



## Protecting the Association's Assets

By Roger K. Hendricks, PCAM  
*American Management Services, Inc.*

Many of you probably never really thought about what this means, or if you did, you may have believed the assets of an association to be the physical assets only such as the buildings, roads, amenities, etc. It is with a definite certainty that they are an association's assets... but there are other assets as well, and they should be found on the association's balance sheet. "Protecting the asset" is not another tired cliché!

Your community is obligated to prepare a pro forma operating budget annually so that you have sufficient funds to defray the typical day-to-day operating expenses of the association. That budget should also include a line item for the homeowner's share of the contribution to reserves. The combination of these two funds, operating and reserve, comprise the monthly assessment each homeowner is obligated to remit to the association as a result of their membership in the association.

Most governing documents express the owner's responsibility to remit their assessments in language very similar to the following:

*"...The owner is obligated to pay any assessments levied against that owner's unit on or before the due date of the assessment. The owner(s) **on acceptance of a deed to the unit** automatically personally assumes the obligation to pay any assessments against the owner's unit (including, but not limited to, any portion of the annual regular assessment not yet due and payable) and agrees to allow the association to enforce any assessment lien established hereunder by proceedings under the power of sale or by any other means authorized by law. The owner shall be liable for the full assessment levied against that owner's unit regardless of possession or use...."*

*This is the other asset that the Board has an obligation to protect, and which you probably did not think about. **The assessment!!** The successful collection of the monthly assessment means that the life stream of the association has been protected. The association's insurance policies, utilities, vendors, management, and oh yes, the association's legal counsel must all be paid... and on time.*

Depending on the number of units and the amount of the assessment, the non-payment of assessments from one homeowner alone can place the association's cash flow in serious trouble. When more homeowners go south in the timely remittance of assessments, then the Board and management need to decide what went wrong and begin doing something about it right away. That means all debts that are seriously delinquent, as defined in the association's collection policy, should be sent to professional collectors so that the collection agency and/or collection attorney can record liens on the owner's unit as soon as possible so long as the association's governing documents, collection policy and state statute requirements are followed.

To keep from getting into this situation, each month the association's manager or treasurer should review the AR (Accounts Receivable) Summary to determine who has not paid, and to verify that the bookkeeper has sent collection correspondence to homeowners who are in arrears. By aggressively generating letters from management, the association is generally rewarded with the remittance of the past due assessment. Although the collection of late fees (equal to 10 percent or 10 dollars whichever is greater) and interest (equal to 1 percent per month or 12 percent per annum, unless your documents say otherwise) was not the association's goal, the homeowner received the message that there is a price to be paid for seriously affecting the ability of the association to meet its financial responsibility.

Beyond sending the initial correspondence, after the case has been referred to professional collection, you (meaning a manager or director) should refrain from communication with the delinquent homeowner unless they have asked to speak with the Board about a payment plan. In executive session, federal and state statutes concerning fair debt collection require a professional collection personnel to speak in a certain way to debtors, so that managers and Board members do not risk violating the statutes they should avoid discussion with the delinquent owner.

Sacramento's zealousness in proliferating new laws, year after year, makes it almost impossible for management companies and self managed communities to stay current and understand how they are to work these new procedures into their operations. Heck, even the attorneys whose job it is to understand the new legislation have their share of problems with implementing the new laws.

After the initial letter, let the collection firm experts handle the collection of the delinquent assessment from that point on.

*Roger K. Hendricks, CCAM, PCAM, is the President of American Management Services, Inc., San Jose, a company that specializes in the management of common interest communities in California.*



## ASSESSMENT COLLECTION & LIENS

### **Assessments and Liens 2006 and Beyond. . .**

**By Sandra L. Gottlieb, Esq.**  
*Association Lien Services*

With the passage of Senate Bill 137 in 2005, new assessment collection laws went into effect January 1, 2006 which affect *all* liens recorded after that date. Now, more than ever, the timely recordation of liens is necessary to secure an association's financial well-being.

The new law adds several new requirements and changes to collection and foreclosure procedures. The changes to California Civil Code § 1365.1 and new Civil Code § 1367.4 require that delinquent assessments total \$1,800 or are one (1) year delinquent prior to foreclosure. Homeowner associations are prohibited from foreclosing on an assessment lien unless *either* the amount of the assessments owed (not including costs, interest, or accelerated assessments) is \$1,800 *or* one (1) year of delinquency has passed on any unpaid assessments. Unless payment plan agreements say otherwise, payment plans do not stay the running of the one (1) year of delinquency.

As a tip, when levying a large special assessment, do not levy the assessment with monthly payments. Instead, levy the whole amount of the special assessment due in thirty (30) days, and offer a payment plan as an accommodation to those homeowners who cannot pay within forty-five (45) days. Levying assessments this way protects the association against an owner that sells their unit and, if set forth in the notice, allows for acceleration upon default.

One big issue is the definition of foreclosure; is it the process or the act of selling? California case law indicates that foreclosure is the actual act of the trustee sale, and not the recording of the assessment lien or the Notice of Default. All actions leading up to the foreclosure sale are merely proceedings to secure an interest in delinquent assessments (i.e. recording the lien, noticing the default, etc.). However, technically an association cannot notice the sale (or use language that threatens a sale) until the threshold of either the \$1,800 or one (1) year of delinquency has been reached. To do otherwise could be a violation of the Fair Debt Collection Practices Act ("FDCPA"), a Federal law, and would violate the Rosenthal Fair Debt Collection Act ("RFDCA"), a State law, as well.

As to "Notice of Assessments and Foreclosure" required mailings, California Civil Codes §§ 1365.1(a) and (b) require the following: Civil Code § 1365.1(a) requires associations to distribute the written notice described in § 1365.1(b) ("Notice of Assessments and Foreclosure") during the sixty (60) day period immediately preceding the beginning of the association fiscal year. Civil Code § 1365.1(a) specifies the language of exactly how the notice should read. In order to understand how to prepare the notice, see Civil Code § 1365.1(b) for the exact language. This Notice should be sent *in addition* to an association's assessment and collection policy.

As to the Date of Delinquency, Civil Codes § 1365.1 and 1366 provide that Regular and Special Assessments are considered delinquent fifteen (15) days after they are due unless the governing documents provide for a *longer* period.

Civil Code § 1367.1 requires the Pre-Lien Notice Letter and itemizes everything that must be contained within that letter. This should not be the first letter sent to the owner regarding their delinquency. Rather, this is the formal letter that starts the official collection process and must meet the requirements of the Civil Code. The letter must contain all of the things it did before the new law changes in January of 2006, including: a general description of collection and lien enforcement procedures, homeowners' rights to inspect the books, etc. This requirement is usually met by attaching a copy of the association's collection policy with the letter to the owners.

Attached is a document entitled "Sample Delinquent Assessment Collection Policy". The policy contains information to be included in the Pre-Lien Notice Letter that meets all of the requirements of Civil Code § 1367.1: an itemized statement of charges, a statement that the owner shall not be liable for any of the charges, interests, or costs of collection if it is found that the assessment was paid on time to the association, and an owner's right to request a meeting with the Board to discuss a payment plan. (This request by the owner is not Internal Dispute Resolution or "IDR"). The owner's request does stop the collection process if the owner has requested a meeting with the Board to discuss a payment plan until after that meeting occurs.

New information effective January 2006 that must be included in the formal demand letter is IDR – the right to dispute the assessment debt by submitting a *written* request for dispute resolution to the association pursuant to the association's "meet and confer" program. If there is no program in place, the association's obligations will default to the statutory minimum requirements. The "how to" process is stated in Civil Code §1367.1(a). A request stating "I want to meet with the Board" is *not* considered a request for IDR. If someone says they want to meet with the Board, it must be clarified whether they want to meet with the Board to discuss a payment plan, or whether they are requesting IDR. If an owner requests IDR before the lien is recorded, the lien cannot be recorded until the association participates in IDR.

After the lien has been recorded, a homeowner has the right to request Alternative Dispute Resolution ("ADR") with a neutral third party and specify what type of ADR the owner requires the association to participate in before the association may initiate foreclosure of the owner's separate interest, *except* that binding arbitration shall not be available if the association intends to initiate judicial foreclosure.

However, an owner no longer has to pay the disputed assessment(s) or fees and costs as a prerequisite to ADR. Potential liability for the association exists if the homeowner contacts the association or the manager representing the association requesting IDR/ADR and the request is ignored or is not relayed to the association's attorney or collection service. ADR stops the association from proceeding with the next stage of collection. The homeowner must be given notice of the right to participate in ADR thirty (30) days before the recording of the lien (pre-lien letter) and before initiating foreclosure by the recordation of a Notice of Sale (NOS).

The new law also adds a secondary addresses requirement. California Civil Codes §1365.1 and § 1367.1 state that if an owner provides a secondary address to the association, it must send additional copies of all notices to that owner at the given secondary address. The changes to the law specify that the homeowner must make a *written* (fax is ok) request for the association to send notices to a secondary address. While the association must honor any verbal secondary address additions/updates, it is important to notify the owner/manager/association that this is being done as a courtesy and that it needs to be requested in writing in compliance with the new law. As a tip, California Civil Code § 1367.1(k) also requires that the association give notice to the owner of the owner's right to provide for a secondary address at the time the association distributes the pro forma budget.

California Civil Code § 1367.1(k) states that if a secondary address is identified or changed *during* the collection process, the association shall only be required to send notices to the indicated secondary address from the point the association receives the request to update/add a secondary address.

California Civil Code § 1367.1(c)(B)(2) now requires that a *majority* of the Board of Directors must vote to decide to record a lien at an *open* meeting of the Board (not executive session). The decision of the Board must then be recorded in the minutes of the meeting. There is no language in the new law that requires that the owner remain anonymous at this point in the proceeding, but there are requirements that the owner's information be kept confidential in the minutes of the executive meeting when the Board votes on whether to Notice the Sale of an owner's unit. That said, notwithstanding the fact there are no limitations on the disclosure of the members name due to potential liability for slander (spoken) or libel (written in the minutes), and violation of FDCPA and RFDCRA (collection practices laws, both Federal and State), do *not* use the owner's name! Please refer to the attached sample "Board of Directors Resolution to Record a Lien" for an example of a proper way for the Board to approve a lien and comply with Civil Code § 1367.1.

As to the lien, California Civil Code § 1367.1 requires the same information that is in the pre-lien letter to be included in the lien (except for the owner's right to IDR or ADR). (See Civil Code § 1367.1 (d)). The Board shall provide notice of the lien by service in compliance with Code of Civil Procedure starting with Section 415.10 et. seq. If the owner has legal representation, service should be made to that legal representative. Certified Mail is acceptable when it is going to the owner directly.

If the homeowner does not bring their account current, new changes to the Civil Code state that the decision to foreclose must be made by a majority vote of the Board in an executive session and the vote must be recorded in the minutes of the next general session of the Board. The Board must maintain the privacy of the owner by referring to the matter by the parcel number (APN) of the property rather than the owner's name in the minutes and/or resolution. Although nothing prohibits the Board from referring to the owner's name during the executive session, potential liability for defamation, invasion of privacy and violation of fair debt laws still exist. As referenced above, the code allows for reference to the owner by the APN number (Assessor's Parcel Number) as it is listed on the Grant Deed. Some older properties will not have an APN and then, with no other options, the matter should be referred to by either the legal description or lot number of the property. The vote of the Board must occur within thirty (30) days prior to any sale.

Once the decision to foreclose is made, the Board must provide *written* notice of that vote by: *First-Class Mail* to all owners of a separate interest who do not occupy the separate interest, at the most current address shown on the books of the association; or *Personal Service* - to an owner of a separate interest who occupies the separate interest or to the owner's legal representative. *Unfortunately, the code does not specify that personal service must be in compliance with Civil Code § 415.10 (personal service).* Managers and Board members need to be very careful if they take on this responsibility of service, and if the property goes to foreclosure based on a manager/association's statement that a person was properly served. If they, the owners, are not properly served, the legality of the foreclosure sale will be questioned.

Once again, prior to initiating non-judicial foreclosure, the Board must offer the owner ADR. If the owner requests ADR, the association and the owner shall participate in ADR. As a reminder, binding ADR is not an option if the association is pursuing judicial foreclosure; otherwise, if the Notice of Default is recorded and the homeowner requests ADR, the Board must participate in ADR before it can notice the sale.

California Civil Code § 1367.4(c)(4) provides that if a unit is sold for delinquent assessments, the foreclosed owner has a right of redemption within ninety (90) days after the sale. However, the homeowner must pay their delinquent costs, costs of collection and whatever costs the third party (including the association) incurred during the sale (amount paid for property, insurance, assessments, etc.). The code does not specifically state how the redemption should occur so we have taken the position that you should follow the same procedures utilized for redemption after a judicial foreclosure.

In the last five years, assessment collections in California have changed dramatically. The most important thing is for Boards of Directors to establish collection policies consistent with association governing documents and state statute and the consistent enforcement of the association's policies.

*Sandra L. Gottlieb is President of Association Lien Services, the assessment lien foreclosure specialists, with offices throughout Northern and Southern California and a partner in the community association law firm of Swedelson & Gottlieb.*

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#### SAMPLE DELINQUENT ASSESSMENT COLLECTION POLICY

1. Prompt payment of assessments by all owners is critical to the financial health of the Association and to the enhancement of the property values of our homes. Your Board of Directors takes very seriously its obligation under the Declaration of Covenants, Conditions and Restrictions (CC&Rs) and the California Civil Code to enforce the members' obligation to pay assessments. The policies and practices outlined shall remain in effect until such time as they may be changed, modified, or amended by a duly adopted resolution of the Board of Directors. Therefore, pursuant to the CC&Rs and Civil Code Section 1367.1(a), the following are the Association's assessment practices and policies:
2. Assessments, late charges, interest and collection costs, including any attorneys' fees, are the personal obligation of the owner of the property at the time the assessment or other sums are levied (Civil Code Section 1367.1(a)).
3. Regular monthly assessments are due and payable on the first day of each month. A courtesy billing statement is sent each month to the billing address on record with the Association. **However, it is the owner of record's responsibility to pay each assessment in full each month regardless of whether a statement is received.** All other assessments, including special assessments, are due and payable on the date specified by the Board on the Notice of Assessment, which date will not be less than thirty (30) days after the date of notice of the special assessment.
4. Any payments made shall be first applied to assessments owed and only after the assessments owed are paid in full, shall such payments be applied to late charges, interest, and collection expenses, including attorneys' fees, unless the owner and the Association enter into an agreement providing for payments to be applied in a different manner.
5. Assessments not received within \_\_\_\_\_ (\_\_\_\_) days of the stated due date are delinquent and shall be subject to a late charge of \_\_\_\_\_ Dollars (\$\_\_\_\_) or \_\_\_\_ percent (\_\_\_\_%) of the delinquent assessment. [Note: The CC&Rs govern as long as the delinquency date in the CC&Rs is no less than fifteen (15) days and the late charge is no more than Ten Dollars (\$10.00) or ten percent (10%), whichever is greater.] [Note: If the CC&Rs are silent, the Civil Code mandate of Ten Dollars (\$10.00) or ten percent (10%) shall govern.]
6. An interest charge at the rate of \_\_\_\_ percent (\_\_\_\_%) per annum will be assessed against any outstanding balance, including delinquent assessments, late charges and cost of collection, which may include attorneys' fees. Such interest charges shall accrue thirty (30) days after the assessment becomes due and shall continue to be assessed each month until the account is brought current. [Note: Check CC&Rs for interest amount.]
7. If a special assessment is payable in installments and an installment payment of that special assessment is delinquent for more than thirty (30) days, all installments will be accelerated and the entire unpaid balance of the special assessment shall become immediately due and payable. The remaining balance shall be subject to a late charge and interest as provided above.
8. A first notice of past due assessment ("late letter") will be prepared and mailed once an assessment becomes delinquent. A \_\_\_\_\_ dollar (\$\_\_\_\_) charge for the late letter will be made against the delinquent owner's account. [Note: Provision optional.]

9. If an assessment is not received within \_\_\_\_\_ (\_\_\_\_) days after the assessment becomes delinquent, the Association or its designee, in the event the account is turned over to a collection agent, will send a pre-lien letter to the owner as required by Civil Code Section 1367.1(a) by certified and first class mail, to the owner's mailing address of record advising of the delinquent status of the account, impending collection action and the owner's right to request that the Association participate in some form of internal dispute resolution process ("IDR"). The owner will be charged a fee for the pre-lien letter. Notwithstanding the provisions of this Paragraph, the Association may (i) send a pre-lien letter to a delinquent Owner at any time when there is an open escrow involving the Owner's Unit/Lot, and/or (ii) issue a pre-lien letter immediately if any Special Assessment becomes delinquent.
10. If an owner fails to pay the amounts set forth in the pre-lien letter and fails to request IDR within thirty (30) days of the date of the pre-lien letter, the Board shall decide, by majority vote in an open meeting, whether to authorize ALS to record a lien for the amount of any delinquent assessments, late charges, interest and/or costs of collection, including attorneys' fees, against the owner's property. If the Association authorizes ALS to record a lien against the owner's property, the owner will be charged for the fees and costs of preparing and recording the lien. The lien may be enforced in any manner permitted by law, including, without limitation, judicial or non-judicial foreclosure (Civil Code Section 1367.1(g)).
11. Once the matter has been transferred to ALS, ALS may be authorized to enforce the lien thirty (30) days after recordation of the lien and may be authorized to foreclose the lien by non-judicial foreclosure sale when either (a) the delinquent assessment amount totals One Thousand, Eight Hundred Dollars (\$1,800) or more, excluding accelerated assessments and specified late charges and fees or (b) the assessments are delinquent for more than twelve (12) months. You could lose ownership of your property if a foreclosure action is completed. You will be responsible for significant additional fees and costs if a foreclosure action is commenced against your property.
12. The decision to foreclose on a lien must be made by a majority of the Board of Directors in an Executive Session meeting and the Board of Directors must record their votes in the minutes of the next open meeting of the Board. The Board must maintain the confidentiality of the delinquent owner(s) by identifying the matter in the minutes by only the parcel number of the owner's property. Prior to initiating any foreclosure sale on a recorded lien, the Association shall offer delinquent homeowners the option of participating in IDR or Alternative Dispute Resolution ("ADR").
13. An owner is entitled to inspect the Association's accounting books and records to verify the amounts owed pursuant to Corporations Code Section 8333.
14. In the event it is determined that the owner has paid the assessments on time, the owner will not be liable to pay the charges, interests, and costs of collection associated with collection of those assessments.
15. An owner has the right to dispute the assessment debt by submitting a written request for dispute resolution to ALS for delivery to the Association pursuant to Civil Code Section 1363.810 *et seq.*
16. An owner has the right to request alternative dispute resolution with a neutral third party pursuant to Civil Code Section 1369.510 *et seq.* before the association may initiate foreclosure against the owner's separate interest, except that binding arbitration shall not be available if the Association intends to initiate a judicial foreclosure.
17. Any owner who is unable to pay assessments will be entitled to make a written request for a payment plan to ALS to be considered by the Board of Directors. An owner may also request to meet with the Board in executive session to discuss a payment plan if the payment plan request is mailed within fifteen (15) days of the postmark date of the pre-lien Letter. The Board will consider payment plan requests on a case-by-case basis and is under no obligation to grant

payment plan requests. Payment plans shall not interfere with the Association's ability to record a lien on an owner's separate interest to secure payment for the owner's delinquent assessments. If the Board authorizes a payment plan, it may incorporate payment of ongoing assessments that accrue during the payment plan period. If a payment plan is approved, additional late fees from the homeowner will not accrue while the owner remains current under the terms of the payment plan. If the owner breaches an approved payment plan, the Association may resume its collection action from the time the payment plan was approved.

18. Nothing herein limits or otherwise affects the Association's right to proceed in any lawful manner to collect any delinquent sums owed to the Association.
19. Prior to the release of any lien, or dismissal of any legal action, all assessments, late charges, interest, and costs of collection, including attorneys' fees, must be paid in full to the Association.
20. There is no right of offset. An owner may not withhold assessments owed to the Association on the alleged grounds that the owner is entitled to recover money or damages from the Association for some other obligation.
21. The Association shall charge the owner a Twenty-Five Dollar (\$25.00) fee for the first check tendered to the Association that is returned unpaid by the owner's bank and Thirty-Five Dollars (\$35.00) for each subsequent check passed on insufficient funds. If the check cannot be negotiated, the Association may also seek to recover damages of at least One Hundred Dollars (\$100.00), or, if higher, three (3) times the amount of the check up to One Thousand, Five Hundred Dollars (\$1,500.00) pursuant to Civil Code Section 1719.
22. Owners have the right to provide a secondary address for mailing for purposes of collection to the Association. The owner's request shall be in writing and shall be mailed to the Association in a way that shall indicate that the Association has received it. An owner may identify or change a secondary address at any time, provided that, if a secondary address is identified or changed during the collection process, the Association shall only be required to send notices to the indicated secondary address from the point the Association receives the request.
23. All charges listed herein are subject to change upon thirty (30) days' prior written notice.
24. Until the owner has paid all amounts due, including delinquent assessments, late charges, interest and costs of collection, including attorneys' fees, the Board of Directors may suspend the owner's right to vote, and suspend the owner's right to use the Association's recreational facilities after providing the owner with a duly noticed hearing pursuant to Civil Code Section 1363(h). However, any suspension imposed shall not prevent the delinquent owner from the use, benefit and pleasure of the owner's lot. [Note: Check CC&Rs and Bylaws to confirm that the association has the right to suspend voting rights for nonpayment of assessments.]



BOARD OF DIRECTORS RESOLUTION TO RECORD LIEN  
California Civil Code § 1367.1

Association: \_\_\_\_\_ (the "Association")  
Owners (identification other than name, ex. address): \_\_\_\_\_ (collectively, "Owners")  
Assessor's Parcel Number of Property: \_\_\_\_\_ ("APN")  
If no (APN), description of Property: \_\_\_\_\_ ("Property")

WHEREAS, the Board of Directors ("Board") has found the Owner of Property listed above is delinquent in paying regular and/or special assessments and currently owes \$ \_\_\_\_\_ in assessments, late charges, and interest and is \_\_\_\_\_ months delinquent in making their payments.

WHEREAS, the Board, in compliance with the current Association collection policy, has resolved to turn the Owners account over for collection and had to lien the Property as a result of non-payment of delinquent assessments.

WHEREAS, the Board hereby certifies that the following has occurred in compliance with California Civil Code section 1367.1:

- ☛ The Board itself has voted on the subject of this resolution and did not delegate voting to any agent of the Association.
- ☛ The vote occurred in an open meeting of the Board at which a quorum was present.
- ☛ A majority of those Board members present constituting a quorum has voted in favor of recording a lien for delinquent assessments on the property described above.
- ☛ A copy of this Resolution must be attached and made part of the Board's meeting minutes.

IT IS HEREBY RESOLVED THAT, the Board has adopted this Resolution and that it is signed by a member of the Board vested with the authority to do so.

ADOPTED BY:

\_\_\_\_\_  
Signature of Authorized Board Member

\_\_\_\_\_  
(Please Print Your Name)

Title: \_\_\_\_\_

Date: \_\_\_\_\_

Maintenance Painting  
For Common Interest Developments

By Mike Muilenburg

Mike Muilenburg Bio

Mike Muilenburg graduated from UCLA in 1978, as a cum laude recipient of a Bachelor of Arts degree in Economics. Mr. Muilenburg subsequently created Ekim Painting in 1979, specializing in servicing the CID industry. Mike is a licensed contractor, with C-33 and B designations. Mike is an active participant of the various trade groups that provide support to homeowner associations, and is a past ECHO board member, serving from 1994 – 2000.