CHADWICK WASHINGTON MORIARTY ELMORE & BUNN P.C.

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THE QUARTERLY ASSESSMENT

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Ten Tips for Financial Responsibility

1. Understand safe harbor investments.
2. Review financial documents of the Association periodically.
3. Make sure directors have updated bank signature cards
4. Review insurance coverage annually.
5. In the event of a transition audit, obtain documents immediately.
6. Always keep a sharp eye on reserves.
7. Conduct an annual audit.
8. For amounts over $1,000.00, require two or more directors' signatures.
9. Treat the Association's money as you would treat your own.
10. Know what bank is holding association funds and do not hesitate to contact them directly.

LENDER FORECLOSURES AND THE IMPORTANCE OF ASSESSMENT LIENS

By Allen Warren

With so many lender foreclosures, should our association still file assessment liens?

In the current housing market and economic recession, some of our community association clients have asked whether they should bother filing assessment liens against debtors' units or lots. The short answer is… yes! As you may know, when a lender forecloses on a prior deed of trust (mortgage lien), the assessment liens against that property are extinguished and no longer encumber the property after foreclosure. However, even though assessment liens are extinguished under those circumstances, associations should not stop filing assessment liens.

Here are the main reasons why:

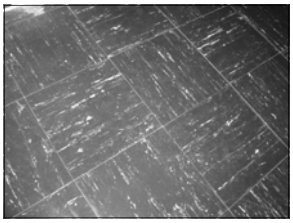
- **Not Every Debtor is Going to be Foreclosed On** – no one knows whether a debtor will become a foreclosure prospect or not. Just because an owner is delinquent in assessments does not necessarily mean that the owner's lender is going to foreclose. There are many possible outcomes, and the best way to protect the association's interests, regardless of the outcome, is to timely file assessment liens on delinquent accounts. Associations should err on the side of consistency and protection in these difficult economic times.
- **Notice and Excess Proceeds** – a recorded assessment lien should ensure your association receives notice of a pending lender foreclosure, and if there are excess proceeds from a foreclosure sale (after the lender covers the mortgage balance, foreclosure expenses and taxes), an assessment lien moves your association up the priority list for getting paid from those proceeds (e.g., ahead of judgment creditors) – excess proceeds are rare these days, but we have seen it happen even in current market conditions.
- **Secured Status for Bankruptcy** – if the owner files for bankruptcy to stop a pending foreclosure, having a previously recorded assessment lien ensures that the association will be treated as a secured creditor for purposes of receiving any payments through the bankruptcy court for Chapter 13 bankruptcies and, for Chapter 7 "no-asset" cases, the assessment lien will still encumber the property after the bankruptcy is over. While judgment liens also will provide an association with "secured creditor" status if recorded prior to the bankruptcy filing, filing an assessment lien can be done much more quickly than filing a civil suit, obtaining a judgment and recording that judgment in land records.
- **Short Sales** – if a short sale is conducted to avoid foreclosure, third parties are notified of the association's claim and the assessment lien should be paid at closing; if not, the lien remains an encumbrance on the property after the sale and the new owner is responsible.

Again, just because some properties may be foreclosed on and your association's assessment lien is extinguished, continue being vigilant about recording assessment liens in your local jurisdiction's land records. This puts your association in the best possible position to protect its claim for delinquent assessments. Please contact us with any questions or if you would like our assistance in filing assessment liens.

Your association may be responsible for determining the presence of asbestos containing materials within your building.

Regulations place the onus on building owners when it comes to the knowledge or presence of asbestos.

Associations with buildings built prior to 1980 should especially consider conducting a building-wide asbestos survey.



Floor and ceiling tile installed prior to 1980 is presumed to contain asbestos.

ASBESTOS: DOES YOUR ASSOCIATION NEED TO PERFORM A PROFESSIONAL ASBESTOS SURVEY?

By Bruce Easmunt

Asbestos. The mere mention of this fibrous substance causes insurance companies to shudder and class-action lawyers to salivate. Does your building contain asbestos?

Under current Federal regulations, the answer to this question is required to be provided to any contractor hired to perform construction in your building, as well as any employee working within the building (including maintenance and cleaning staff). In order to provide this information, your association may need to perform an asbestos survey.

Federal Asbestos Regulations

In addition to governing construction and occupational safety standards, Chapter 29 of the Code of Federal Regulations ("CFR") regulates asbestos exposure in construction, maintenance and repair work. Federal regulations presume that building owners "are often the only and/or best source of information concerning" whether asbestos containing materials are present in a building. As the best source of knowledge, Federal regulations put the onus on building owners to determine the presence of asbestos within their building.

Associations should be aware that the definition of "building owner" is not as clear cut as it seems. Even if your association does not technically own your building (as is the case in a condominium where all unit owners own an undivided percentage of the common elements), your association may be responsible for determining the presence of asbestos containing materials. Section 1926.1101(b) of the CFR defines a "building owner" as the legal entity "which exercises control over management and record keeping functions relating to a building and/or facility…" This definition can be interpreted to include property owners associations as well as condominium associations (and possibly their managing agents).

Determination and Notification of Asbestos

Federal regulations require that "before work… has begun, building and facility owners shall determine the presence, location and quantity of [asbestos containing materials] and [presumed asbestos containing materials] at the work site…" It is thus the responsibility of the building owner or manager to have knowledge of and notify contractors, employees of contractors and tenants of the results of this determination. The CFR also imposes a duty on the building owner or manager to inform building employees (including cleaning and maintenance staff) of the results of this determination as well.

But how is this determination made? An association can determine the presence of asbestos containing materials within a building by conducting a building-wide independent asbestos survey. There are multiple firms throughout Virginia and Washington, D.C. that can perform these types of surveys. Associations with buildings built prior to 1980 should especially consider conducting a building-wide professional asbestos survey as Federal regulations presume asbestos containing materials are present in all buildings built prior to 1980.

Failure to meet the requirements of these Federal regulations may subject your association to penalties imposed by the Virginia Department of Labor and Industry, as well as the United States Department of Labor Occupational Safety and Health Administration.

Please contact us if you have questions regarding asbestos concerns, or would like assistance in coordinating a professional asbestos survey.

HOARDING: DEALING WITH THE HOARDER

By Brendan Bunn

Sometimes you can tell from the common area corridor – an unusual rancid smell. Sometimes it's the bugs migrating to neighboring units. Often, it's discovered when a contractor enters the unit to make a repair– and his path is blocked by massive piles of junk.

The horror of the hoarder.

Most associations have at least one unit or lot where the resident throws nothing away and lives in preposterous filth and squalor. In condominium units, this may be characterized by newspapers and junk mail stacked from floor to ceiling; trash -- empty cans, dirty dishes, half-empty glasses, junk food bags – littered throughout the property; or sofas obscured by stacks of clothes and random papers. In an HOA setting, one can see back yards filled with non-working appliances or garages stacked with junk in classic Fred Sanford style.

Quality of life and property values can be significantly compromised by the neighbor-hoarder.

As we all know, the conditions caused by hoarders and pack rats usually violate the association's governing documents and have palpable, negative consequences for the immediate neighbors. Whether it's a wafting stench, the migration of bugs or the horrifying appearance of the yard, one's quality of life and property values can be significantly compromised by a neighbor-hoarder. Sadder still, the pack-rat syndrome may be caused by psychological or emotional disorders which make it difficult to deal with the resident in an efficient and rational way.

We recently handled a hoarder problem for one of our condominium clients, and despite numerous attempts to work with the owner, it took a lawsuit and court order to allow the association to enter the unit and remediate the situation. In the end, the owner (an elderly woman) passed away from respiratory problems, probably caused or exacerbated by the awful condition existing in her unit. Not a happy ending.

A pack rat problem rarely solves itself, so here are some strategies for handling the hoarder syndrome:

- Contact family or social service agencies. Many hoarders are elderly or have mental problems which underpin their behavior. As such, it is often the involvement of family members (if you can locate them) or a proactive social service agency (not always the norm) which can help get to the real core of the problem.

- Involve health department or fire marshal. In many jurisdictions, local governments have instituted programs to deal with hoarders from the perspective of either health or fire code violations. Your tax dollars pay for these services, so at least try them out before spending money on legal action.

- Written demands for cleanup. Demand letters from management and/or counsel, unfortunately, often end up contributing to the very stacks of paper which make the hoarder's property a fire hazard. However, demand letters show a judge that the association sought compliance prior to court action. Such letters should remind the owner that they may end up paying costs and legal fees if court action is required.

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Hoarding: Dealing with the Hoarder

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- Inspect and take pictures. Most governing documents provide for the right of the association to inspect a unit if violations are suspected. Get access to the unit and photograph it from various angles. If one ends up in court, the pictures, more than any other piece of evidence, will impress upon a judge the seriousness of the situation.
- Be vigilant and resort to court, if necessary. The process may take awhile, but don't become discouraged. Each approach may fail, for various reasons; however, in the end, a lawsuit – admittedly the last resort – ultimately should work, as long as the problem is severe, and the governing documents have appropriate language requiring that the owner maintain the property in proper order, condition and repair. A judge – once he or she sees the pictures or hears the testimony of the pack rat's neighbors – will usually side with the association.

Please contact us if you need assistance in dealing with a hoarding situation.

REGULATION OF POLITICAL SIGNS BY COMMUNITY ASSOCIATIONS

By Cassie Craze

As a general rule, constitutional protections, including the freedom of speech, apply only to state or federal governmental bodies, and not to private parties such as community associations.

Community associations are not government and free speech rights do not impact restrictions recorded covenants may place on owners.

The issue of whether community associations may lawfully regulate or prohibit political signs is a question that frequently arises at election time, and is often a major point of contention between community associations and those owners who claim that their freedom of speech is being violated by such restrictions. However, so long as an association's recorded covenants provide the association with the authority to regulate or prohibit signs, then the association may restrict political signs without being concerned about violating an owner's free speech rights or Virginia law.

As a general rule, constitutional protections, including the freedom of speech, apply only to state or federal governmental bodies, and not to private parties such as community associations. In addition, it has been clearly established that private parties may waive constitutional rights by contract.

These issues were recently litigated in New Jersey in the case of Committee for a Better Twin Rivers v. Twin Rivers Homeowners' Association. The trial court in that case originally held that the association was precluded from regulating campaign signs because such regulation was deemed to be in violation of free speech rights provided for in the New Jersey Constitution. This ruling caused significant concern among community association professionals because the First Amendment generally applies only to the government and, of course, community associations have not, as of yet, been afforded that status.

Fortunately, the error in the trial court's judgment was recognized by the New Jersey Supreme Court when the case was reviewed on appeal. That court held that community associations are not governments and that the free speech rights do not impact what restrictions recorded covenants may place on owners. The court also noted that the free speech rights provided for the New Jersey Constitution are broader than those provided in the U.S. Constitution and in most state constitutions. This decision is generally in line with the rulings of courts in other states which have generally held that community associations are not governments and governmental power should not be imputed to them.

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Regulation of Political Signs by Community Associations

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Even though associations are not prohibited from restricting political signs on the basis of free speech, several states have passed legislation limiting associations' ability to restrict or prohibit political signs. The constitutionality of these laws, which invalidate provisions in many associations' covenants, is questionable. However, as of yet we are not aware of any court rulings deeming such laws to be unconstitutional.

Section 15.2-109 of the Virginia Code prohibits "localities" from restricting the display of political signs on private property. However, "locality" is defined by Section 1-221 of the Virginia Code to mean "a county, city, or town." Thus, this prohibition should not be construed to apply to community associations.

Bills that would prohibit community associations from restricting or prohibiting political signs have been introduced in the Virginia General Assembly. In 2006, House Bill 878 was introduced by Delegate Jeffrey M. Frederick but never made it out of committee. In 2007, Senate Bill 964 was introduced by Senator Linda T. Puller; however, after pressure from industry professionals, the bill was withdrawn. Therefore, although there have been efforts to adopt a law in Virginia that would prevent community associations from restricting political signs, none of those efforts have been successful and community associations in Virginia remain free to regulate or prohibit political signs as provided in the association's recorded covenants.

In summary, although there have been challenges to the authority of community associations to regulate political signs, at this time it remains lawful for community associations in Virginia, through recorded covenants, to regulate the placement of political signs on property that is subject to those covenants.

At this time it remains lawful for community associations in Virginia, to regulate the placement of political signs

FIRM UPDATES: RECENT HAPPENINGS AT CHADWICK, WASHINGTON, MORIARTY, ELMORE & BUNN, P.C.

- Ken Chadwick was recently elected to the Board of Governors of the College of Community Association Lawyers ("CACL"). CACL promotes high standards in legal education as well as professional and ethical responsibility among attorneys practicing community association law.
- Wil Washington recently instructed an ALI-ABA accredited continuing legal education course in San Antonio, Texas regarding the practice of drafting governing documents for condominiums and planned communities.
- Allen Warren was recently elected to serve as the 2009 Vice President of the Washington Metropolitan Chapter of the Community Associations Institute ("WMCCAI").
- Marie Johnson recently joined the WMCCAI Washington DC Legislative Action Committee, and currently serves along with Molly Peacock on the WMCCAI Golf Committee.
- Bruce Easmunt recently joined the WMCCAI Publications Committee.
- Finally, we would like to congratulate Sara Ross and her husband on the birth of their son, A.J.