CHAPTER 2

The Players

A. The Unit Owners.

Who is an owner? In its simplest form, the answer is easy: anyone whose name appears on the deed to the Unit. Sometimes it's not that simple. For instance, what if a corporation or a trust or an LLC owns the Unit?

By the terms of the Condominium Act, anyone who acts as an officer, director, trustee, etc. of such a legal entity, is considered a unit owner. RSA 356-B: 40, II. On the other hand, if the person acting, for instance, as a Board member or Officer does not hold such a position, then the person is not considered a unit owner. Further, if the person was a unit owner under one of these legal entity type of ownership methods at the time s/he became an Officer/Director, but no longer holds such a position in the legal entity, then the person is automatically disqualified from acting as an owner and guiding the association and perhaps spending its money, when the person no longer has a vested interest in the property. RSA 356-B: 40, II.

Although most associations are run by a Board of Directors, it is not required. "The Bylaws shall provide whether or not the unit owners' association shall elect a board of directors." RSA 356-B: 35, II. In other words, if there is no Board established in the Bylaws, then operation of the association falls back to all of the unit owners as a collective whole. What may sound like a choice that should make no difference in the operation of the association, is in reality a choice fraught with peril to the smooth operation of an association. Without a Board of Directors, chaos likely reigns.

When there is no Board of Directors, by default, the operation of the Association is left to the members as a whole. In theory, this creates a direct democracy, much like the Greek Polis system, where everyone[1] votes on everything. In Condo World however, if everyone is involved, an association meeting must be called. In turn, there are notice provisions that are triggered (more on this in the Meetings section) to be sent to all unit owners (perhaps by certified mail, perhaps not), within certain time frames; then a quorum has to be present at the meeting; an affidavit has to be created and made available at the meeting; a list of addresses to which each of the Notices was sent must be drafted and made available to everyone at the meeting; and then if all that goes right, actions can be taken. It gets a little tricky calling a valid meeting.

Of course, if someone is playing music too loud, parking illegally, improperly disposing of garbage, etc., nothing can be done for weeks, perhaps months, until the notice requirements are met, a meeting is held, a quorum exists, etc. On a larger scale, if there is a large catastrophe, such as ice dams that have caused damage to multiple units, then the insurance claim cannot move forward until notice, meeting, quorum, etc.

Boards, on the other hand, can act quickly, frequently the same day an issue arises.

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[1] Not really everyone. Slaves, women and poor people were excluded from voting in ancient Greece. In other words, everyone eligible to vote.

On balance, it is better for associations to cede some of their democratic powers to a Board of Directors in order to have the Association have the ability to act quickly and decisively when managing the association.

The common complaint of unit owners who are opposed to the operation of an Association through a Board, their Board, is they fear what a Board would do, would not trust them, etc. This is a misunderstood control issue.

Boards are routinely elected. If the members truly do not like the actions of the Board, then, at worst, at the end of the election cycle, usually annually, they can replace one or more members. If things are really bad, a special meeting can be called, and Board members can be removed from office. And if Board members are not ousted, then it is clear the majority are at least satisfied, if not happy, with the actions of the Board. The choice then is between a representative democracy where we elect officials to do our bidding or a direct democracy where all eligible votes vote on all issues.

In reality, most unit owners who are against a Board are usually comprised of people who are not against a Board per se, but who are against it because they do not want anyone to tell them what to do about anything. In other words people who want to live in a single family home, but who live in a community association.

B. The Board of Directors

In the vast majority of condominium associations in New Hampshire the chosen method of governance is through a Board of Directors. This section deals with how Boards operate.

The Board of Directors is, technically, "an executive and administrative entity, by whatever name denominated, designated in the condominium instruments as the governing body of the unit owners' association." 356-B: 3, I.

Further, "(t)he bylaws shall provide whether or not the unit owners' association shall elect a board of directors." RSA 356-B: 35, II. If there is no Board, the unit owners as a whole have to operate the Association, generally a disaster waiting to happen. *See above.*

Perhaps the most important item to remember when dealing with Boards is that Boards have the extraordinary power and duty to act as a fiduciary to the condominium and the owners. In English this means all unit owners who have purchased a unit have chosen to place their trust in the governing body that is the Board. In turn, the Board has the duty not to act with that good faith, its fiduciary duty.

Most of the time, far and away most of the time, Boards act responsibly and take their duties seriously. Occasionally, Boards overstep their boundaries. They may funnel contracts to a preferred vendor, or have their units repaired first, or have projects with no bids granted to friends or relatives. And in smaller associations, you can have a Board that is comprised of members who, either by number or by percentage of ownership, control not only the Board but also the association or can even make amendments that favor them.

What to do in such situations? Well, most of the time a Board is unconcerned about the prospect of being sued. After all, associations are covered by insurance.

However, there are some problems with this reliance on insurance.

The more minor of the two points is that most policies only cover the actions of the Board when the suit requests money - monetary damages in legal lingo. If a unit owner sues not

for damages, but to force a Board to abide by the condominium instruments, then there is a real likelihood the insurance company will decline coverage.[2] Additionally, an insurance company can decline coverage if it is determined the actions of the Board have been in breach of its fiduciary duty to the association.

The more major of the two points is that the offending owners, even though they are Board members, will not be covered and will have to defend the suit on their own. The fiduciary duty requires Board members to act in a manner that is best for the Association, not individual board members. In some cases, for instance where it is funneling contracts to friends or relatives, then it is not doing what is best for the association, but what is best for an individual on the Board. In such instances the Board has violated its fiduciary duty and can be subject to claims its actions do not give them protection as individual Board members.

This analysis is based upon an understanding that as a fiduciary a person is entrusted not with acting on behalf of themselves or select others, but on behalf of the association.

It is also helpful to notify the association's attorney represents the association and not wayward Board members. In other words, the attorney has a legal and ethical duty to represent the amorphous association and not defend the actions of wayward Board members.

Simply put, Boards have to act, as a fiduciary, to preserve and increase the value of the Associations assets, the common area and the units. Part of this duty is to ensure their actions will not invite lawsuits.

In summary it is perhaps easiest to think of Boards as having an extraordinarily high level of obligation to the association and not the individual Board members.

i. <u>Number</u>

There is no set number of Directors to be elected. Generally, the larger the number of units in the association, the larger the Board of Directors. The size of the Board can be changed by an appropriate amendment to the Bylaws.

The only potential difficulty with the number of the Board of Directors, aside from the unwieldiness of having a large number of Board members, comes when there is an even number. This is not uncommon. For instance, there are many, many small, two- and four-unit buildings that have been converted into condominiums.

In either of these cases, it quickly becomes a problem when Board votes result in ties. Such a result, when repeated over and over, especially at those associations where the members just do not get along, can paralyze an association. Imagine how an association can deteriorate, for instance, if there are tie votes about which bids to accept for roofing, insurance, paving, siding, painting, etc.

The solution in the two-person Board is simple. The documents should contain a provision that indicates if there is a tie vote, then the owners have to agree to hire a condominium attorney to act as mediator, hear both sides and make a decision.

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[2] The insurance company can also choose to defend the case under a reservation of rights. This means the insurance company will provide initial coverage, and later make a determination of whether the actions of the Board were covered. If it later finds the actions were not covered, it will sue the association to recover its costs.

If the two Units cannot agree on an attorney, then each side picks one and those two attorneys agree on a third one who shall become the arbitrator. The reality is that such provisions require the owners to spend a lot of money on attorneys and mediators just arguing over who should be awarded a painting contract. Such financial penalties usually force the owners to come to quick agreements.

With regard to the four-unit association, the same tie breaker can be utilized. But perhaps the simpler and cheaper solution is to create a three-person Board. What to do about the fact the fourth unit is essentially powerless with little to no influence at the Association? Simply amend the documents to place each unit on the Board, and have a rotating schedule of voting units. By doing so, it will make those in power be a bit more cautious in their actions as they will soon be rotated out and lose influence and power.

ii. Elections

Elections are governed by the Declaration and Bylaws. (If drawn properly, the requirements will be in the Bylaws.) Usually elections occur at the Annual Meeting, however there is no set protocol for elections at the unit owners' gatherings. To help speed such meetings along, the Notice of the Annual Meeting should indicate how many openings are on the Board and whether the current Board member(s) is/are running for reelection.

However, there is no requirement under the New Hampshire Condominium Act that all who wish to run for the Board have to notify the Board before the Annual Meeting packet is sent to the Unit Owners. Nominations can be, and frequently are, taken from the floor at the meeting.

Some associations have tried to control the Board by allowing only those who have submitted names for election prior to the meeting to run for the Board. This control tactic is of dubious legal merit. The problem is the Annual Meeting is the one time the Unit Owners have the unequivocal right to attend and participate. After all, it is their Association, not the Board's Association. There is nothing in the case law that suggests a rogue Board can prohibit nominations from coming from the floor.

Finally, there are no statutorily set procedures on how to vote. Much of this depends upon the size of the Association and the number of owners who appear. The Board should, prior to the annual meeting, determine how votes are to be tallied, either by hand vote, voice vote, open or closed ballot.

iii. Vacancies

What to do about vacancies on the Board of Directors is determined by the condominium instruments, and the guiding language should be in the Bylaws. Generally, the most common, and likely the best, way is to have language in the Bylaws that allows the Board of Directors, by majority vote, to appoint someone to fill the vacancy until the next association meeting at which the unit owners can elect someone to serve out the remaining portion of the unexpired term of the previously vacant seat.

The other option is to have a vacancy on the Board of Directors until the Association members can fill the vacant spot. This may not have much effect in most day-to-day or week-to-week matters that effect the Association, but if there are important matters that require immediate attention, such as a determination of who is responsible for maintenance under the documents, or

how to proceed with an insurance claim, or whether to impose a special assessment in order to pave the potholes in the entranceway, and the vacancy has created an even number of members on the Board, and the Board vote is a tie, then things, important things, can grind to a halt.

Best to give the Board the option to appoint someone to allow the Board to do what it is charged with doing … operating the Association.

Finally, it would be best to have a provision in the Bylaws that requires the Board, in the absence of it appointing someone to the Board to fill the position within thirty (30) days of the vacancy, to set an Association meeting within sixty (60) days of the vacancy. This type of provision will prevent a situation where an even-number Board will repeatedly end up in ties, including even whether to set an association meeting.

This reluctance to set a meeting date for the members to fill the vacancy on the Board is not that far-fetched. Imagine a situation where the Board is at odds over whether to impose, for example, a special assessment. Either side, suspecting the new Board member will tilt the majority away from their preference, may vote not to schedule an Association meeting. Having such a mandatory meeting provision prevents this type of situation from paralyzing the association until the next Annual Meeting.[3]

iv. <u>Removal</u>

There are two types of removals and two ways to be removed. None of these are very good choices for an Association.

A Board member can be removed for cause or no cause and the removal can come from the Unit Owners or from the Board itself.

A removal for cause requires the documents to have a definition of what "for cause" means. Definitions can vary from association to association, but usually it means the breach of a material duty or obligation. But that, of course, is vague. If a Board member must have violated a provision of the documents, then you invite a suit to determine whether there was an actual violation.

Do you remove someone who has sued the Association? Removing someone for exercising a constitutional right to appeal to a court to resolve a dispute would likely be looked upon dimly by a court.

Do you remove someone because they have been convicted of a crime? If so, it is possible you are punishing them after society has punished them.

There are a myriad of possibilities that can create problems, and associations have to ask themselves if it is worth the time and trouble to remove the member rather than simply wait until the next Annual Meeting and address the problem at that time by voting the person out.

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[3] A Board can, of course, always refuse to accept the resignation, but there are at least two problems with this provision. First, it would be very hard to require a Board member who has submitted a resignation to appear at Board meetings. Second, even if the first hurdle were cleared, it is likely not in the Association's best interest to have someone who does not wish to be on the Board making decisions that affect the rest of the Association. Best to let the resigning Board member fade away as she or he wishes.

There is also the problem of a vacancy being created when a Board member sells his/her Unit, necessarily creating a resignation and vacancy. Best to have a provision in place that requires the Board to fill the vacancy by majority vote, and, failing that, require an Association meeting be set to fill the vacancy by Association vote.

I suspect Locke and Hobbes would be appalled by a democratically elected official being recalled and removed after the voice of the people has been heard and the person duly elected.

There will undoubtedly be real cause for removal, but those instances will be both immediately recognizable by the Board and the other owners, and likely the offending Board member as well, and they will be few and far between.

It would be wise not to make it easy to remove someone as governing the Association then becomes that much harder because the Board members not only have to worry about governing but about meshing personalities and styles as well.

v. Payment

Simply put, it is best if Board members never be paid for their time. Payments to Board members open an avenue of criticism which only leads back to the Board members. In such situations, Unit owners frequently, and sometimes correctly, claim Board members are only on the Board so they can get paid. Charges such as these, no matter how inaccurate, put the Board on the defensive where, instead of proactively working to make the association better, they have to act defensively by justifying all of their actions for the wrong reasons.

And payment can come in many forms. The most obvious is a cash payment. Another is crediting the Board members accounts so they either do not have to pay condominium fees or they have a portion waived.

A common complaint of those who wish for payment is that the volunteer job has become a full-time job, or nearly so. It would seem a much better course that when an association is so large or its issues so demanding that the job of a Board member becomes a full-time job that it is time to hire a management company, full or part-time, that is well versed in condominium management.

There is a place for paying people for running an association, but that should be for professionals, much as you hire and pay landscapers, lawn care specialists, snow removers, accountants, etc.

vi. Powers

Board powers are extraordinary powers. The New Hampshire Supreme Court has long recognized that, by and large, Board members are volunteers and as such are to be given great latitude in how they operate the association on behalf of all of its members. New Hampshire courts, beginning with a case called Schaefer v. Eastman have a two-pronged test to determine whether a Board's actions are legitimate

They first look to see whether the action was within its scope of authority; then they look to see whether the action(s) taken reflects reasoned decision-making or arbitrary and capricious decision making.

Because an association is a corporation, it may only act in ways authorized by the Declaration and Bylaws.[4] As New Hampshire has made clear, the Declaration is the constitution

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[4] Technically, the Bylaws are a part of the Declaration, usually Exhibit C, Exhibit A being the legal description, in metes and bounds, of the property, and Exhibit B being the number, size and percentage of ownership of each Unit, so the case law frequently mentions just the Declaration, and as such, includes the Bylaws as well.

of an association. Much like the United States Constitution, Declarations usually contain broad statements of general policy.

In turn, the Declaration invests the Board of Directors with the power to implement these policies.

As such, it is very clear under New Hampshire law that a Declaration is not to be narrowly interpreted. Rather, it is to be looked at as giving a Board of Directors extraordinary powers to operate the Association in order to maintain (and increase) property values and provide municipal-like services.

As the Schaefer Court noted, if it were otherwise, the common area property could fall into a state of disrepair, which is contrary to the whole condominium world scheme.

In English, as the Schaefer Court pointed out, this means that so long as a Board's actions do not directly contradict an express provision of the Declaration (or Bylaws) or try to take away something that is expressly reserved to the entire membership of the Association to do, then the Board has the prerogative to act as it sees fit.

The remedy should an owner not like how the Board acts? Use the democratic power to replace Board members.

More explicit examples are noted and analyzed in Chapter 6.

vii. Rules and Regulations

Rules and Regulations, unlike the Declaration and Bylaws are not required to be filed with the Registry of Deeds; nor should they be.

The Condominium Act makes clear that people are notified of any Amendments to the condominium instruments upon their being filed in the Registry of Deeds for the county in which the association is situated. On the other hand, Rules and Regulations must be served upon the owners before they become effective. Filing them with the Registry of Deeds will not suffice.

In one common example, Rules and Regulations are filed with the Registry of Deeds. The theory behind such action is to notify everyone who is interested in purchasing into the association what the Rules are. In reality however, filing the Rules with the Registry causes more problems than it solves.

Generally, Rules need not be passed by the Association, but are adopted, implemented and enforced by the Board of Directors. Rules are meant to be fluid and flexible, so Boards can amend, change, revise and implement as they see fit to best protect the interests of the association. So, to illustrate just one problem, the original Rule on file with the Registry of Deeds says pets are allowed at the association. However, because of problems with some owners and some pets, the Board has amended the rule to limit the number of dogs to two and requires the unit owners to submit their dog to DNA testing to track who is not picking up after their beloved pet.

The new owner has relied on the Rule filed with the Registry, purchases a Unit, and moves in with three dogs the owner has had for many, many years. Imagine the surprise followed by anger when the Board notifies the unit owner one of the dogs has to go. The Board can rely on the law that says Rules are the prerogative of the Board, but the owner may have a legitimate claim in a court of law that they relied on what was published.

Of course, in this situation the Association could simply file a new set of Rules with the Association every time it changes a Rule, but since it is not unusual for Rules to change frequently, an Association would be faced with the extra cost of drafting and filing Rules nearly every year at the Registry of Deeds, when there is no legal requirement for them to be filed at all.

The Condominium Act does not require Rules to be filed with the Registry of Deeds; it would seem with good reason.

The whole purpose of Rules is to allow for flexibility in the operation of the association. For instance, say someone is routinely changing the oil in their truck, checking the fluids, replacing timing belts, etc. in the parking lot of the Association. This may be all right, but the Board and/or the members may feel it is not, especially if fluids are being spilled on the parking lot, tools and parts are left lying around, etc.

A better example, perhaps, is someone who has a guest who parks in a place where it blocks others, especially in the winter when the plow cannot plow properly.

In either of these cases, most Boards would be allowed to move quickly to address the situation. However, if the rules either have to be passed by the Association members and/or filed with the Registry before they become effective, the delays in getting this done can not only allow a nuisance to continue for months, but it can also create safety problems opening an Association up to liability.

In the normal course, the Board would be able to send a warning letter notifying the owner and/or the tenant of the problem and let them know of the consequences before the incident becomes a problem. But if Rules must be passed by the Association and/or filed with the Registry, then the time delay will likely make things worse, not better.

viii. <u>Fines/Late Fees/Interest</u>

Fines.

Boards have the power to impose fines. Of that there is no doubt. There is little better way to enforce documents and bring a wayward unit owner back into the community flock than to hit them in the wallet.

Too many associations, however, get bogged down creating fine schedules. For instance, a first violation may be a written warning; a second may be a fine of $25.00; a third may be a $50.00 fine; etc. The problems with this type of attempt to address problems are three-fold. First, over what time period are the fines to be administered? Does each unit owner's slate get wiped clean each year? Are violations tabulated on a calendar year or on a rolling twelve-month period? Do the violations apply per unit, per owner, per guest?

Second, as you can see, this becomes an administrative nightmare.

Third, a $25.00, $50.00, perhaps even a $100.00 fine is worth the price for some people. If someone wants to have a group of people over for the Super Bowl and is charging $10.00 a head for the keg of beer, then a $25.00 fine is nothing. Worse, if it's a first offense, they will get nothing but a warning sign.

In a more extreme example, it is not unheard of for a parent to throw a child a college graduation party, to include hiring a band or a DJ that goes to the wee hours of a Saturday or Sunday morning. Clearly, a warning or small fine is not going to deter this type of problem.

As such, the best fine schedule is one where the Board is simply allowed to fine anyone up to a certain amount, $500 or $1,000.00, for each violation of the condominium instruments and/or the Rules and Regulations, leaving the amount to be imposed by the Board based upon the circumstances of each incident.

Late Fees

Late fees are most commonly used to spur delinquent unit owners to pay their assessments. The same analysis that applies to Fines works here as well. The lower the late fee, the less likely the fee and/or the assessment will be paid in a timely manner. The fee should be proportional to the monthly condominium fee. If, for instance, the monthly fee is $200.00, then a late fee of $50.00, or 25% is good. If the condominium fee is $500.00, then an owner who can comfortably afford a condominium unit that has a monthly fee of $500.00 will probably not be motivated to pay a delinquent fee by the looming specter of having to pay an extra $50.00. However, if the fee is $100 (20%) or $125 (25%), the likelihood of payment increases.

It should be noted that late fees and interest are not in an association's budget. Therefore, such fees can be used as an incentive to pay the regular fees. In other words, agreements can be reached with owners that if they pay the amount due for the regular fees by a date certain, the Board will waive the interest and late fees.

There is little to be accomplished by backing a unit owner, a member of the same community association as the Board, into a corner where they have to pay every fee possible. It leaves the owner little choice but to fight every step of the collection way, when the goal of the Board should be to get the budget back on track, not collect extra money.

Interest

Interest cannot be so high that it is either unfair or that a Court will think it unfair. Additionally, it should not be in such an odd amount that it is hard to calculate.

Interest is calculated yearly, but added in monthly to each monthly fee that is late. For instance, if the monthly fee is $100.00, and it is late, then on the first month that it is late there should be a late fee, say $25.00, added in as well. If the interest is say 18%, $1.50 is added in for that month, for a total owed of $26.50.

For the next month, there would be another $26.50 for the second month, but an additional $1.50 added onto the first month, for a total the second month of $28.00, plus the first month fee of $26.50. As you can see, this adds up.

The same analysis that applies to Late Fees applies with Interest payments. It is best to use the imposition of interest to delinquent fees as an incentive to get someone to pay than to try to either "punish" a fellow community member or to increase revenue.

ix. <u>Access to Units</u>

One of the common misconceptions in Condo World is that the Unit Owner's Unit is his castle. It may be their castle, but the castle is part of a larger kingdom, the condominium association. This fact means there is a higher power that needs to maintain the value and viability of the Association. As such, the Association has the right to enter into a Unit, the castle,

for certain things. Additionally, parts of the castle/unit are not the owner's. Depending upon the language of the documents, the doors, windows, siding, roof etc. may be part of the Common Area. Certainly sections of the pipes that run in between units are owned by the Association, and the Association has the duty to repair and replace them, necessitating entry into Units.

As such, the Association has to, and does, have the right to enter into Units. This language will be found in every set of condominium instruments somewhere and is in the Condominium Act as well.

Aside from these factors, there is the health and safety factor. For instance, since Boards are charged with maintaining the value of the Units, if one person has become a hoarder, then the inside of a unit can fall into a state of disrepair such that it can smell, rot, and otherwise affect the value of neighboring Units. In such cases, the Board has the duty to enter and fix the problem, including getting a Court Order to remove the offending persons(s).

Look at your documents to see what notice, if any, a Board has to give to a Unit Owner before entering. Some give a certain period of time; others are silent. Either way, the notice, except in case of an emergency, has to be reasonable.

Additionally, the scope of the access should be detailed as well. Gaining access to check sprinkler heads, but then using that opportunity to check for code violations is improper, likely unnerving to the Unit owner, and will likely not be upheld by a court. After all, an Owner's home may not be their castle in Condo World, but it is still their home.

Finally, the notice should reasonably detail how many people will be entering. Imagine the Owner who stays home to await the sprinkler hear person and then in walks one or two members of the Board, the manager, the inspector, the inspector's helper, etc. That's not fair and likely will not be tolerated by either the fellow owners or the courts. Courtesy is the key. Let your fellow owners know who will be coming into their home, why and for how long.

x. Mortgages and Leases

There are usually provisions in the Declaration and Bylaws requiring notice to the mortgagee(s), such as termination of common area services and the placing of liens on a delinquent owner's Unit. As such it is important to know who the mortgagee is. The Board can easily adopt a provision to require every unit owner to provide the name and address of each such mortgagee, but one is then relying on the accuracy of a unit owner who may not even want to pass that information along although it is likely public information. The better way, unless one really enjoys reading mortgages, is to require a copy of the first 1-2 pages of the mortgage, i.e. the portion of the mortgage that indicates the amount, the mortgagee, and the mortgagee's address.

At the same time such a provision is adopted, it helps to also adopt a provision that allows the Board to acquire a copy from the Registry of Deeds and assess all costs for doing so to the owner, if the owner has not provided the requested portions of the mortgage within thirty (30) days.

Additionally, in this day and age of reverse mortgages, it occasionally happens that one appears in a condominium association. Unfortunately, it is not uncommon for the reverse mortgagor to have taken out all available funds to enjoy the autumn years of their life. The problem, of course, is the reverse mortgagor does not usually set aside funds to pay the

condominium association. In turn, either the mortgagor has no funds left and falls behind in paying condominium fees, or the unit owner passes away with no equity in the Unit, making it difficult to collect the unpaid assessments.

This can be remedied if the Board and/or the Association adopts a provision requiring someone who takes out a reverse mortgage to have a provision that sufficient funds will be set aside to pay the condominium assessments. Failing proof of same, the Board can impose a fine monthly until it is corrected.

xi. Budgets/Reserves

Budgets are the *sine qua non* without which Associations cannot run properly. People are creatures of habit. We like to know what's coming around the corner for our mortgage, our car payment … and our condominium fee. Budgets set the condominium fee. Usually the budget will include such line items as landscaping, snow removal, accounting (for an annual audit and the filing of the Association's tax return), a management fee (if there is a management company), administrative costs (such as postage), electricity (for such things as common area lights), insurance, maintenance, and trash removal.

There is an art to accounting, but budgets are just numbers and not very hard to establish. Every association comes with a budget from the Declarant. After the first year it will need to be tweaked since no one really knows what any of the costs will be for the first year. But after that it is simply a matter of adjusting it from year-to-year based upon increases in insurance, maintenance, etc.

The important thing to remember is budgets are simply guidelines. Too many associations get caught up in the rigidity trap where stress levels begin to rise if, for instance, the snow removal budget is off because of a severe winter. But there really is no reason for such stress. Again, budgets are guidelines. If one line item is over, chances are another one, perhaps maintenance, will be under. And if things just go consistently awry, then the Board can always specially assess to make up any shortfalls and then tweak the line items for the following year.

The most commonly overlooked line item is for Reserves. Reserves are just that, money set aside or reserved for future expenses. Remember, many of the expenses are not due every year. This includes paving, roof replacement, and other long-term, capital expenses.

Interestingly, the Condominium Act does not directly require that Reserves be set aside. (Even for declarants, who are to provide voluminous documents in order to get approval to create and build the condominium association, there is no requirement for Reserves. It is suggested, but if the Declarant does not want to have any money set aside for reserves, s/he only has to make such a statement that there are no Reserves.) But it is implied in the Condominium Act that associations should have Reserves. For instance, the Condominium Act allows Boards to specially assess for emergencies. However, roof replacement (other than through a catastrophic loss, such as a lightening hit) is not a true emergency. Roofs do not last forever. It is not unexpected that they will fail at some time in the future. So for an Association to specially assess for a roof assessment leaves the Board open to challenge by the last owners to purchase into the Association who may question the ability to specially assess for an "emergency" that

lack of proper administration has caused. As one judge used to intone from the bench, "You can't murder your parents and then ask for pity as an orphan."

Additionally, the condominium instruments require the Association to establish a maintenance budget. It does not suggest it is only for immediate repairs. Future maintenance is still maintenance for which funds must be budgeted.

Additionally, not having proper Reserves is inherently unfair. If there are insufficient Reserves then when, for example, a roof needs to be replaced after 25 years, everyone is specially assessed. In such cases the Unit owner who has most recently purchased is penalized for the inaction (some would say … frugality) of the long-term owners by having to pay for twenty-five years of use of a roof when the owner has only lived there one or two years. If one of the primary purposes of the operation of a condominium association is to treat all with fairness, then not having proper Reserves and penalizing the last owners to purchase and rewarding the last owners to sell and leave, violates that purpose.

How do volunteer Boards figure out how to set a Reserve Budget for maintenance items such as paving that might not need to be done for 15 years? If there is a management company, it is their job. Otherwise, there are companies that do Reserve studies for condominium associations. The good news is it is one-time expense. Once established, it sets out the projected life remaining in all capital expenses; what the projected cost will be in the future to address the capital expenses; builds in an inflation figure; calculates how much will be needed from now until the expected repair date; and determines how much is needed each year to meet the financial expectation.

From that point the Board can decide whether the budget is right on track to meet these expenses. If not, then the Board, and perhaps the Association itself, can decide whether a large special assessment is needed to get the Reserves to where they need to be with no increase in the regular assessments, whether not special assessment is needed, but the regular fee needs to be raised substantially, or a mix of an increase in the regular assessment and a smaller special assessment.

And who sets the budget (and the Reserves)? Well, there are two options: the Association or the Board of Directors. The decision depends upon the makeup of the Association itself. In reality the Board is in the best position to set the budget. After all, it is the Board that has worked with the contractors the most, has acquired quotes, and has the most knowledge of what has created the best value for the money all throughout the budget. Unfortunately, some associations have the misperception that the Board is freely spending "their" money and wishes control over the budget. This is nearly always a problem.

xii. Permissions, Revocations, Waivers and Grandfathering

As noted earlier the New Hampshire Supreme Court (rightly so) has granted Boards much latitude in how to operate the Association and to act in what it collectively thinks is in the Association's best interest. This means it can grant permission to someone to have a dog, but if the dog becomes a nuisance or a danger, it can revoke that permission. Simply put, there is no such thing as grandfathering, where anyone negatively affected by a rule change is exempt from

its enforcement. Boards have to remain fluid to take care of everyone and the condominium property.

Think of it this way. If the Board granted permission to a unit owner to have a dog and it turns out the dog likes to bite little children, and the Association has little children (or those who act like little children), then the Board has to revoke the permission in order to make the members safe. The same holds true for noises, nuisances and any other action the Board has to take. As such, there is no such thing as "Grandfathering," the concept that once permission has been granted it cannot be taken away. It doesn't work like that in Condo World. I am sure there are one or two extreme cases where so much time, effort, energy and money has been invested by a Unit Owner into something that a Court would at least pause and even perhaps allow the continuation of the policy changed by the Board, but such exceptions would be far and few between.

Waivers have the same basis in law and logic. If the Board thinks it is appropriate to waive, for instance, a fine or the enforcement of a Rule, then it may do so. The presumption is it is doing so for the benefit of the Association, such as allowing an RV to be parked on Common Area for a few days because an owner's sister has arrived from California.

Of course, Boards should not be waiving matters for Board members, unless the affected Board member has been recused.

Finally, never forget that associations are democracies. As such, if the Board is doing things it should not be doing, such as forgiving fines for Board members, then the offending Board members can be voted out of office. If that fails, an aggrieved owner always has the remedy of the courts.

C. **The Officers**

Associations have to have officers. Interestingly, there is nothing in the Condominium Act that specifically says this, but different sections make it clear that officers are necessary by requiring officers, and only officers, to sign certain documents. For example, for collections the Act requires "the principal officer" or "other designated officer" of the Association to sign memoranda of lien. RSA 356-B: 46-a. Additionally, it is a little known but important section of the Condominium Act that states only an officer may be served with a lawsuit on behalf of the Association. RSA 356-B: 40, III.

As a final example, municipalities expand and develop all the time. Neighbors may ask for a variance to put a large addition onto their house or a developer may want to develop land next to the association, for a storage facility or a restaurant, for example, next to the condo association many condominium associations, at one time or another will have to go before a local land use board. It could be for approval at the request of the Declarant to have a condominium project approved; it could be for added parking; changing parking, installing utility meters, pretty much anything over which a municipality would have control. Clearly, the municipality would need to notice someone of any issues or even just a general notice of what new business a neighbor hopes to have open next door. In such cases, as with lawsuits, any Officer may be served. RSA 356-B: 40, IV.

Additionally, the law is clear, as are most condominium documents, that a Board and/or an Officer can delegate the duties of their position to those more experienced. For instance the Association may have a bookkeeper pay their bills and work on the budget, or a property manager may actually take the minutes at Board and Association meetings. In other words, Officers, like Board members, are usually volunteers. In fact, most documents expressly prohibit officers from receiving payment from the association. As such there's really no reason to have Officers not be unit owners.

Besides, why would an Association not want to have Officers? Not doing so would require endless notices of numerous meetings where a quorum would have to be established and then a majority vote to pass and/or sign any document. And then they would have to designate someone, an Officer, to sign the documents such as insurance policies, landscaping and snow removal polices, etc.

The most common Officers of a condominium association are a President, Treasurer and Clerk/Secretary. (Until some attorney convinces the courts otherwise, the words are used interchangeably in Condo World.) Larger associations may have a Vice-President as well. (Inexplicably, some smaller associations have Vice-Presidents as well. I know of one comprised of but eight units. This, of course, creates a situation where there are too many generals and not enough soldiers. There are ways to get unit owners involved other than having multiple offices and officers.)

Then comes the problem, one not limited to small associations, where not enough people are interested in becoming officers. If your documents require Officers, and you don't have them, you are in violation of your documents. Now you find yourself creating legal fictions where someone who never shows up is drafted to be an Officer, filling the title, if not the duties.

Best to have fewer Officers, not more. Less is more.

More interestingly, and a bad idea, is that Officers need not be unit owners. Nothing requires that officers by unit owners. This is a bad idea for the simple reason that most people have a fair amount of their money invested in their condominium. For some it can be almost all of their net worth. So it's important, and they pay attention to it. Others who have no vested interest, necessarily pay less attention to the property. To them, it's a job. To the condo owner, it is his or her present and future. What a strange situation indeed where an outsider would be allowed to make decisions about property that is not their property.

If the documents state the Officers must be Unit Owners, then the definition of who is an Owner for purposes of acting as an Officer is an expansive and fair definition. The regular owner is someone who purchases (with or without a spouse for example) a Unit and puts it in the name of John Smith. But many, many units are not owned so simply anymore. They are owned, for example, by the John Smith Family Trust or Smith Properties, L.L.C., etc.

By the terms of the Condominium Act, anyone who acts as an officer, director, trustee, etc. of such a legal entity, is considered a unit owner. RSA 356-B: 40, II. On the other hand, if

the person acting, for instance, as a Board member or Officer does not hold such a position, then the person is not considered a unit owner. Further, if the person was a unit owner under one of these legal entity type of ownership methods at the time s/he became an Officer/Director, but no longer holds such a position in the legal entity, then the person is automatically disqualified from acting as an owner and guiding the association and perhaps spending its money, when the person no longer has a vested interest in the property. RSA 356-B: 40, II.

So Officers are important. Not a bad idea, then to see what they can and should be doing.

i. President

1. Statutory Duties

The Condominium Act details very few duties of the President of an Association. Those duties are mostly left to the Declarant to define and will most likely appear in the Bylaws.

However the Act does detail two specific acts of the President. They include signing a termination agreement (along with the Treasurer) if the Association chooses to terminate the condominium association, RSA 356-B: 34, IV, and signing a division certificate and all other necessary documents (along with the treasurer) if the condominium decides to divide the association into two (or more) associations, RSA 356-B: 34-a, II.

That's it. The rest is left to the imagination of the Declarant and the wishes of the Association.

2. Presiding Officer

Clearly, the statutory duties referenced in the previous section are not used frequently. So what does a President of a condominium association really do? The dirty little secret of Condo World is the President is the least important person in the Association.

Most Bylaws set out the details of what a President does. Here is a typical passage:

> President. The President shall be the chief executive officer; he or his designate shall preside at meetings of the Association and, if present, at meetings of the Board of Directors and shall be an ex officio member of all committees; he shall have general and active management of the business of the Condominium and shall see that all orders and resolutions of the Board are carried into effect. He shall have all of the general powers and duties that are usually vested in or incident to the office of president of a stock corporation organized under the laws of the State of New Hampshire. Any of the powers of the President herein may be designated to a management company or any other designee, although the President shall assume final responsibility for all Association actions. The President may also hold the office of Secretary, but may not simultaneously hold the office of Treasurer.

Essentially, the President is the conductor of the orchestra that is the association. She or he controls the meetings, sets the debates, determines who and how long people will speak, etc.

The President has the power to dominate meetings, both of the Board and of the Association, by choosing who speaks, the time for which they can speak, and the topics about

which they can speak. As such, the one caveat of the presidency is to watch that the President does not become so full of himself as to start acting as a dictator. Especially in small associations it takes but one overly large personality, and that person, who curiously almost always gravitates to the Presidency (hmmmm) can dominate both the rest of the Board and frequently the other members as well. Always look to the documents to see that the President is following them, particularly with regard to allowing owners to speak, following Board rules, essentially doing to him what he demands of others.

Finally, it is usually the duty of the President to call a special meeting when asked to do so by the Board of Directors or the owners.

ii. <u>Clerk/Secretary</u>

1. Records/Minutes

The Clerk is, without a doubt, the most important person in a condominium association. Much as the mantra in real estate is "Location. Location. Location." and the mantra in landscaping is "Water. Water. Water.", so the mantra in Condo World is "Document. Document. Document."

The case law is filled with examples of associations that have lost their arguments in court because they did not document what occurred at meetings properly, did not have proper references in meetings to who moved and how motions passed, and did not document what decisions were ultimately made by a Board and/or an association.

Minutes have to be properly taken. And to be sure, taking minutes is an art. There is no set way to do them. Some associations record the meetings of Board meetings and/or Association meetings. That's not a bad idea in theory, but who is going transcribe them, and who is going to ensure the accuracy of the transcript? Unless the Clerk is also a certified transcriptionist, then recording makes everyone feel good, but it causes more problems than it solves. Minutes are not meant to be a transcript. If they were, they wouldn't be called minutes, they would be called transcripts.

Thus, the goal is to accurately take accurate notes of what occurred. They are not meant to be a verbatim reflection of what occurred, but an accurate summary of what occurred. It is never a bad idea to record the meeting, but the Clerk should also take notes and create minutes. In that manner, if there is a dispute, there would be a recording for reference.

Some associations try diligently to recognize by name and unit every owner who speaks and the content of the point(s) made. This is well and good and can work. But if it is a heated discussion with people getting a bit … passionate about their positions, then it can be very hard to detail accurately who said what followed by whom, especially if the Clerk is one of the verbal participants. Therefore, it is likely best in most situations just to indicate there was a discussion regarding a certain topic, including points made by owners of Units A, B and C, and thereafter a motion was made by D, seconded by E and the motion passed/failed by a vote of ---.

The Clerk has time to go back and fill in thoughts and morsels after the meeting to flesh out the details.

It is important to note there is a built in provision in the Condominium Act to force the Clerk to detail what occurred at the meeting before his or her memory fades. The minutes must be "made available" to the members within either sixty (60) days of a Board meeting or within fifteen (15) days of their approval by the Board, whichever comes first.

> The board of directors shall make copies of the minutes of board meetings available to the unit owners within 60 days of the board meeting or 15 days of the date such minutes are approved by the board, whichever occurs first. The unit owner shall be responsible for any copying costs, except that, if the association chooses to make the minutes available electronically, there shall be no charge to the unit owner.

RSA 356-B: 37, II.

Of course, the best way in this day and age to make the minutes available is either emailing them to all or posting them on the Association's website.

Not only does this force the Clerk to finish the minutes before memories fade, but it helps solve a lot of problems in Condo World. By making the minutes available (either by emailing, posting in a common area or areas (such as in a lobby or at a mail box) or posting on the Association's website, it helps let everyone know what is going on at their association, quelling concerns before rumors and myths take hold and inaccurate positions become entrenched.

Of course, the cited provision applies only to Board meetings. The requirements for Association meetings are different. There is no companion section of the Act that requires the Annual Meeting minutes or the minutes of any other association meeting to be distributed at all. In theory this is because most associations do not meet but once a year, so the minutes from the previous year's meeting are usually included with the agenda, proxy, etc. and then listed as an agenda item to be reviewed and approved.

Despite the long time to prepare and distribute.

So, perhaps the most important attribute of a Clerk is someone who does things sooner rather than later.

2. Notices

Notices of meetings are different for Board meetings and Association meetings.

<u>Association Meetings</u>

Keep in mind the only time unit owners are entitled to appear at a meeting is at an Association meeting. To some this may be harsh, but condominium associations are corporations in a sense. As such, much like Apple or Google or any other corporation, the only meeting shareholders are entitled to attend is any duly called shareholder meeting. Neither you nor I has any right to attend an Apple Board meeting. It is the same in Condo World. No one has the right to attend a Board meeting; but all have the right to attend Association meetings.

Thus, to protect the unit owners, there are several provisions that must be followed for a meeting to be valid.

- There must be at least one meeting held each year.
- The officer designated in the Bylaws (usually the Clerk or the Clerk's designee) has to send the Notice out at least twenty-one (21) days in advance of the annual meeting or any regularly scheduled association meeting; at least seven (7) days in advance of any specially called meeting.
- The Notice has to be sent, postage prepaid, by first United States mail
- The Notice goes to the unit owners of record at the address of their respective unit(s) *and* to any other address they have given to the officer designated to send out the notices.
- One of the officers (or his/her designee) must prepare and sign an affidavit in which s/he indicates s/he sent the notice of the association meeting by mail to all owners.
- Attached to the Affidavit must be a list of the addresses to which the Notice was sent
- The Affidavit and the mailing list must be available for inspection by the owners at the meeting.
- Thereafter the Affidavit and mailing list must be kept with the minutes of the meeting.
- The Affidavit (and mailing list) must be kept and be made available for inspection for at least three years after the date of the meeting.

A few things are of note.

Many, many condominium documents still state the Notices have to go out by certified mail. This provision was originally in the statute, and was deleted in 1999, but many associations have not deleted it from their documents. As such, if your Bylaws still state the Notices must go out certified, then you cannot rely on the language of the statute, but must, to be safe, send them out certified until you amend the Bylaws to strike the certified language. If not, anything done at the Association meeting can be challenged for up to three years. Imagine the chaos if a special assessment is passed, for thousands of dollars, contracts are signed for a large roofing job, and some choose not to pay because of improper notice of the meeting. That's not a place in which an association wants to find itself.

More and more associations allow for a waiver of the Notice provisions. This is, plain and simple, a mistake. There is nothing in the Act that allows for Notice to be waived. Arguably, if an owner shows up and participates in a meeting, they would have a hard, but not impossible, time convincing a judge the Notice was improper and they could not properly prepare for their participation at the meetings, but absent such an appearance, waivers should not be utilized as a way to get around the plain requirements of the statute. Waivers will lessen the possibility of losing court challenge, but the real possibility remains.

The theory behind the waivers is that people have, obviously, waived any objection to the Notice requirement of either seven or twenty-one days (special or annual meetings, respectively). But the case law is filled with situations where courts put little to no reliance on waivers. More

importantly, unless each and every unit owner signs the waiver then an argument exists that no matter how many people showed up and waived, there are some who did not show up, and they may not have showed up because of the waiver. Therefore, any votes would be invalid.

Why is all of this so important? Because, generally speaking, New Hampshire has a three year statute of limitations. In English, that means a person has three years to sue for improper actions taken by a condominium association. So, imagine. Here's a scenario.

At an improperly noticed meeting two new members are elected to the Board. A few months later the newly configured Board votes to specially assess each unit several thousand dollars to repair roofs and/or re-pave. They sign contracts. The Association is on the hook for several thousand (perhaps hundreds of thousands of) dollars. The workers start. But several owners do not like the Board's choice of contractors and/or the project itself; or the amount assessed. They refuse to pay. The Association sues. They discover the meeting was not properly noticed, e.g. notices were to be sent certified, but were not and there was less than 100% attendance, or there is no affidavit on file proving that notice was sent, or there is no mailing list to prove that the absent owners received the notice. The disgruntled owners can rightly call into question any action taken by the Board (even whether the fraudulently elected Board had the right to file suit). One can imagine the chaos.

Best to be a little annoyed at the requirements than a lot angry if not followed and challenged down the road.

Be safe. Be diligent enough to get the Notice out properly.

Finally, Notices of the Annual Meeting must go out at least twenty-one days before the meeting.

However, Notices of Special Meetings (of the Association) need only go out a minimum of seven days before the meeting.

<u>Board Meetings</u>

There is no language in the Condominium Act that requires a set period of time for Board meetings, such as twenty-one for Annual Meetings and seven for Special Meetings.

Check your documents, usually in the Bylaws for how much time must be given for Board meetings. And, frequently Boards can now conduct business through email, Skype, teleconferences, etc. But to ensure the actions are valid and enforceable, it is best to affirm all of the actions at the next official Board meeting by having someone make a motion to accept all of the actions taken by the Board via email, Skype, etc. since the last meeting of the Board. Such a notation should then go in the minutes of the Board meeting.

3. List of Owners

At every Association meeting (Annual or Special) the Secretary (or his/her designee) must send a notice to the Owners at the address of each owner that is on file with the Association. (If there is no such address on file, by default the address is the Unit itself.) This makes sense. Owners need to have notice of any meetings. But it gets slightly more complicated than that. The Secretary has to make up an address list, attach it to the Affidavit (see previous section), and keep it with the records of the meeting for three years.

> Such notice shall be sent by first class United States mail to all unit owners of record at the address of their respective units and to such other addresses as any of them may have designated to such officer. The secretary or other duly authorized officer of the unit owners' association, who shall also be a member of the board of directors of the unit owners' association, shall prepare an affidavit which shall be accompanied by a list of the addresses of all unit owners currently on file with the association and shall attest that notice of the association meeting was mailed to all unit owners on that list by first class mail. A copy of the affidavit and mailing list shall be available at the noticed meeting for inspection by all owners then in attendance and shall be retained with the minutes of that meeting. The affidavit required in this section shall be available for inspection by unit owners for at least 3 years after the date of the subject meeting.

RSA 356-B: 37.

Doing so protects the Association from complaints that the meeting was not properly noticed, so anything done at the meeting was invalid. Not doing so is an invitation to challenges to any actions taken at the meeting.

The address list requirement is a seemingly trivial matter, but one that can both protect an Association and, if not done, open the Association to real problems.

4. Deeds, Mortgages and Leases.

<u>Deeds</u>

One of the paramount issues in associations is who actually owns the property. Only owners have the power to vote or to give that power to a proxy. In turn, such votes can bind associations to such matters as special assessments, major maintenance projects, assessment increases, lawsuits, and more. And any improperly documented votes subject an association to suit for up to three years for any actions it believes it legitimately undertook, but did not. More importantly, projects approved, such as paving, may require substantial sums assessed to all owners. If an owner balks at the project and refuses to pay, and the voting was improperly done, the case law holds the Owner does not need to pay. Of course, a contract is already signed, a contractor needs to be paid, other owners can then choose not to pay, either, and problems easily corrected by this proposed amendment ensue.

As such, it is extremely important to know who the owners are. The easiest way is to have a provision in your documents that requires a Unit Owner to provide a copy of the Deed to the Board within thirty days of the purchase of the property (or within thirty days of passing such an amendment or rule). The policy should also note that the failure to do so will result in the Board acquiring one, and any costs in acquiring one (through a search at the Registry of Deeds), including the fees of an attorney or title company, shall be assessed to the Unit Owner. That will prompt them to get you the Deed.

In addition to voting, associations need to know who the owners are for purposes of collections. You do not want to be sending collection letters out, or suing, someone who is not an owner. That can be a real problem. Passing the suggested provision takes care of this potential pitfall.

Mortgages

Similarly, it is important to acquire a copy of the mortgage. Well, the entire mortgage is not necessary, just the first page or so, the pages that contain the information regarding how much the mortgage is and the name and address of the mortgagee.

This information is not needed to satisfy some strange association curiosity. (Remember, deeds and mortgages are on file publicly; they are public documents. They are there for the world to see with a few taps on a keyboard.) Rather, it is needed for collections and rules enforcement.

With regard to collections, under certain circumstances an association is required to send a delinquency letter to the first mortgagee within a certain time period in order to jump ahead of the first mortgagee and ensure payment to an association should the unit fall into foreclosure.

Also, if an association wishes to terminate a delinquent unit owner's common area privileges, such as parking, by law, the first mortgagee has to be notified at least thirty days prior to the termination. Why? Every institutional mortgage for a condominium contains language that, to protect its interest, gives the bank the right to pay any delinquency, rather than going through the cost of a foreclosure. They usually just tack the amount onto the mortgage, earning more money in the form of interest on what they have paid the association, and, under certain circumstances, it can give the owner(s) a chance to get caught up financially, without losing their home. And it works. Banks will sometimes contact the Association, ask how much money is owed, receive a ledger from the Association in return; and the Association will receive a check … and be able to pay its bills.

How do you notify the mortgagee as required if you do not have a copy of the mortgage? You can wait until the collection process starts, but starting at that late date can delay the collection of the funds owed as it can take time to hire a title company, get a copy of the mortgage, and get it to you. Best to establish a system at the association to acquire a copy of the first two pages of the mortgage within thirty days of the signing of a mortgage (or within thirty days of the passage of an amendment or rule that requires forwarding a copy of the mortgage pages to the association).

As with acquiring the deed, any costs to acquire the mortgage copies should be borne by the unit owner if not provided within the thirty day period.

Leases

Acquiring a copy of a Lease is important as well. (If not the entire Lease, which may contain information an owner would not wish to share with others, such as the price of the rental, then a statement noting the name and address of the tenant(s)). Associations have no legal relationship with tenants, only owners. However, most documents require all tenants to abide by the provisions of the Declaration and Bylaws. But associations cannot fine tenants for violations of the rules, such as illegal parking, loud parties, etc. They can only fine the owner.

The goal is always to solve problems. If you have the name and address of the tenant, then sending a notice of violation (or a warning) both to the owner and the tenant, is, in the first instance, just polite and the way things should be done. It also notifies both interested parties

that the Association has a problem, while taking away the argument that the tenant is telling the landlord one thing and the association is telling the landlord another thing. Sending a letter to both opens the lines of communication and makes the issue clear, helping to end the problem before it festers.

In most instances, doing things this way will result in the Owner communicating with the tenant, and warning the tenant if the action does not stop, then any fine levied against the Owner will be passed along to the tenant, and possibly form the basis for a breach of the Lease leading to eviction. That usually solves the problem.

Additionally, the Condominium Act, in cases of a delinquency where there is a tenant, allows the Association to notify the tenant to pay the monthly rent to the Association, not the Owner, until notified by the Association that the account is brought current. But how do you do this if you do not know the name of the tenant?

That's why you need a copy of the Lease.

iii. Treasurer.

The Treasurer is, simply, the one who is responsible for the Association's funds. Importantly, especially in light of the fact most Treasurers are volunteers and have little knowledge of finances, the Treasurer does not have to do the accounting, billing, depositing, reconciling checks and invoices, and more. Rather, the Treasurer can designate someone to do so, such as a management company or bookkeeper.

The Treasurer's duties will be detailed in the Bylaws, but usually include the following duties:

Funds

The Treasurer is the one responsible for collecting and depositing the funds assessed by the Association, either regular assessments or special assessments. As a companion to this duty, the Treasurer should be required to provide reports to the Board (and as requested by individual unit owners) detailing who has paid, who has not, what the balances of the accounts are, what bills have been paid, etc.

Audits

There is no requirement in the Condominium Act for associations to be audited, but an audit is a good idea nonetheless. Each Association should have an audit done each year, both to protect the Association as well as to have proof for the owners that the Board is doing its job, and the members' funds have been accounted for. This may be waived at smaller associations where everyone is involved in the operation of the Association. But even in small associations, this is not routinely the case. Frequently one person "takes care" of everything. To protect that person, and provide proof to the other owners, the Association should have an audit done each year.

Sadly, it is rare but not unheard of for management companies to abscond with association funds. Requiring an annual audit will decrease the likelihood of this occurring.

Investments

Associations should have (at least) two accounts, an operating and a reserve. The operating account is usually in a non-interest-bearing account as it handles the month-to-month operations of the Association. On the other hand, the reserve account is for long-term projects, such as roofs, paving, siding, i.e. things for which money is to be set aside each payment period. Leaving this money in a non-interest-bearing account actually causes the association to lose money to inflation. (If inflation rises, for instance, at 2% per year, and the account bears no interest, the association is losing 2% of the buying power of its money each year.)

There are several ways of dealing with this, including depositing the money in an interest-bearing account that will at least match the rate of inflation. The Association can also invest in one or more money markets. (The best way to do so is to have one year CDs. Get four of them staggered quarterly, so the association is getting the highest interest, but every quarter it can take money out without penalty, if need be.) The Association can also take and invest in the stock market and other financial vehicles, but the risk is higher, calling into question the Board's reasonableness in its actions.

The other, most often overlooked investment avenue, is for the Association to invest in real estate, its own. Sadly, there are foreclosures in condominium associations. However, no one knows the finances of an association better than the association itself. No one knows what units are selling for better than the association itself. And no one knows what local rents are than the association itself. This local knowledge can be used to the advantage of the association.

If, for example, units are selling for $150,000, one goes up for foreclosure auction, and it can be purchased for $100,000, the Association should consider taking money from its Reserves and purchasing the Unit. If the Unit can then be sold for close to $150,000, then the Association will have quickly made its money back and added to its Reserves much more than if getting 3% in a CD.

If the Unit does not sell for that much, the association can rent out the unit. Even subtracting the condo fee, the taxes and the mortgage payment, the association will be making money. (If it is not, it should not have bid on the Unit.) Then the Association, in addition to having additional income, can hold onto the Unit until the market rises and sell the Unit, again for more of a return on the money it held in its Reserve account than any CD will likely provide.

Ledgers

It used to be so easy. Not so many years ago, if a Unit Owner was delinquent, as part of the collection process, the Association would file a Memorandum of Lien that indicated the amount of money that was owed. Now things are a bit more detailed. In order for a Memorandum of Lien to be valid, it has to contain the following information:

> (a) A description of the condominium unit in accordance with RSA 356-B:9;
>
> (b) The name or names of the persons constituting the unit owners of that condominium unit;
>
> (c) The amount of unpaid assessments currently due or past due together with the date when each fell due; and

(d) The date of issuance of the memorandum.

The important part is section (c). As opposed to a simple total listed on the Memorandum of Lien, as in past days, now particular detail is required. So the Treasurer has the necessary duty to provide, essentially, a ledger that details when each assessment was due, what kind of charge it was, e.g. a regular assessment, a special assessment, a fine, interest, legal fees. It is more work to establish such a system, but once done the Association is protected should it need to file a Memorandum of Lien.

And if not, then the chances of collecting decreases dramatically.

D. <u>The Tenants and Guests</u>

Tenants and guests are just that. Phrasing this another way, they are not owners. Much like tenants and guests in your home, they do not control the finances, determine maintenance, etc. They have no control over the property. Conversely, the Association has little control over them, either.

What to do if there is a problem with one of them? First, every association should have a copy of every Lease. That way it can identify who the guests on the property, the association's property are. Second, if there is a problem, primarily communicating with the tenant/guest does not work. All communication should be sent first to the owner, who does have control over his tenants and guess. A copy of the letter should be sent to the tenant.

For instance, say a tenant is letting his dog do his business randomly, and that includes either not picking up after the dog or letting the dog, even if polite, friendly and waggy, wander onto neighboring decks.

If done well, the Declaration and/or Bylaws will have a provision in them that binds all tenants, guests … occupants to the provisions of the Declaration, Bylaws and Rules, but how do you enforce it against a tenant? You have no real contractual relationship with the tenant. True, the condominium instruments are a contract, and they may bind the occupant to them, but how would you enforce it? Fine schedules are set up to be levied against an Owner, so they have no effect upon a tenant. Why? Collections. If you fine an Owner, and s/he doesn't pay, the fine can be assessed to the owner. If the Owner fails to pay the fine, it can, again if the documents are drafted properly, be part of a collection action. The delinquent fine can then be considered part of the delinquency. If so, then it becomes a collection. The Unit itself is used as security to collection the fine.

If a fine is levied against a tenant, aside from the questionable ability to fine a tenant, how would it be collected? The Association could sue over a $500 fine, but now it is not a collection case against the owner, which makes all of the reasonable legal fees to be paid by the delinquent owner. Rather, the Association could spend several hundred, even thousands, of dollars collecting a $500 fine.

Best to fine the Owner. If the Owner is smart, experienced, or both, the Owner will have language in the lease that ensures that if the tenant's actions result in a fine or other sanctions

being levied against the Owner, then the tenant is responsible for them and such actions are a breach of the Lease.

The same holds true for guests. If a guest decides to park on the common area grass and leaves divots and/or tire marks in it, the remedy is to fine the Owner, who is responsible for his guests.

The language in most condominium instruments that best accomplishes this result is something like this:

> All present and future tenants and occupants of Units, and any other person who might use the facilities of the Property in any manner, are subject to the provisions of this Declaration, the Bylaws and the Rules to be adopted by the Board of Directors, and decisions and resolutions of the Board of Directors or its representatives, as lawfully amended from time to time.

E. The Management Company

A good management company can make life in a condominium association so much easier. It can collect the assessments, find contractors, coordinate maintenance projects, deal with infractions of the condominium instruments, and just let the Board enjoy life in a condominium association rather than worrying about its day-to-day operation. Essentially, management companies can be assigned any of the duties a Board would normally do.

Maintenance can be a daunting issue at associations. It can range anywhere from cleaning entryways of snow, to fixing a common area light pole, to hiring a competent landscaping company, to undertaking necessary roof replacements. Most Boards do not have the experience in these matters to hire quality contractors, know which ones are good or not so good, know how to read and make suggested changes to a contract, oversee large construction contracts and handle insurance claims. Management companies do, or at least good ones do.

May association believe they are too small to afford a management company, but that belief need not be correct. There are management companies that work part-time for associations, where they will bill on an hourly basis for work performed. This is important for small associations that will need a management company only occasionally, such as for insurance claims or large projects that need proper bidding and oversight.

When interviewing management companies, rather than asking simply for references, ask for the contact information from 2-3 other associations handled by the management company. Then contact them. A short phone call or a short email will likely tell you much more about the pros and cons of the management company than will a letter provided by the management company.

Depending upon the size of the association and the state of the association's budget, an association's condo fees can rise with the hiring of a management company, but as with many other things in life, it may be money well spent, resulting in less work for the Board and a better run association.