

SOUTH COAST HOMEOWNERS ASSOCIATION

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A WORD FROM YOUR EDITOR

I would like to thank all of you for your patience since I have not gotten a newsletter issued in six months. From previous surveys and numerous conversations with board members over the years, this newsletter is the primary reason that you maintain your membership in the South Coast Homeowners Association. Local opportunities to become informed and stay current are scarce and our organization attempts to fill that void by providing timely information to you.

Many of you know that I am a CPA in private practice here in Goleta. The only staff I have are my wife and son who provide part-time administrative support especially during tax season. In addition to providing service to over 100 homeowner associations, I also provide income tax preparation services to over 200 individual clients and related entities. I have had to tell clients not to make referrals as there is only so much one person can do. I find it pointless to market my services to new clients when I would not be able to properly service the clients I already have. I don't want to supervise staff. I find that I am most satisfied when I can provide one-on-one services to my clients and can directly make a difference for them.

Helping to form South Coast HOA nearly 20 years ago is one of my proudest professional achievements. Our goal today remains the same as it was at the beginning – to help volunteer board members understand their responsibilities and provide you with the support you need to do your job. Thanks again for your patience and continued support.

**PLEASE FEEL FREE TO MAKE COPIES FOR YOUR BOARD MEMBERS
SHARE THIS NEWSLETTER WITH YOUR ENTIRE BOARD OF DIRECTORS**

2008 CONDOMINIUM BLUEBOOKS

We have about 15 copies of the *2008 Condominium Bluebook* remaining in stock. This handy reference guide contains the complete text of the Davis-Stirling Act (California's HOA law) along with numerous California laws which relate to association operations. In addition, there are case law summaries and articles dealing with association operations. Our cost remains at \$18/each, postpaid until they're gone.

SOARING NATURAL GAS RATES WILL IMPACT SOME HOA BUDGETS Water and Trash Rates Also Continue to Increase

Seemingly lost in the soaring cost of oil has also been a rapid rise in the cost of natural gas. On August 1, 2007, the cost of gas as reported by the Southern California Gas Company was 56 cents per therm. Their baseline rate was 84.5 cents per therm. On June 1, 2008, just 10 months later, the cost of gas was \$1.09 per therm and their baseline rate was \$1.38 per therm. Their cost has nearly doubled and that's a 64% increase in the charge of gas to users in ten months. If you heat your pool with gas, have master gas appliances such as washers and dryers, or have master water heaters serving multiple units, your gas costs are soaring. In the 1960s and 1970s, master metered utilities such as water and gas were deemed to be more economical than separate metered utilities. Rising utility costs have contributed their share to monthly assessment increases exceeding published consumer price indexes and cost of living statistics.

For example, the City of Santa Barbara is proposing a 3.5% rate increase for water and 6.5% for sewer. Trash rates are expected to increase 4.5% on July 1. The Carpinteria Water District has proposed an 8-9% increase in monthly consumption and service charge rates with a change in how the capital improvement program rate is computed. Low usage customers may see a reduction in costs. Notices of proposed rate changes are usually included with your utility bills or in a separate mailing.

SB 528 - BOARD AGENDA FOLLOW UP

In our November-December 2007 newsletter, Attorney Beth Grimm provided an extensive analysis of SB 528 which deals with board agendas, notice requirements and actions which can be taken at a board meeting. At our January law and legislative update meeting, Attorney Jim Smith shared a form developed in his office to help associations meet the requirements of the new agenda disclosure law (now part of California Civil Code 1363.05(f) and (i)). A number of attendees asked that this form be made available to them and I did send an email copy to those associations on our email contact list after the meeting. On the following page is the form that you may adapt for your association's use.

Form No. 25
01/08
CC §1363.05(g)
Corp Code § 7211
4 days

NOTICE OF BOARD OF DIRECTORS MEETING

Date of Meeting: _____

Time of Meeting: _____

Location: _____

NOTICE IS HEREBY GIVEN THAT a meeting of the Board of Directors of the _____ Homeowner's Association, will be held on the date, time and at the location stated above. The issues to be discussed include:

1. Assessments, income, expenses, budget, management, maintenance and repair of the Development.
2. _____
3. _____
4. _____
5. _____
6. _____
7. _____
8. _____

_____ ASSOCIATION

Dated: _____

By: _____, Secretary

"Caution"

This form is provided as a courtesy by James H. Smith, Esq. of the law firm of Grokenberger & Smith. Telephone: (805) 965-7746. Your Association's Governing Documents and/or changes in the law may require this form to be modified.

TO FORECLOSE OR NOT TO FORECLOSE; That Seems to be the Question

How to Collect Assessments during the Sub-Prime Crisis

***By: David C. Swedelson, Esq., Swedelson & Gottlieb
Tracy Neal, Esq., Association Lien Services***

Editor's Note: At our June 4 program with Sandra Gottlieb, this article was distributed as part of the presentation. Assessment collection is a major concern for many associations in 2008. This article was written by two members of her firm and is reprinted here with permission. Questions may be directed to them at 1-800-372-2207 or at www.lawforhoas.com

What a difference a year makes. The sub-prime mortgage crisis seems to be growing as news reports indicate an increasing number of owners defaulting on their home loans with many owing more than their homes are worth. This crisis is not just affecting lenders and the many homeowners who may have had questionable ability to borrow money in the first place; it is also negatively impacting their homeowners' associations. As assessments (monthly fees) are typically the sole source of an associations' income, many associations are now finding that they are having trouble collecting thousands of dollars in delinquent assessments from owners who in some cases have no equity. We know this as we are getting the calls.

This situation should not have been too much of a surprise as we have recommended for the last two years that associations get ready for the increase in defaults and factor the potential "bad debt" in their budgets. While for more than ten years we have enjoyed a period of increasing value in real estate that correlated with very few owners losing their homes through foreclosure (and thus not paying their assessments), those good times, at least for now, are gone.

The purpose of this article is to answer the questions you will likely have regarding assessment collection when delinquent owners appear likely to let their homes go to foreclosure sale. Should you use the non-judicial foreclosure process or judicial foreclosure? Should you foreclose or not foreclose? These are all good questions. We have some answers.

First, non-judicial foreclosure still remains the fastest and least expensive method for collecting delinquent assessments. Experience (we have been collecting delinquent assessments for more than 20 years and have weathered prior real estate market downturns and increased defaults/foreclosures) tells us that most homeowners do not want to lose their homes and are eventually paying their delinquencies. While we have seen an increase in the number of homes being lost in foreclosure, as expected, most are being foreclosed on by senior lenders. And while our foreclosures are also up, two thirds of those homes we have foreclosed on have been redeemed by the owners (yes, owners now have 90 days after the sale to redeem or buy their property following the sale). One big benefit of the non-judicial process is that associations find out sooner if the homeowner is going to pay or not. The hard reality is that some of them cannot.

Utilizing judicial foreclosure, an association's legal counsel must first find the homeowner, personally serve them with a lawsuit, wait for them to respond, and if they do not respond, take their default. Upon default, the association will have to apply to the court for a default judgment, which may include an order to foreclose. Then the association can try to find an asset like a bank account to execute on or start the foreclosure process.

With the non-judicial foreclosure process, the association's collection service sends out the required pre-lien notice, records a lien, and if the owner does not pay, records a notice of default, starting the foreclosure process. Using the non-judicial foreclosure method of assessment collection, the association does not receive a personal judgment, as there is no court action. But what good is a judgment if the owner has no money to collect? Let's not forget many owners who were considered "sub-prime" had questionable credit and likely have no other assets. Finding an asset to collect on is no easy task.

What if the homeowner refuses to communicate and/or indicates that they cannot pay the delinquent assessments they owe and tells the association's board that they are going to let their home go into foreclosure? If the senior lien holders (their bank/lenders) have started foreclosure, then the association can record a lien and then wait to see if the owner loses the home. If the association is at a point in the process where the owner has not paid, and the next step is the actual foreclosure sale, the board needs to decide if it wants to proceed. Why is this a big decision? Because there is a possibility that a third party will not buy the property if there is no equity (meaning that the amount of the underlying "senior" liens exceed the value of the property). In that event, the association may end up with the property, which has no value as it is subject to the first trust deed. Sometimes boards will decide that they just want to foreclose, especially if the senior lender is not doing anything to eliminate a delinquent owner that is trying to get a free ride. And no, in California we do not have "super" liens, and the banks are not obligated to pay the amount owed to the association.

At this point in the process, the board should evaluate the owner's equity in the property. Through the non-judicial foreclosure process, a title report is obtained which will show the amounts of liens, mortgages and deeds of trust in the senior position or otherwise ahead of an association's lien and other encumbrances on the property. The board should have a good idea of the current value of the homes or condominiums at their association and should be able to determine if there is any equity at all in the property. If there is no equity, and the lender is foreclosing, it is likely that the association's lien will be extinguished or "wiped out" (as the association's lien is junior to the lender). The association can then decide to proceed through small claims court as the fastest and least expensive method of getting a personal judgment against the owner (considering the fact that the judgment may not be collectable in any event).

Although it has been many years since we have seen such a significant number of lender foreclosures, from our prior experience, we believe that lenders generally take their time in foreclosing, as they don't really want the foreclosed properties in their portfolios. They may even be willing to talk to the association about taking over the loan (perhaps at a reduced amount) or allowing the association to sell the property.

If, however, the lender has recorded a default notice, it may only be a matter of time before they start the foreclosure process. If there is no equity in the property, the association may

not want to proceed with a non-judicial foreclosure sale as it may end up with a unit that has more debt than value, what we call “upside-down.” Because the owner may have no ability to pay the debt, as stated above, the best solution may be to obtain a judgment in small claims court. This will not cost the association attorney’s fees (that may not be easily collected from the owner) and a judgment obtained in small claims court can be easily and inexpensively recorded as a judgment lien. If over the next ten years the owner sells any real property, the owner will have to satisfy the judgment lien plus interest at the rate of 10% per annum.

If the association does foreclose and obtains the property through a non-judicial foreclosure sale, it is not automatically obligated to pay the lender. If the association determines there is value in the property and wants to try to sell it to recoup its losses, once the statutory 90 days redemption period ends, it can take possession and negotiate with the lender and pay the underlying mortgage. Otherwise, the association can just let the property go back to the lender. It may be able to collect rent from a tenant residing in the property.

In California, we have what is called the “single action rule” and an association cannot both foreclose and then seek to obtain a personal judgment against an owner for the deficiency. Associations only get one chance to collect the money. An association can proceed with the foreclosure process to compel the owner to pay, but cannot proceed with the actual foreclosure sale and then determine there is no equity and decide to pursue the owner for money (and not the property). We recommend that the association proceed non-judicially at least to the point of sale and then make the decision, as in our experience, most often owners will pay rather than lose their home. Even an owner with no equity will want to keep the home as they may realize that with their credit ruined by a foreclosure, they may not get another chance to buy a home, and eventually their property will increase in value. In most instances, non-judicial foreclosure is simply the right answer, when other methods are a waste of time and money.

In conclusion, the current “sub-prime crisis” and resulting increase in defaults by owners is going to require that associations and their boards realize that they may have some bad debt. It is also going to require that boards of directors and managing agents for community associations be more diligent about assessment collection. They are going to have to keep a closer eye on the status of their delinquencies, and be prepared to make the evaluations and decisions that we described above. More importantly, it is likely that associations will encounter situations where they are just not going to be able to collect an owner’s delinquent assessments. Be prepared!

NEW ON WWW.SOUTHCOASTHOA.ORG

A recent addition to our website is an archive of all newsletters from 2000 – 2005. There is a lot of relevant content available. A newsletter index is also on the site. The index allows you to locate articles of interest by topic and then you can go to the archive to find the information you’re looking for. We will add additional newsletters in the future to the archive.

THE CPA MANAGEMENT LETTER GUIDANCE FOR BOARD OF DIRECTORS

By: Michael J. Gartzke, CPA

Each year, many homeowner associations will engage a CPA to review or audit their annual financial statements and/or prepare their annual income tax returns. These compliance services meet the requirements of the association's governing documents, the California Civil Code (reviewed financial statements required by California Civil Code 1365(b) for associations having \$75,000 or more in revenue) and income tax law (all associations must file a Federal income tax return and most are required to file a California income tax and exempt organization return). To some, it's a necessary "evil" but over the many years that I have provided accounting services to associations, the management letter serves as an excellent opportunity to provide observations and recommendations to improve the operations of the association.

Accounting standards require CPAs to communicate "matters coming to the auditor's attention that, in his judgment, should be communicated to the audit committee because they represent significant deficiencies in the design or operation of the internal control structure, which could adversely affect the organization's ability to record, process, summarize and report financial data consistent with the assertion of management in the financial statements." In addition, "the auditor may also identify matters that in his judgment, are not reportable conditions as defined above, however, the auditor may choose to communicate such matters for the benefit of management". (AICPA Auditing Standards Section 325.02-.03)

I have found that the "management letter" can be the most discussed portion of the documents that I provide an association at the conclusion of an accounting engagement. Those CPAs who have provided services to associations for many years have become knowledgeable of the wide range of disciplines that affect association operations. While we can't (or won't) take the place of your manager, lawyer, insurance agent or maintenance experts, we can offer recommendations from our experience on a wide variety of issues for the association to consider in future operations. What follows is a sampling of financial and other issues that I have encountered that should be considered in improving association operations.

CASH AND INVESTMENTS: Cash and investments are typically the largest assets that an association has. Many times, these assets will be underinvested either in noninterest or low interest checking and saving accounts. Sometimes, checks will be held for days or weeks without being deposited timely, reducing the average balance on deposit which means less interest income or paying bank charges because of low balances. Bank investments such as higher interest money market accounts and certificates of deposit are available to associations. Many associations have opted for US Treasury bills and notes for a portion of their reserve investments. Principal is guaranteed if held to maturity and in most cases, the Treasury interest income is California tax-free.

Some associations will have over \$100,000 in cash in the same bank. FDIC insurance does not cover balances over \$100,000 so there is the possibility of loss for balances over \$100,000. While bank failures have been rare in recent years, the current turbulent financial

markets have caused some banks to report large losses. A large, FDIC insured, internet-based bank failed in the fall of 2007 causing losses for those who had placed more than \$100,000 on deposit in expectation of larger investment returns. Some associations have placed funds in mutual funds. These funds are subject to substantial, stock market fluctuations and also early withdrawal penalties if redeemed within 5 years of the investment. Capital losses on securities sales are only deductible against capital gains received by the association for income tax purposes.

Bank signature cards are frequently not updated when officers change. Disbursements from reserve accounts require the signatures of two officers or an officer and director of the association. No one else is allowed to withdraw or expend funds from association reserve accounts. Some managing agents will use a commingled cash account where funds from multiple associations are deposited in the same bank account. California law restricts this practice to managing agents that provided this service in February 1990 or earlier.

CPAs are concerned about the controls that the managing agent uses to safeguard your association assets and that they are accounted for properly. Some managers will leave reserve funds in the operating account to make it more convenient to use funds to pay reserve expenses when they are incurred. Many managers are given check-signing authority on the operating checking account by the association's board. This practice makes it more difficult to determine whether reserve assessments are being used only to pay reserve expenses as these assessments are retained in the operating account and reserve expenses are paid from the same account. An operating deficit caused by an inadequate assessment or unanticipated increases in operating expenses can be covered by not transferring all the reserve assessments during the year. The CPA will reconcile the reserve fund balance (beginning balance, plus reserve assessments and interest, less reserve expenses equals ending fund balance) and establish an interfund payable from the operating fund to the reserve fund and show it on the association's balance sheet. This balance should be repaid to the reserve account via increased future operating assessments.

Are bank statements being reconciled monthly? Are copies of bank statements and reconciliations being provided to the board at least quarterly in compliance with California Civil Code requirements? Is the association able to segregate (use two different people) the issuance of payments for bills and the mailing of the checks? Does the board approve maintenance and nonrecurring invoices for payment?

ASSESSMENTS: The prompt and efficient collection of assessments is the lifeblood of association operations. When the economy is strong, collections are generally easier. Increases in members' equity in their property will convince most people to not risk the loss of that equity by not paying assessments. The economy is cyclical and some members who purchase at the "top of the market" will find their equity eroded or completely gone in a down real estate market. It is important to establish a diligent collection policy that is consistent and equal to all members. Late notices and late payment penalties should be sent on the 16th of the month (or later if your governing documents specify a later date). Follow-up should be made and further collection activity should be pursued (pre-lien letters, lien filings, small claim judgements and/or foreclosure as necessary). Lenders are wary of providing financing to unit owners in associations where large amounts of delinquent assessments exist.

Editor's Note: I had included the preceding paragraph in a January 2004 article when real estate values were rising. Did I foresee the lender practices that have driven the downward adjustment of real estate values? I can't say I did but what some associations need to consider is that some newer owners have purchased in the past 2-5 years with abnormally low-interest adjustable rate mortgages. As these interest rates reset, their monthly mortgage payments are skyrocketing. Some of these loans were made with little or no money down or negative amortization (monthly payments less than accrued monthly interest) which means that the principal balance on these loans is now higher than the value of the property. Some owners are simply not paying their loan payments or their assessments and their lenders are not promptly foreclosing. When a lender forecloses, it has to start making the assessment payments but only from the day of foreclosure forward. The volume of foreclosures has overwhelmed these lenders. For the first time in many years, associations will have uncollectible assessments as a result of these bad loans and the remaining members of the association will have to make up the difference. These bad debts will have to be budgeted for or covered from future assessments. Some associations have had to levy special assessments on the remaining solvent members to raise enough money just to run operations when a sizable percentage of units are unable to pay their regular assessments. Ironically, it is the poor lender practices that are leading to these delinquent assessments and now they want to penalize you for having high delinquent assessments.

I have noted, fortunately on infrequent occasions, that even board members will sometimes fall behind in paying their assessments. If the delinquency is large enough, a disclosure will be made on the financial statements indicating the amount due from the officers and directors. Some associations will have an inadequate monthly assessment. Political pressures not to raise assessments or not increase them enough conflict with the reality of increased costs. Many times, reserve funds will not be funded at the level specified in the budget or recommended in the reserve study. Over time, this underfunding of reserves will result in a major special assessment. Most special assessments require a membership vote. Special assessments are never popular.

Speaking of reserve funding, California law has mandated disclosures about reserve information for 22 years now. Many more associations are obtaining the required reserve information either through a reserve study professional or on their own. As with high delinquent assessments, lenders are reluctant to lend on association units with low reserve fund balances. Lenders often now request a copy of the reserve study from the association in the escrow process.

OTHER OPERATIONAL ISSUES

Reserve Expenses – Are major expenses approved by the board and noted in the minutes? Are there annual reviews of the reserve study by the board and is a reserve study done every 3 years. Has a reserve funding plan been approved and noted in the minutes?

Employee vs. Independent Contractor – Is the association using independent contractor workers who should be classified as employees? The IRS has a checklist of 20 factors to review when making this determination. Factors such as who controls the worker, licensure, how the worker is paid go into making this determination. Are workers covered by insurance, especially workers compensation? Although rarely seen, some associations compensate

their board members. As officers, compensation of board members would require the association is to issue W2s (officers are employees, so 1099s can't be issued like to independent contractors). Further, certain immunities provided to volunteer board members under the California Civil Code may not be provided to those who are not volunteers.

Insurance – Is the association carrying the proper kinds of insurance in accordance with its governing documents and the Civil Code? Does the board meet with its insurance agent annually to discuss necessary coverages and policy limits?

Minutes – Are minutes complete? Are they signed? Are executive session minutes included with regular minutes and improperly disclosed? Are relevant accounting issues such as major expenditures, assessment changes, open/close bank accounts, tax elections and budget approval included?

Taxes – Has the association filed 1099 forms for independent contractor services? Is the association paying property tax assessments that are only chargeable against residential parcels? Does the association have tax-exempt status with California? Are income tax filings up to date? Has the association made its biannual corporate information filings with the California Secretary of State?

Professional Organizations – Is the association a member of South Coast Homeowners or another HOA trade organization? Can the board members benefit from the seminars and newsletters published by these organizations?

Other topics such as record retention, accounting system recommendations and comparative financial information are worthy of discussion with your CPA. Ask your CPA about any of these issues. We welcome the opportunity to provide guidance in these areas and to provide a service that you really want! We can attend board meetings and/or annual meetings to present relevant information. Your CPA is part of your professional team.

A GLIMPSE OF THE FUTURE

The California Legislature is considering a total rewrite of the Davis-Stirling Common Interest Development Act. AB 1921 is currently in the legislative process with hearings and comments. I recently submitted several comments regarding proposed changes on accounting terminology that would be used in the new law. All of the code sections would be renumbered and certainly, many changes would occur if the law is passed this year.

There are numerous other bills under consideration by the Legislature this year. Future issues of the newsletter will discuss these bills and their status in the legislative process. This is the second year of the two-year legislative session. My understanding is that any bill must pass by the end of August and then signed by the Governor. If it doesn't pass the Legislature by then, the process starts anew next year if a legislator will sponsor the bill.

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