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THE SPECIAL ASSESSMENT

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Ten Commandments of a Director

I. Be consistent in all thy dealings

II. Be faithful in attendance at board meetings.

III. Allow the professional manager to manage.

IV. Insist that professional management be responsible to the board of directors.

V. Keep a watchful eye on the financial reports.

VI. Communicate with your fellow board members and homeowners.

VII. Deal honestly with all thy fellows.

VIII. Resist using thy position for personal gain.

IX. Remember that you are a board member of a business.

X. Encourage the association to be members of CAI.

-Terrence P. Crawford, 1981

Details Are Key to Effective Management Contracts

Henry Thoreau's famous advice to writers was to "simplify, simplify." But for community associations writing or negotiating management contracts, "Specify, specify" is far better advice. When relationships between associations and their managers break down, as they unfortunately do, the problems can often be traced to the failure on both sides to articulate their expectations at the outset and state them clearly in the contract they sign. A well-drafted contract can avoid many problems and provide a framework for resolving problems you can't avoid.

Explain Everything

If there is a cardinal rule of management contracts, it is this: Spell out everything, assume nothing, don't leave any expectation, however insignificant, unstated or unexplained. The goal of the management contract is to state clearly and unambiguously the expectations on both sides, outlining in sufficient detail precisely what the management company is supposed to do and how it will be compensated for the services it provides. You hope the contract will sit in a drawer gathering dust. But when something goes wrong, that's when the contract means something. And if that point comes, you want to be sure the contract says what the board members meant when they signed it.

With that concern in mind, it may be a good idea to attach the management company's proposal as an exhibit to the contract, incorporating by reference all of the services the company described when presenting itself as a candidate for the job. It would be difficult for a company to argue that it never intended to provide the services described in its proposal, and equally difficult for an association to insist that it expected services neither the proposal nor the contract specifies.

Draw Clear Lines

Management services will typically encompass a broad range of administrative, advisory, maintenance, financial, and communications functions. Most of the manager's duties, although not all of them, would be part of the overall contract price, the equivalent of a "fixed price" dinner on a restaurant menu. But some services should be classified appropriately as "a la carte" – extra services provided on demand but billed separately, in addition to the contract fee.

In contract parlance, the fixed price duties would be classified either as "recurring routine services," which are included in the base contract fee, or "periodic routine services," also included in the base price, but involving costs (for mailing, document preparation, etc.) for which the manager is to be reimbursed. This category would include activities such as the prepara-

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tion of 6(d) certificates or the copying and mailing of the association newsletter, and the contract should list all of these services, along with the reimbursement anticipated for them.

"A la carte" services would typically be listed under a category labeled "non-routine," encompassing, for example, oversight of a major construction project – the replacement of a roof or the construction of a clubhouse – as distinguished from regular maintenance or periodic repairs, such as the replacement of a broken pipe. The contract should draw clear lines between routine and non-routine services and should specify the rate at which this "a la carte" work will be billed.

How Much, How Often and When?

Clarity and detail are equally important in the description of "recurring routine services" covered by the base contract fee. If the association expects the manager to produce a newsletter, the contract should specify how many newsletters the association expects and how they expect the newsletter to be delivered. Simply stating that the manager will conduct regular inspections also leaves too much potential for an expectation gap. If you expect the manager to conduct monthly inspections and you want those inspections to cover all buildings including the exterior as well as interior common areas, the contract should make that clear.

The contract should also describe the manager's authority to make decisions and spend association money without specific board authorization, and note as well the limitations on that authority. Associations handle the financial authority question differently, depending on their size and leadership style. Statutory requirements may also come into play. But most allow managers to write checks against the operating accounts on their signatures alone, up to a specified limit that typically reflects the largest recurring bill the association has to pay. Amounts above that limit should require an authorizing signature by a member of the board. Agents may also be able to cut and sign check for existing Association contracted services.

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Managers are entrusted with large amounts of money and financial checks and balances are essential. But the contract should also contain language allowing the manager to exceed the specified caps and dual signature requirements in an emergency. While that emergency authority should not be open-ended, it should be reasonable. You don't want a fire-damaged building to remain open to the elements for the three days it requires a manager to locate a non-resident board member with the authority to write a check for the emergency repairs.

Indemnification

Management contracts typically have many features in common, but they aren't standardized. The terms, necessarily, will reflect the different needs and different negotiating positions of the associations and management companies involved. One example is the indemnification provision. This provision requires the association to defend the management company and pay any damages resulting from the company's performance of its contractual duties. Indemnification clauses typically cover the performance of management duties,

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excluding "negligence, gross negligence, willful wrongdoing, or criminal acts."

Associations should determine whether the management agent can be covred under the Association's insurance policy. If the association's commercial general liability policy includes the manager as a named insured, as it should, that coverage could apply to acts resulting in personal injury or property damage. Consideration should also be given to naming the manager on the association's Directors' and Officers' liability policy, which would cover areas the general liability policy excludes, such as discrimination claims or allegations that the manager acted improperly.

Termination Clauses

Fortunately, management-association disputes do not often end in litigation, but these disputes do sometimes end the management relationship, a possibility contracts should anticipate by including a termination clause. You should draft this clause with the idea that everyone loves everyone when the contract is signed, but provide for what happens when everyone does not love everyone as much. Make sure to check your Association's governing documents. Mahy contain requirements relating to the type of termination provision which should be in a management agreement.

Whatever termination terms the association includes in its management contract should include an exception specifying that if the cause of termination is misappropriation of association funds, the contract can be severed immediately, with no advance notice and without any opportunity to cure.

The major concern when an association and its management company part ways is how to ensure a smooth transition between the old company and the new one. That is not a huge problem in most cases; management companies don't like losing clients, but they also recognize that relationships don't always work out and so take these break-ups, when they come, in stride. Still, a particularly bitter split can sometimes make a departing manager less than cooperative. To avoid the disruptions that could result from a bumpy transfer of power, the termination clause should specify that the departing company is required to turn over association records to a new manager in a timely fashion. The contract should require the manager to deliver pertinent records and provide a full accounting of money owed under the contract within a specified time (four weeks is usually reasonable) after receiving the termination notice.

Try to Hang On

While it is important for the contract to anticipate a possible termination and provide for it, it is equally important for associations to do everything possible to avoid that outcome. You don't want to prolong a relationship that isn't working, but changing management companies is difficult and expensive; it is almost always worth the effort to try and repair a relationship before ending it.

If problems arise, as they will periodically in even the best relationships, boards should discuss their concerns directly with the manager, and if necessary, with the company president. It may turn out that the problems are, indeed, irreconcilable, but if that is the case, you want to make sure you understand precisely what went wrong and why. Otherwise, the problems that led the association to end one management contract will almost certainly mar future management relationships, with the same unfortunate and undesirable results.

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TEN TIPS TO ENSURE FINANCIAL RESPONSIBILITY

1. *Understand safe harbor investments. When deliberating investing the Association's money, especially reserve funds, make sure you understand where it can go.*

2. *Review financial documents of the Association periodically.*

3. *Make sure directors have updated bank signature cards. Signature cards do not need to be kept at the management office.*

4. *Review insurance coverage annually. As the land value of property in the Association rises, the insurance coverage should increase accordingly.*

5. *In the event of a transition audit, obtain documents immediately. Keep documents organized to help out the next management company.*

6. *Always keep a sharp eye on reserves. Reserves should always be increasing and only used for the purposes originally budgeted.*

7. *Take time with the annual audit. If any accounting discrepencies arise, keep open lines of communication with the management company and the accountant.*

8. *For amounts over $1,000.00, require two or more directors signatures.*

10. *Treat the Association's money as if it were your own.*