Community Association Management *Insider*®

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INSIDE THIS ISSUE

Proposed Bill: Speedy Foreclosures for Unpaid HOA Dues

Proposed Florida legislation would speed up community associations' ability to foreclose on houses or condo units with unpaid dues in the Sunshine State. Homeowners behind on their community-association dues would have to make good on the full amount before fighting the charges, under a bill filed by Sen. Alan Hays (R-Umatilla). The bill would also bring state oversight to Florida's homeowner associations.

If passed, the legislation would allow an association to foreclose immediately on the house if a homeowner didn't deposit the unpaid balance in a special registry as directed by a court; now, owners can contest associations' charges in a process that can stretch out for years.

Supporters of the bill have said that

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FEATURE

Prepare Board of Directors for Association's FHA Certification

The Federal Housing Administration (FHA) provides mortgage insurance on loans made by FHA-approved lenders throughout the United States. It insures mortgages on single-family and multifamily homes—including condominiums and homes in planned communities. Since late 2008, the FHA has issued regulatory guidance to set standards associations must meet in order for a prospective member to qualify for FHA financing. The FHA has said that it conducts thorough appraisals to protect both lenders and borrowers.

For associations that are still struggling to fill vacancies left by foreclosures or other financial issues, FHA certification is playing

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PREMISES LIABILITY

Tell Members How to Interact Appropriately with Service Animals

Last month's feature touched on the changing face of service animals—that is, nontraditional breeds being used as service dogs, and the ways that associations should handle responsibility and liability if a service dog of any kind happens to bite somebody (see "Keep Restricted Breed Dogs on Short Leash in Community," February 2013). Although it's important to speak with your association's attorney as soon as there's a request for a service dog that raises safety concerns, you should make sure that members generally understand how to interact with all service dogs, whether they're a restricted breed or not.

Education Plays Key Role

"We don't use restricted breed dogs in our program, in part because public opinion and perceptions tend to be negative towards these breeds—and that often makes the daily life of the recipient harder," says Michelle Nelson of Paws Assisting Veterans (PAVE). A nonprofit organization, PAVE is dedicated to training and providing service dogs free of charge for veterans with mental and/or physical disabilities and to advance public knowledge of service dogs and the essential roles they play.

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FHA Certification (continued from p. 1)

a larger role than ever. It may be hard to find prospective owners if once-typical homebuyers can no longer qualify for traditional mortgages. An FHA mortgage is the only way for some people to buy a home now. So associations that previously didn't give much thought to FHA certification are now scrambling to get it—which exposes the association to a rigorous process and potential liability.

Here's what you need to know about FHA certification for your association, how it could affect your community, and your role in obtaining it.

Why Consider Certification?

Three years ago barely 3 percent of all loans were FHA certified; now it's close to 40 percent. What happened? "Prior to the mortgage meltdown, lenders were able to package mortgage loans and sell them to investors as securities. That way, the lender got its money out and was able to then make more loans. If things went bad on the loan, the investors would take the loss," explains Lionel Harris, chief executive officer of Culver City, Calif.-based property management company Harris Properties.

"Now, with little investor appetite for mortgage-based securities, lenders have been forced to seek another approach. They've turned to FHA insurance to guarantee loans so investors will again support the loans," says Harris. He notes that, faced with a meltdown of the real estate market, the government supported the FHA loan with its low down payment (as low as 3.5 percent) and willingness to accept less than stellar credit. "It became the only low down payment game in town," he says. The FHA doesn't lend money—it provides insurance to lenders to guarantee against loss, Harris specifies. But before the FHA will insure a condo or planned community home loan, certain standards must be met, he emphasizes.

First, the borrower must meet credit standards—that is, income and creditworthiness, among other financial requirements. Also, the project must conform to FHA codes on the day the loan is granted—for example, not more than 15 percent of owners are 60 days delinquent, owner occupancy is at least 50 percent, there are adequate reserves, and litigation disclosures are made. Finally, before any loan can be considered, the entire association project must have obtained prior FHA certification.

Why would a board submit to this? In addition to trying to attract new owners, the pressure from owners who want to sell or refinance can be enormous, Harris points out. Their argument is that low down payments and easy credit result in more buyers who can qualify and faster home closings. And the larger the pool of buyers, the higher the prices. Presumably, these higher prices lift all values in the building or community, he says.

Research, Record Information for Board

Managers should review the issue of prior certification, says Harris. It's important to familiarize yourself with the certification requirements. For instance, the board of directors must agree and pay for the certification. The cost is between $800 and $1,200 for a skilled consultant to undertake the process of locating and compiling original construction plans, plat maps, Department of Real Estate (DRE) approval, municipal approval, certificates of occupancy, and a letter from an attorney stating the project meets all state and municipal laws. "Even when the specialist knows the arcane paths within the FHA, the process will take from 30 to 60 days," warns Harris.

A lot of the legwork, research, and record keeping for your association's FHA certification will be your responsibility. You'll need to diligently keep track of your association's certification, which must be renewed every two years, and keep all documentation as the FHA keeps no records, Harris advises. "Unfortunately, you must start from scratch every two years," he says.

Also, find out what your board should consider before going forward. For example, the board should ask whether it wants people buying in with 3.5 percent down and spotty credit, says Harris, who points out that might suggest a risk of default. "Sure, the lender is covered, but what about the association?" he asks. Boards should also decide whether they want to pay the $1,000 FHA insurance fee or leave that to the seller who presumably will benefit.

➤ Basics of FHA Certification

FHA certification may be new to many managers who have only a vague idea of the issues involved. To become FHA-approved, a property must successfully pass inspection by a certified FHA appraiser. The appraiser will examine a certain set of criteria that will determine if the property is eligible for FHA-insured financing. What are the criteria? According to the FHA, the property must be in a condition and location that are free of all known hazards and adverse conditions that impair the health and safety of occupants, the structural soundness of the improvements, or the use and enjoyment of the property.

FHA appraisers also follow guidelines that are focused on the health and safety of the borrowers in addition to the overall aesthetics and condition of the home. During the appraisal, they focus on issues including broken windows, windows without screens, and evidence of rodent infestation, among other things.

Structural soundness is also taken into account. FHA appraisals are considered by some to be more comprehensive than appraisals for conventional loans. For example, many non-FHA appraisers don't look for signs of termite damage; they generally leave that to home inspection agents, whose services are optional. But FHA appraisers do inspect for wood rot, termite damage, roof damage, and other red flags that might be left undiscovered by conventional inspectors.

The FHA appraiser reports any defects or issues to the lender and requires that repairs be made before the home can be cleared as FHA-approved and the sale completed.

You should find out whether, if the association applies this year, it's committed to renewing in two years. And, if you refuse, does that mean unit values will shrink? "If you listen to real estate brokers they'll tell you, 'yes,'" says Harris. "However, values mostly depend on comparables, which include the building across the street that might be FHA certified," he notes.

Beware of Legal Issues

There may be some liability involved in the decision to be or not be FHA certified. For example, the issue of whether a board can be sued if a sale is lost because it failed to obtain FHA certification hasn't been addressed in any cases so far, but real estate experts think it's a possibility. Always check with your association's attorney before taking any action.

On Sept. 13, 2012, the FHA issued new guidelines that expire Aug. 31, 2014 (see *http://portal.hud.gov/hudportal/HUD?src=/federal_housing_administration*). It's important for community association managers to get up to speed on the current FHA guidelines and how they'll affect the community. "This issue is not going away anytime soon," stresses Harris. ♦

Insider Source

Lionel Harris: Founder and chief executive officer, Harris Properties, 11520 Jefferson Blvd., #200, Culver City, CA 90230; *www.harrismgmt.com.*

RECENT COURT RULINGS

➤ Ban on Renters Applied Retroactively to Tenant

Facts: A townhome owner and her tenant challenged an amendment adopted by the association prohibiting her from leasing her unit to tenants. The owner purchased the unit before there were any restrictions on leasing individual units. The amendment was adopted in accordance with local laws and in accordance with the documents governing the units in the community.

The association asked the trial court for a judgment in its favor without a trial. It also asked the trial court to enjoin—that is, stop—the owner from renting her unit and to force her to evict her tenant. The trial court granted the association's request. The owner appealed.

Decision: A Tennessee appeals court upheld the trial court's decision.

Reasoning: On appeal, the owner argued that the retroactive application of the amendment prohibiting the leasing of properties was "arbitrary and capricious" and unreasonable since there was no prohibition on leasing units when she purchased her unit. She also claimed that without the rental income from a tenant, she wouldn't be able to afford the townhome.

The appeals court agreed that homeowner association restrictions must not be arbitrary or capricious and must bear a relationship to the health, happiness, and enjoyment of life of the unit owners as a whole. But the appeals court determined that the amendment was enforceable. The appeals court pointed out that when the owner purchased her townhome, she consented to having restrictions placed upon the use and improvement of her property for the benefit of the townhome development as a whole. That was because she bought her property "subject to the limitations" set forth in the master deed and bylaws, said the appeals court. The documents clearly stated that they are subject to amendment by proper procedure; here, it was undisputed that the amendment prohibiting rental or lease of the units was adopted by proper procedure.

"Condominium and townhome owners live in close proximity and use facilities in common and therefore must give up a certain degree of freedom of choice which property owners might otherwise enjoy in separate, privately owned property," stated the court. Moreover, the leasing restriction "reasonably relates to the health, happiness, and peace of mind of all owners and the welfare of the townhome community outweighs an individual owner's interest in profit," noted the court. The owner's financial problems shouldn't affect the enjoyment of the community by the other owners, concluded the court.

- Preserve at Forrest Crossing Townhome Assn. v. Devaughn, January 2013

➤ Member Lacked Standing to Sue Association

Facts: A former member in a condominium sued the association, board of directors, and property manager for allegedly failing to maintain the complex's common areas. In particular, they supposedly didn't adequately address pipe problems and termite infestations. The defendants asked the trial court for a judgment in their favor without a trial. The trial court granted the request. The member appealed.

Decision: A California appeals court upheld the trial court's ruling.

Reasoning: The defendants asserted that because the member no longer owned a condominium within the association, she therefore lacked "standing"—that is, a stake or interest in a dispute that entitles a plaintiff to sue a defendant—to seek relief with regard to common area maintenance. However, the member claimed that she had standing to recover damages for the period of time *during which* she owned her unit.

The appeals court noted that, "unless otherwise provided in the declaration of a common interest development, the association is responsible for repairing, replacing, or maintaining the common areas, other than exclusive use common areas, and the owner of each separate interest is responsible for maintaining that separate interest and any exclusive use common area appurtenant to that separate interest." It's clear that the association had the duty to maintain the common areas, determined the appeals court. And, generally, a homeowner can sue an association for damages and an injunction to compel the

association to enforce the provisions of the declaration, it added. If the member still owned her unit, she could sue for both damages and to compel the association to fulfill its maintenance duty. But the defendants had provided proof that the member no longer had an ownership interest in the condo in which she resided. Thus, she no longer had the right to sue for enforcement.

The appeals court also pointed out that the member didn't have "cognizable damages" for the time she still owned the unit. It noted that, during the time the member did own the condo, her alleged damages were based on her observing termites in the building and an alleged failure of the defendants to fix this problem; however, she couldn't identify any damage to her living space or personal property, or any expenditures she had made as a result of an alleged failure to maintain common areas. And there was no decline in value of the condo. She also couldn't identify any damage to her personal property. And she couldn't show any other monetary harm. The appeals court concluded that no actual damage had been inflicted while the member resided in her unit.

- Diem Nguyen v. Summergreen Homeowners Assn., January 2013

➤ Association Can Enforce Community Traffic Rules

Facts: An association's bylaws provided that unless otherwise posted, the speed limit on all community roads will be 25 miles per hour and that speed limits "shall be strictly enforced." Driving 16 mph or more over the posted limit was a "Class A violation." Class A violations carried a $200 fine for a first offense. The association rules and regulations also contain provisions empowering the board to enforce the rules and regulations of the association, including through the use of private security guards.

An association security guard pulled over an owner's car while it was going 34 miles per hour and issued a speeding citation. The owner refused to pay the fine and sued the association. A trial court ruled in favor of the association, stating that this was a private matter that would be best handled by the association, but an appeals court reversed the decision, concluding that the association's private security officers didn't have the authority to stop and detain drivers for violating association rules and regulations. The association appealed.

Decision: The Illinois Supreme Court ruled in favor of the association.

Reasoning: The supreme court determined that the trial court properly declined to interfere in the internal affairs of the association. The owner had argued that, in creating its security department, the association was unlawfully exercising police powers that it had not been granted, and was unlawfully empowering its employees with police powers that they did not have, so that any actions taken by the security department were unlawful. The owner contended that only the Illinois legislature has the authority to create a private or public police department. According to the owner, the association security officers therefore had only the authority of a private citizen to effect an arrest, and a citizen's arrest has to be for an offense greater than an ordinance violation.

Regulating and enforcing traffic rules was reasonably necessary to maintain the roadways under state law, said the supreme court. But, under state law, the *association* retained the right to enforce its own traffic rules and regulations. In doing so, the officers had *not* attempted to unlawfully assert police powers, as the owner claimed they had.

The supreme court noted that in "voluntary associations," each person when becoming a member, either by express stipulation or by implication, agrees to abide by all rules and regulations adopted by the organization. "Courts will not interfere to control the enforcement of by-laws of such associations, but they will be left free to enforce their own rules and regulations by such means and with such penalties as they may see proper to adopt for their government," said the supreme court. "Thus, courts generally will not interfere with the internal affairs of a voluntary association absent mistake, fraud, collusion, or arbitrariness," it added.

In this case, there were no allegations of mistake, fraud, collusion, or arbitrariness. Rather, the owner generally complained that the association was unlawfully exercising police powers and authority. The owner couldn't argue that the association and its security officer didn't act consistently with its bylaws, or its rules and regulations, in stopping him for speeding on an association street. ♦

- Poris v. Lake Holiday Prop. Owners Assn., January 2013

Q & A

Using Two-Envelope System for Mail-In Votes

Q I've heard about some associations using a "two-envelope" system for mail-in votes. I'm considering proposing it in our community. What are the advantages of a two-envelope system and how does it work?

A Many community associations choose—or are required by law or their governing documents—to have members vote in elections or on other matters by secret ballot. That way, members can vote without fear of retaliation or intimidation. But if members use mail-in ballots and identify themselves on the ballot or its envelope, secrecy is lost. That's why it's important to use a two-envelope system.

How does the system work? The envelopes should be marked clearly. Envelope #1 should be prepaid and preaddressed to the individual who's collecting the ballots. Preprint the following on Envelope #2: "Put Secret Ballot in this Envelope." Below that, print: "Seal this envelope and insert it into outer, prepaid envelope addressed to 'Inspectors of Election,'" or something to that effect. The ballot should not have a signature line or anything else that would encourage the member to disclose his identity. Each member should fill out a ballot, place it in Envelope #2, and then seal it. No identifying marks should appear on Envelope #2. The member should then put Envelope #2 into Envelope #1 and seal it. Then he should sign and print his name and put his address and unit number in the upper left-hand corner of Envelope #1 and mail it by a specified date.

Requiring members to sign Envelope #1 is a useful precaution in case a member later claims that his ballot is fake. The signature on Envelope #1 could be compared with the member's signature on another official document—such as a check—to determine whether the signature on Envelope #1 was actually forged.

The individual designated to collect the ballots should check off each member's name on the voting list as the envelopes arrive. The ballot collector should remove Envelope #2 from the outer Envelope #1 without opening Envelope #2. He should keep all Envelope #2s together, safe and sealed, and then open them on the appropriate date.

To help the membership understand how to use the two-envelope system, send all members a letter, like our Model Letter: Two-Envelope System for Mail-In Ballots. It explains the steps they will need to take to vote using this system. ♦

MODEL LETTER

Two-Envelope System for Mail-In Ballots

[*insert date*]

Dear Member:

In preparation for the [*insert name of community association*]'s board of directors election on [*insert date*], we have enclosed a ballot and two envelopes. Please be aware that [*pick one: state law/the Association's governing documents*] require(s) us to use secret ballots for this election. To preserve the secrecy of the voting process, please follow these instructions:

1. Indicate your vote on the ballot. Do not sign or include any other identifying information on the ballot.
2. Place the ballot in the envelope marked "Put Secret Ballot in this Envelope." Seal the envelope. Do not sign or include any other identifying information on this envelope.
3. Insert the sealed ballot envelope into the prepaid outer envelope that is addressed to [*insert name of person collecting ballots*]. Seal the outer envelope.
4. Sign and print your name, address, and unit number in the upper left-hand corner of the outer envelope. This information will allow us to check off your name on the voting list.
5. Mail the outer envelope containing your completed ballot no later than [*insert date*]. If you have any questions about the voting process, please contact [*insert name*] at [*insert tel. #*]. Thank you for your cooperation.

Yours truly,
Board of Directors

Premises Liability

(continued from p. 1)

"Any breed can be an assistance dog as long as the breed has a calm temperament and is non-aggressive," Nelson explains. "The more education you can provide for neighbors of someone who will have or has a service dog, the easier it will be to avoid unpleasant interactions with the dog and welcome the member and his service dog into the community," she says.

To make the transition as easy as possible, Nelson recommends that managers organize a professional presentation. If a new assistance dog is moving into the community, ask a local assistance dog organization or trainer to make a presentation to members and their children to explain etiquette and basic concepts. Children especially can have a hard time understanding the concept of a working dog, and a presentation will help them to handle any interactions with the working team—that is, the dog and the person it's assisting—well, advises Nelson.

"It is much easier for an organization or trainer to explain the basic concepts and exciting work that assistance dogs do in comparison to a member having to talk about his own personal situation," she notes. "The organization or trainer can bring an assistance dog along and show what that particular dog can do," she adds.

If you can't arrange for a professional presentation, give members the following etiquette basics—either in a meeting, a memo, a community newsletter, or on your Web site:

Don't interrupt. "Explain that an assistance dog is a working dog, and just as you would never interrupt a person who is concentrating on a task, you should never interrupt an assistance dog, no matter how tempting," says Nelson.

Hold questions. When people encounter a working service dog and its partner they should never ask what the assistance dog is trained to do. "Many disabilities are not visible, so this is basically asking the person what his medical condition is, which is an invasion of privacy," warns Nelson. "Think about how you would feel if a stranger walks up to you and starts asking about your medical conditions," she advises.

Resist urge to pet, play, or feed. In general, individuals with service dogs can get tired of people asking to pet their working partner. Preferably, people shouldn't even ask to pet a service dog. It's a distraction to the assistance dog and the working team in general. And never just walk up and pet the assistance dog. If you have to, at least first ask the owner if you may pet the dog or talk to it before doing so. Always address the person and don't approach the dog, Nelson emphasizes.

Also, advise members and their children to speak naturally, not in a high pitch or excitedly, says Nelson. "Assistance dogs get lots of time to play, get attention from others, and cuddle—when they're working is not the time to entice them to do that," she clarifies. Don't be offended if the teammate prefers that you not pet the dog or talk to it—bothering the dog could be a distraction from the important job it's trained for.

And warn members that they should never offer the assistance dog food or other things that may distract it. Assistance dogs are trained to resist offers of food, but temptation weakens this training and makes life harder for the working team, says Nelson.

Ensure Pleasant Interactions

"The more people know about the important tasks assistance dogs do, the better they understand how crucial their appropriate behavior is; when people observe these etiquette rules the occurrence of negative interactions is greatly reduced," says Nelson. But always volunteer help if you think it's needed, she recommends.

"Some of our assistance dog teams have encountered behaviors that made their lives harder and often demonstrated the lack of general knowledge about dog behavior," says Nelson. "Kids sometimes approach assistance dogs running, screaming, squeaking, or putting food in their faces," she adds. "And sometimes people walk by and pet the assistance dog as if by accident," she says. "These incidences are opportunities for the team to educate the children and parents about the dangers of these interactions with dogs in general and particularly with ones they don't know," she says.

Education, whether by a community association manager or a working team, is one of the most important parts of ensuring that the interactions with assistance dog teams are always pleasant. ♦

Insider Source

Michelle Nelson: Paws Assisting Veterans, Inc., P.O. Box 871, Cornelius, OR 97113; *www.paveusa.org.*

Proposed Bill (continued from p. 1)

the proposal is a way to shore up the finances of homeowner associations, many of which were affected by the recession. During the economic downturn, many investors and owners failed to pay their HOA dues. In response to the drop in revenue, community associations cut back on spending and are now more likely to foreclose on properties in hopes of forcing payment. Supporters see this as an opportunity to relieve the burden from a community's dues-paying owners who have had to shoulder more of the association's operating costs in place of the delinquent owners.

The pay-up-now proposal is just one provision of a bill that also would make the state Department of Business and Professional Regulation responsible for Florida's homeowner associations, which are currently loosely regulated even though an estimated 60,000 subdivisions, neighborhoods, and developments across the state are governed by associations. The bill is a starting point for discussion and subject to amendments, said Hays, but he wants to level the playing field in the way associations are governed. "My purpose in sponsoring the bill is to try to establish more fairness in the homeowner-association community and try to have a better balance between the residents and the developers," Hays said in a statement.

The bill calls for homeowners in an association to pay $4 annually to cover the costs of state regulation and oversight, including a government ombudsman for associations. Associations would also have to hold secret-ballot elections for board members; rules for elections are currently much more lax.

Critics of the proposal are skeptical about some of the provisions, asking whether it's fair to force delinquent homeowners to immediately pay all of their back dues before allowing them to challenge whether they actually owe that money, since one reason for withholding dues is because the owner is contesting whether charges are legitimate. ♦