembly recently passed a law generally prohibiting Judgment Creditor's Suits in events where a debtor resides in the property as the primary residence and the judgment is less than \$25k exclusive of interest and costs.
 - However, judgment creditor's suits are still permissible for delinquent common interest community association assessments if the total amount secured by one or more judgments, exclusive of interest and costs, exceeds \$5,000.
- The basic process involves obtaining a title report for the property to determine the liens (if any) encumbering the property.
- Then the suit is drafted and filed (explaining the property, ownership, judgment details, and naming the lienholders of the property, etc.).
- The owner is served with the lawsuit. Once served, the owner would have 21 days within which to file a responsive pleading. Should she fail to respond, association could ask for the court to enter default judgment as well as the court appointment of a special commissioner to oversee the sale of the property.

Judgment Creditor's Suits - Continued

- Should the owner respond, Association could still proceed to ask the court to hear the matter and ask for judgment/appointment of a special commissioner to sell the property.
- Once sold, the proceeds would be applied satisfy the liens/costs as set forth by statute.
- While there is no guarantee that the suit would net any money for the Association, however, the chances of such are higher if the owner has equity in the unit.
- It is also possible that a mortgage lienholder may offer to pay the amount due and owing and/or foreclose on the unit themselves.
- The judgment creditor's suit is more expensive than the memorandum of lien foreclosure process. Also, such is more time-consuming.
- However, it has the potential to recover the full amount of the prior judgments against the owner (as opposed to the 12 months' worth of delinquent assessments for a memorandum of lien), as well as force the sale of the property.

Complying with the Fair Debt Collections Practices Act (FDCPA)

- FDCPA: federal statutes that apply to “debt collectors”
- FDCPA does not apply to Associations acting themselves to collect their own debts, but it does apply to law firms and management companies in the business of collecting debts
- Certain protections afforded debtor by FDCPA, including ability to “dispute” debt within 30 days of initial notice/demand letter
 - If disputed, debt collector needs to “verify” or “validate” the debt to debtor by providing certain information
- Other prohibitions:
 - Debt collector cannot:
 - » mislead the debtor;
 - » threaten action that it will not take;
 - » issue demand letter for time-barred debts; or
 - » talk to third parties about debt of debtor (except under limited exceptions).

Weighing Costs and Benefits

- For modest assessments, usually worthwhile to at least pursue a memorandum of lien
- Once a delinquency approaches the 2 year mark, it is prudent to consider filing suit in light of statute of limitations concerns
- Also important to check documents as to whether attorney's fees may be passed along to owner when Association incurs them in collections
- Payment plan agreements can be beneficial, however, check with counsel before signing one (or have counsel provide an approved template)

Best Practices to Handle Collections

- Keep a list of current collections matters
- Establish guidelines for when to turn matters over to attorney for collections (usually a monetary or length of delinquency threshold)
- Apply collections guidelines fairly and uniformly
- Double check appropriateness of charges/fees on account statements, and check with attorney on any items that Board is unsure about
- Keep copies of prior demand letters sent by Association or management company (these can be helpful in court)
- Review payment plans with counsel before signing
- Set up a periodic review with the Board and with counsel on the current status of collections matters

Covenant Violations

- Violations
 - What are they?
 - They typically take the form of a violation of the Association's Declaration
 - » Could also take the form of a violation of a validly promulgated rule/regulation

Covenant Violations – What can the Association do?

- Typically, the first step is to document the violation
- Time-stamped photographs and prior correspondence with the owner are key
 - These will likely be exhibits in court, so it's important to be mindful of the contents of the correspondence
- If there is not a positive response to the initial demand letter, then an association, in certain circumstances, may be able to take the owner to a due process hearing (only if permitted under the Association's governing documents in compliance with statute)
 - Notice requirements, must give owner the opportunity to correct violation
 - Owner has the ability to appear with legal counsel
 - If violation is found, charges may be assessed for violations (limited to \$50 per violation or \$10 per day for up to 90 days for a continuing violation (note: only if process is permitted under Association's governing documents in compliance with statute))

Covenant Violations

- If the demand letter and due process hearing (if permissible) don't result in compliance by the owner, the next option for the Association is to file suit seeking an injunction
- What is an injunction?
 - A court order to perform (or refrain from) an action
 - Considered an “extraordinary remedy” under Virginia law
 - » Means that awarding an injunction is not automatic and whether to grant one is up to the court's discretion
 - » To obtain a permanent injunction, Association must show several elements, including, the lack of an adequate remedy at law, and that the “equities” favor the Association
 - Suits may be filed in either general district court or circuit court
 - » Differences in procedure and discovery
 - » General district court litigants also have a right to a *de novo* appeal to circuit court

Covenant Violation Lawsuits

- Once served, the owner may contest and file responsive pleadings to the lawsuit
- Potential motions hearings
- Discovery may be conducted
 - In circuit court, potentially depositions, written discovery requests
 - In general district court – only subpoenas *duces tecum* may be issued for copies of relevant documents
 - » No depositions, no written discovery
 - Resolution is typically much faster in general district court compared to circuit court but there is a *de novo* appeal right
- As trial, Association would need to present evidence of violations, governing documents, prior correspondence with owner, etc.
 - Need Association representative to attend and testify
- Owner has ability to contest and present evidence on her behalf

Covenant Violation Lawsuits

- If injunction is awarded, it is enforceable through the court's contempt power
 - Contempt power – ability to hold owner in contempt for failure to comply with the Order through the *show cause* procedure
 - Contempt power - ability to fine or jail an owner for noncompliance with court's Order
- Show Cause process starts with Association's request to the court for the issuance of a show cause summons to the owner (note: the request usually takes the form of a formal motion). The court will then need to decide whether there is sufficient evidence that the owner is in violation of the court Order. If so, then the court should issue a show cause (summons to the owner to appear on a date certain to "show cause" why he or she should not be held in contempt for violating the court's Order)
- If a show cause is issued, then, at a later hearing, the court will determine whether owner is in violation of court Order, and, if so, it has the discretion to fashion a remedy
- This process can be time-consuming, as the court will likely want to give the owner an additional opportunity to bring the property into compliance

Executive Session

- Items that may be considered in Executive Session - Virginia Code § 55.1-1816(C)
 - personnel matters;
 - consultation with legal counsel;
 - discussion and consideration of contracts, pending or probable;
 - litigation;
 - matters involving violations of the declaration or rules and regulations; or
 - the personal liability of members to the association
- Must vote in an open meeting to assemble in executive session, which must include the purpose for the executive session
- Include vote and purpose for executive session in minutes
- Any vote made during executive session must be taken again outside executive session, with the substance of the matter reasonably identified

Meeting Minutes

- Associations are required to keep minutes of meetings of the board of directors and make them available to members. Virginia Code §§ 55.1-1816, 55.1-1949
- Draft minutes of the meetings for Homeowners Associations must be open for inspection and copying within 60 days of the meeting or when the minutes are distributed to the board members as part of the package for the next meeting. Virginia Code § 55.1-1815
- Although there is no specific requirement for what the minutes must contain, Virginia's Freedom of Information Act provides a guide:
 - the date, time and location of the meeting;
 - the members of the board recorded as present and absent (including those who participated electronically);
 - a summary of the discussion on the matters proposed, deliberated, or decided; and
 - a record of any votes taken.
- It should NOT be a transcript of the meeting or a play-by-play of the entire meeting

Owner Forums

- The board of directors shall provide a designated period during each meeting to allow members an opportunity to comment on any matter relating to the association – Virginia Code § 55.1-1816(D)
- During a meeting at which the agenda is limited to specific topics or at a special meeting, the board of directors may limit the comments of members to the topics listed on the meeting agenda.
- Board may adopt reasonable rules relating to owner forum
- Tips for a successful owner forum
 - Do not treat is as a question-and-answer session; when an owner is finished speaking, thank them for their time and move to the next owner
 - » Remind owners that the board is not answering questions during the forum if direct questions are asked
 - Limit the duration of the open forum and the amount of time each member may speak so as to allow all members who want to speak to have an opportunity
 - Have a plan for unruly members

Quorums

- A “quorum” is the minimum number of board members or members of an association needing to be present to hold a meeting
- Property Owners’ Associations
 - Number of board members required for quorum set by governing documents
 - » Typically, a majority of the board members
 - Number of members required for a quorum (i.e. at annual meetings) set by governing documents
 - » Typical amount is 10%
 - » Governing documents may allow proxies to count toward achieving quorum
- Condominium Unit Owners’ Associations
 - Unless governing documents specify otherwise, 1/2 of the board members constitutes a quorum
 - Unless governing documents specify otherwise, more than 1/3 of members constitutes a quorum

Virtual and Informal Meetings

- All meetings of the board of directors where business of the association will be discussed or transacted shall be open to the members of record – Virginia Code § 55.1-1816(A)
 - Board cannot use work meetings or informal gatherings to circumvent open meeting requirements
 - This includes using e-mails, text messages, or phone calls to transact business ALL of which communications may become open to the members if used to transact business of the association
- Any meeting of the association, the board of directors, or any committee may be held entirely or partially by electronic means, provided that the board of directors has adopted guidelines for the use of electronic means for such meetings – Virginia Code § 55.1-1832
 - Only authorized persons can access such meetings
 - Persons entitled to participate in such meetings have an opportunity to do so
 - If a member does not have the capability or desire to attend virtually, the Association must make a reasonable alternative for the member (e.g. make the meeting hybrid virtual)

Rogue Director

- What is a Rogue Director?
 - A Rogue Director is a director who violates (or appears to intend to violate) any of the previously mentioned fiduciary duties
 - A Rogue Director is also someone who will not listen to legal advice or advice from fellow directors as to an improper course of action
- Rogue Directors create serious risk management problems for Associations
 - Rogue Directors can lead to all sorts of problems for Associations, including:
 - » exposing Associations to potential legal liability
 - » impairing the ability of the Association to carry out its day-to-day business
 - » increasing insurance rates through potential insurance claims
 - » harming the goodwill of the Association
 - » jeopardizing Association contracts or legal rights

Strategies to Deal with Rogue Directors

- Rogue Directors are serious risks
 - It is important to act quickly to try to address them
 - It is also important to document the Board's efforts in addressing Rogue Directors
- First Steps
 - At the first red flag of a Rogue Director, Board members ought to raise the issue directly with the Rogue Director, explain the problem, and make a request that such behavior immediately cease
 - Sometimes this approach will work and there will be no further issue
- Next Steps
 - If the initial discussion amongst the fellow Board members doesn't work, the next step is to bring in the Community Manager and/or legal counsel to address the issue
 - Oftentimes, legal counsel and the Community Manager can have a discussion with the Rogue Director about the behavior, explain the risks that the Rogue Director is creating for himself or herself and the Association at large

Strategies to Deal with Rogue Directors

- At this stage, if the Rogue Director still will not cease the behavior, the Board may wish to screen the Rogue Director from further discussion on the issue
- This motion can be reflected in the minutes

Strategies to Deal with Rogue Directors: Censures

- If these steps still do not work, it is time to pursue more serious remedies
- Censures:
 - A censure is a formal admonishment to the Rogue Director that is made by the Board of Directors
 - A censure is intended to formally reprimand the Rogue Director at a board meeting, which is reflected in the meeting minutes
 - As for other Board business, a censure can take the form of a motion, which is voted on by a majority of other Directors
 - A censure is designed to, in part, embarrass the Rogue Director into reigning in the poor behavior
 - A censure is also designed to document the Board's efforts in calling out and addressing the Rogue Director's bad behavior
 - A censure can be evidence that the other Board members are not complicit in the Rogue Director's behavior

Strategies to Deal with Rogue Directors: Removing them as Officers or Directors

- If a censure fails to reign the Rogue Director in, another remedy is to remove the Rogue Director as an Officer
 - Generally, the Board of Directors elects the officers
 - In that circumstance, the Board of Directors may vote to remove the Rogue Director as an Officer
 - But in many circumstances, the Rogue Director will still be a Director
- Many sets of Governing Documents do not permit the removal of a Director by the Board
 - As a result, the Rogue Director may stay on the Board even after being removed as an officer
 - If the Governing Documents permit the removal of a Rogue Director as a director, it is important to consult with legal counsel on how to do this

Strategies to Deal with Rogue Directors: Using Confidentiality Agreements with Liquidated Damages Clauses

- Another way to address potential Rogue Directors is to use confidentiality agreements
 - These are contracts that can be entered into between the Association and the individual directors
 - These contracts may have provisions that provide for liquidated damages provisions (set damages amounts) in the event of a breach, such as leaking confidential information, violating the governing documents, etc.
- These provisions can be used as a sword against Rogue Directors
- The threat of suit and the prospect of recovering damages from the Rogue Directors can work to reign them in in some circumstances
- Note: liquidated damages are not universally upheld by courts. Rather, courts may refuse to enforce them as “forfeitures”

Strategies to Deal with Rogue Directors: Injunctions (Court Orders)

- In extreme cases, the Association may need to file suit seeking an injunction (court order) against the Rogue Director
 - An injunction is a court order compelling someone to do something or refrain from doing something
 - Injunctions are considered extraordinary remedies, and are guaranteed to be awarded
- If a Rogue Director engages in extreme conduct or a course of conduct detrimental to the Association, the Association may have no choice but to file a lawsuit seeking an injunction
- An injunction is enforceable by the Court's contempt power
- If a Rogue Director fails to comply, the Court may fine and/or imprison the Rogue Director

Strategies to Deal with Rogue Directors: Injunctions (Court Orders), Continued

- Process:
 - File lawsuit in court
 - Serve the lawsuit upon the Rogue Director
 - Rogue Director has 21 days within which to file a response
 - The Parties can conduct written discovery (interrogatories, requests for production of documents, depositions, etc.)
 - At preliminary hearing or trial, the Court will hear evidence on request for injunctive relief (requires testimony and evidence)
- Process can be time-consuming and costly
- Additionally, it is important to plead intentional misconduct on the part of the Rogue Director to decrease the chances of any indemnification requirement, and to lessen the chances of the Rogue Director tendering the lawsuit to the Association's insurance policies for coverage on his or her behalf

Strategies to Deal with Rogue Directors: Litigating Pursuant to a Protective Order

- Given the confidential nature of Association business and information, it may also become necessary to litigate pursuant to a Protective Order
- A Protective Order is a court order requiring the parties (and potentially others to include attorneys, expert witnesses, etc.) to keep certain information and documentation confidential
- The terms of a Protective Order are discretionary with the Judge, but are enforced by the Court's contempt power
- In lawsuits against Rogue Directors, it is generally advisable to pursue a Protective Order trying to keep as much of the confidential information/documentation out of the public eye as possible

Q&A

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