



What's in Store for Community Associations in 2011?



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"I know of no way of judging the future but by the past." - [Patrick Henry](#)

If 2010 is any indication, 2011 promises to be another interesting and challenging year for community associations. The past 12 months have been highlighted by rising foreclosures and delinquencies, putting greater strain on association funds than ever before. Association boards are being forced to take proactive steps to combat stressful cash flow situations, while balancing the goal to be fair and reasonable with members facing economic hardships.

Some of these efforts have been fruitful for communities, while others only have caused greater strain on communities. New tools, like capital contributions or initiation fees from new buyers, or leasing fees, have helped generate valuable revenue for communities. But, this has come with some challenge, such as proposed federal legislation that could significantly impact capital contributions or initiation fees.

Added to the mix is increasing negative media attention surrounding community association practices and procedures. Community associations are frequently being portrayed as the bad guy in the court of public sentiment, particularly with architectural control decisions and towing vehicles of delinquent owners. This negative representation of community associations in the media shows a lack of appreciation of the importance of community associations, community covenants and prompt homeowner dues payments.

On a more positive note, boards of directors are becoming much more focused on the vital task of building community within their neighborhoods. A strong sense of community within a neighborhood is a foundation of maintaining property values. As common sense, buyers want to buy homes in neighborhoods where people like living.

As a further sign of the great progress made by community associations, there is a positive developing pattern in the community association industry embracing green initiatives and sustainable lifestyles. Boards of directors are increasingly recognizing that their role as stewards of their communities includes practicing and encouraging environmental responsibility.

It may be impossible to forecast the future, but here are five predictions of issues that will hit or stay on the community association radar in 2011:

Continued Bank Foreclosures. Unfortunately, 2010 saw many associations continuing to be negatively impacted by bank foreclosures. While we would like to think that the worst is behind us, clearly this will continue to be an issue in 2011. Given the impact these foreclosures have on an association's bottom line, we are seeing more and more associations developing creative strategies to lessen this impact.

For example, we worked with many associations in 2010 to amend their governing

documents to allow for a foreclosure administration fee to be charged to any person or entity who takes title to a lot or unit out of a foreclosure sale. The foreclosure administration fee is designed to help associations recoup some of its administrative and management costs involved with monitoring foreclosures in the community. Ultimately, the fee also helps remove some of the sting of delinquent assessments written off because of foreclosures. This amendment has proven to be effective for those communities that have adopted it, and we believe it will continue to be a must have for communities in 2011.

In addition to adopting provisions for fees that will help offset some of the costs of foreclosures, we are also seeing a shift in community association collection strategies when it comes to using the association's right to foreclose. Rather than waiting for what is sometimes an impossibly long process for a property to go through a bank foreclosure and ultimately be resold to a dues paying member, many community associations that are subject to the Georgia Condominium Act or the Georgia Property Owners' Association Act are recognizing that the best solution in some difficult collection cases is to cut losses and foreclose on the association's lien.

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The goal here is to take the property back at the foreclosure sale, evict the delinquent owner, and possibly make some money off the lot or unit by leasing it out until the bank ultimately forecloses. In the alternative, sometimes proceeding with an association foreclosure can force the bank foreclosure to happen on a shorter timeline, ultimately resulting in a resale of the property to a dues-paying member. Either way, by exercising the power to foreclose, associations often are able to reduce losses and speed up a final resolution for the delinquent lot or unit. Since foreclosures will continue to be an issue for associations in 2011, we expect to see more associations developing creative collection strategies to help with the impact of bank foreclosures while minimizing association losses.

Increased Demand for Creative Solutions to Delinquencies. Along with the bank foreclosures, many associations fought rising delinquency rates in

2010. Associations are impacted by the country's financial struggles just as are most other businesses. Until the economy recovers, delinquencies will be a continuing issue for associations. This creates an increase in demand for cost-effective collection solutions. If anything, the past couple of years have taught us that the old adage that "it takes money to make money" doesn't necessarily make you come out on top, particularly when it applies to community associations collections. Some associations have found themselves in a position where the delinquency rate is so bad that their cash flow is severely affected, thereby significantly reducing the options available to an association when it comes to collections. As a result, we are finding more and more associations looking for means to collect delinquent assessments that won't break the bank in the meantime.

Lazega and Johanson pioneered the model of contingency collections for community associations, and, in 2010, many communities chose this collection approach to eliminate up-front attorneys' fees for collection actions.

Under this program, the association is only responsible for the payment of court filing fees and other out of pocket costs associated with a collection

action. If, and only if, Lazega & Johanson collects on a delinquent account, Lazega & Johanson retains 40% of the amounts collected and remits 60% of the amounts collected to the association. And, if an account cannot be collected because of an owner bankruptcy or foreclosure, no attorneys' fees are charged. This contingency option allows for associations to move forward on necessary collection lawsuits where it may have once been prohibitive because of the attorneys' fees and costs involved. And, many courts award attorneys' fees in these collection actions to help offset contingency fees paid by the Association. More and more communities are taking advantage of this collection option, and we expect that this will be a huge advantage for many associations in the year to come. For more information on this contingency collection program, call your Lazega & Johanson attorneys, or email us at info@condoandhoalaw.com.

More Negative Media Attention. Call it a sign of the times, but, in 2010, we saw more negative stories in the media focusing on community associations than is typical. Disgruntled homeowners are using the media as a means to air their disputes with their community associations. The unfortunate part is that more often than not, these stories are one-sided and paint the association in a negative light, when, in fact, the association is taking proper and appropriate steps to enforce its governing documents. Given the fact that the media is clearly willing to air these types of stories, and exacerbated by the fact that in this tight economy, more homeowners are fighting legitimate association enforcement and collection actions, we likely will continue to see community associations being cast in a negative light by the media.

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Association representatives are often blindsided when they have been contacted by a reporter to comment on a homeowner complaint. Although it may seem to be an overly cautious precaution, one way to be prepared in such an event is to have a policy in place for dealing with media inquiries and attention. A media policy should address two major points:

- First, the policy should appoint one representative to speak on behalf of the association and to ensure that the representative presents the positive aspects of a community association.
- Second, in crafting the policy, board members should fairly and impartially review current association practices and procedures to determine whether certain procedures would be viewed as inappropriate or offensive by a reasonable third party. If association practices do not meet this first-blush test, then update those practices. And, be prepared to defend association practices and decisions publicly.

When the media is called, the final report often depends mostly on the reporter; but, the association can be in a better position by rationally explaining association practices and reinforcing the positive aspects of community associations, and the protections that covenants provide.

Hand in hand with negative media attention, we also are seeing an increase in complaints over the use of towing as a collection tool against delinquent owners. While this enforcement tool often is allowed by association governing documents, several media stories this year portray boards as abusing this towing authority. Some Georgia counties and municipalities already have begun limiting the ability of community associations to tow or boot. Given the continued interest in this subject, there is a good chance that we will see, at some point in the future, legislation limiting the authority of an association to tow or boot vehicles as a collection tool.

Going Green. If anything, 2010 has shown that “going green” is not just a passing fad. Efforts to develop and maintain sustainable lifestyles are gaining momentum. We are beginning to see more and more legislation supporting green measures and initiatives. It is only a matter of time before we see legislation that directly impacts community associations, particularly to enable homeowners to make lot and unit improvements for energy and water conservation. In the meantime, associations should expect to see increased homeowner requests for modifications, improvements and community-wide projects that are environmentally friendly or for sustainable measures. To be prepared for such requests and for the potential future legislation affecting association practices and procedures, associations should take the time in 2011 to begin crafting guidelines, and, where necessary, amendments that accommodate green measures. Following trends around the country, associations should be prepared to address more frequent requests for gardens that reduce turf areas, solar panels, and similar alternative energy sources, xeriscaping or low watering landscapes, compost facilities, rain barrels, wells, and community-wide recycling programs. With well crafted guidelines in place, associations can balance accommodating reasonable requests with maintaining high community standards.

Resolution of the Transfer Fee Debate. As many of you may be aware, there is currently a nationwide debate over the use of real estate transfer fees, also known as initiation fees, in community associations. The most common form of a transfer fee is a fee paid at the time of the transfer of a lot or a unit to a new owner, with the fee being paid to the association, and these fees generally are legal only if authorized in a community’s recorded legal documents. The association then uses the fee to fund its capital reserves or to help cover the common expenses for the community. This is an

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extremely common practice that has been in place throughout the country for many years. However, in the past few years, some community developers have abused these fees, providing for the fees to be paid indefinitely to the developer, purportedly to recoup capital costs of development. This newer type of transfer fee has been mostly used in the western United States, but it has been picking up in popularity throughout the country. In some states, the rights to these transfer fees have even been sold as securities.

This recent use of the transfer fee as a means of income production for developers has resulted in legislation in over 15 states prohibiting transfer fees payable to developers or third parties. For the most part, these various laws are still allowing transfer fees payable directly to associations, but, in some cases, with increased disclosure requirements.

In 2010, the Federal Housing Finance Agency ("FHFA") proposed a rule that would prohibit Fannie Mae, Freddie Mac and Federal Home Loan banks from investing in properties where there was a transfer fee of any type, including any fee that was paid directly to the association. This has sparked off a furious debate in the real estate industry, with new bills being sponsored in Congress to limit the application of this proposed rule.

Clearly, a blanket rule prohibiting Fannie Mae, Freddie Mac or Federal Home Loan banks from investing in properties in communities with a transfer fee will have a negative impact on communities. If such a rule was adopted, associations would be forced to amend their documents to either remove or modify the transfer fees. Furthermore, some associations could be forced to raise assessments to cover capital reserve contributions that were formerly funded by transfer fees.

Our firm will continue to keep tabs on this matter and keep board members and managers abreast of the final resolution. We still believe that reasonable transfer fees are an important tool for communities, but, 2011 may be the year when this issue is resolved.

Whether all or any of these predictions comes true, 2011 promises to be another exiting year for community associations. We here at Lazega and Johanson are looking forward to working with you in 2011 and assisting your community to address these issues, as well as any others that this new year will bring us. We wish you a safe and joyous holiday season and a Happy New Year!



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