SUNSET PLACE ASSOCIATION OF CARLSBAD

CAPRI

DELINQUENT ASSESSMENT COLLECTION POLICY

Timely payment of regular and special assessments is of critical importance to SUNSET PLACE ASSOCIATION OF CARLSBAD ("Association"). Although most property owners consistently pay their assessments on time, the failure of any owner to pay monthly assessments when due creates a cash-flow problem for the Association and causes those owners who make timely payment of their assessments to bear a disproportionate share of the Association's financial obligations. Therefore, to encourage the prompt payment of monthly assessments, the Board of Directors has enacted the following policies and procedures concerning collection of delinquent assessment accounts.

We sincerely trust that all property owners, in the spirit of cooperation, will make timely payments and avoid the imposition of late charges and possible resultant legal action. It is in your best interest to do so.

1. **Due Dates, Late Charges, Collection Costs; and Interest**

(a) *Assessment Due Dates*. The regular annual assessment is payable in 12 equal installments on the first day of each calendar month and are delinquent if not paid by the 15th day of the month. Special assessments shall be due and payable on the due date specified by the Board of Directors in the notice imposing the assessment or in the ballot presenting the special assessment to the members for approval. In no event shall a special assessment be due and payable earlier than 30 days after the special assessment has been duly imposed.

(b) *Late Charges*. When an installment payment of a regular assessment or a special assessment becomes delinquent, the owner's account with the association shall be charged with a late payment equal to the greater of $10.00 or 10 percent of the delinquent amount.

(c) *Collection Costs Are Also Recoverable*. As provided by law, the Association is also entitled to recover all reasonable costs incurred in collecting delinquent assessments including the following: (i) reasonable charges imposed to defray the cost of preparing and mailing demand letters; (ii) legal expenses incurred; (iii) recording costs; (iv) costs incurred with title companies or foreclosure service providers; and (v) costs associated with small claims court actions (collectively "reasonable costs of collection").

(d) *Policy Regarding Requests From Owners To Waive Costs*. It is the policy of the Association not to waive any duly imposed reasonable costs of collection. It is the owner's responsibility to allow ample time to drop off or mail before the delinquency date. All notices or invoices for assessments will be sent to property owners by first-class mail addressed to the owner at his or her address as shown on the books and records of the Association. However, it is the owner's responsibility to be aware of the assessment payment due dates and to advise the Association of any changes in the owner's mailing address.

(e) *Interest*. State law and the governing documents of the Association also provide for the imposition of interest at the rate of 12 percent per annum on all delinquent assessments, late

charges, and reasonable costs of collection commencing 30 days after the due date of the delinquent assessment(s).

(f) *Application of Payments*. Payments received on delinquent assessments shall be applied to the owner's account in the following order of priority: first, to the principal owed; then to accrued interest and late charges; then to attorney fees; then to title company and foreclosure service company charges and other reasonable costs of collection. Payments on account of principal shall be applied in reverse order so that the oldest arrearage is retired first. Interest shall continue to accrue on unpaid balances of principal, and other costs and charges imposed in accordance with Civil Code section 1366(d).

2. **Enforcement and Collection Remedies Available to the Association.**

(a) *The First Demand Letter*. When an owner becomes delinquent in the payment of assessments, the Association's management company will mail (by first-class mail) or personally deliver to the owner a "First Demand" letter advising the owner that he or she is late in the payment of assessments and requesting immediate payment. The letter shall also inform the owner of the total amount then due, including late charges and any costs imposed by the association to recover the expense incurred in preparing and mailing the letter (which charge is currently $30.00).

(b) *Collection Alternatives Available to the Association If First Demand Does Not Result in Payment in Full.* If the owner's assessment account remains delinquent for more than 30 days, and interest charges begin to accrue, the Association shall be entitled to pursue either of two alternatives:

Small Claims Actions: First, the Association may elect to instruct its property manager to pursue the Association's claims against the owner in a Small Claims Court Action (if this action is taken, paragraphs (c) through (f) of this subparagraph 2 do not apply to that collection matter).

Second Demand (Certified Mail) Followed by Foreclosure Proceedings. Second, the Association may elect to refer the owner's file to legal counsel with directions to send the delinquent owner, by certified mail, a second demand letter. That letter shall provide an itemized statement of the total amount of assessments then due and the amount of late charges, collection costs, and interest then posted to the owner's account (and a statement of how those sums were calculated). In addition, this notice shall advise the owner of the Association's fee and penalty procedures and the Association's collection policies by including a copy of this Policy with the letter. The charge that the owner will incur for this letter from legal counsel will be $.

Suspension of Membership Privileges. In addition to pursuing either of the above options, membership must be maintained in good standing to retain privileges, including but not limited to, the exercise of member voting rights and the use of Association recreation facilities. Membership is considered not in good standing if any assessments, dues, fees, fines, interest, late charges, or any other charges remain unpaid 60 days after the due date for the delinquent assessments.

(c) *Recordation of a Notice of Delinquent Assessment*. At any time after the Second Demand Letter is sent to an owner by certified mail, the Association shall be entitled to cause to be recorded in the chain of title to the delinquent owner's Lot in the Office of the County Recorder a Notice of Delinquent Assessment covering all sums that are then delinquent, including the delinquent assessment, late charges, costs, and reasonable attorney fees. A recorded Notice of Delinquent Assessment creates a lien on the delinquent owner's lot that is subject to foreclosure. The Association has the option of pursuing foreclosure judicially or under a power of sale.

(d) *Notification of All Record Owners of the Liened Lot*. Once a Notice of Delinquent Assessment has been recorded, the Association must send a copy of the Notice to all record owners of the subject lot within 10 days following the date of recordation. That mailing shall be certified, with all postage prepaid.

(e) *Options Available to Liened Owners*. The delinquent owner of the liened lot to which the Notice of Delinquent Assessment pertains then has 30 days from the recordation date (of the Notice of Delinquent Assessment) to pursue either of the following alternatives:

(i) Payment in Full and Termination of Collection Process. First, the owner can simply pay all amounts shown in the Notice of Delinquent Assessment and thereby conclude the collection process. It is advisable that the owner first contact the Association's management company's office to confirm the amounts accrued and owing as of the pay-off date. The current telephone number is (760) 436-1144. Immediately following receipt of the owner's payment, the Association shall cause to be recorded a release of its assessment lien.

(ii) Alternative of Payment Under Protest; Limitations on Exercise of This Option. The second alternative for delinquent owners who receive a Notice of Delinquent Assessment is: (A) to pay in full and under protest all delinquent sums, interest, late charges, and other noted costs of collection; and (B) to send the Association, by certified mail, a written notice that the amount is paid under protest. That notice should be mailed c/o the management company, 7720 El Camino Real, Suite 2-A, Carlsbad, CA 92009. On receipt of that notice, the Association must inform the protesting owner of his or her right to have the matter resolved through alternative dispute resolution in accordance with Civil Code section 1354, through the filing of a civil action or through use of any other dispute resolution procedures available through the Association. Monies received under protest shall be held in a segregated account until such time as the alternative dispute resolution process has concluded, provided the owner's protest is timely and properly made and the limitations described in the immediately following paragraph do not apply. If an owner elects to pursue alternative dispute resolution in accordance with Civil Code section 1354, it shall be the responsibility of the owner to comply with the statutory requirements relating to the preparation and service of a Request for Resolution.

NOTICE REGARDING LIMITATIONS ON OWNER PROTEST RIGHTS: Unless the Association otherwise agrees, State law provides that this right to pay delinquent assessments under protest and to demand alternative dispute resolution (which is a statutory right conferred by Civil Code section 1366.3) may be exercised only two times in any single calendar year and not more than three times in any five calendar years. Except to the extent that notices are required by law, the Association shall not provide advice to property owners regarding technical requirements of these ADR procedures. Owners should consult their own counsel regarding such matters.

(f) *Continuation With Foreclosure Proceedings*. Following the later of 30 days from recordation of the Notice of Default or conclusion of alternative dispute resolution procedures following a valid owner's protest in a manner that does not result in a binding adverse determination against the Association (see Civil Code section 1363.3(a) and paragraph (e), above), the Association's lien may be enforced in any manner permitted by law, including sale by the court, sale by the trustee designated in the Notice of Delinquent Assessment, or sale by a trustee substituted under Civil Code section 2934a. Any sale by a trustee in foreclosure shall be conducted in accordance with the Civil Code provisions relating to foreclosure of a deed of trust under a power of sale (see Civil Code sections 2924, 2924b and 2924c).

(g) *Authority of the Association To Recover Attorney Fees and All Reasonable Costs of Collection.* As noted above, if a lawsuit or foreclosure proceeding is initiated by the Association to recover assessments, the Association is entitled, by law (Civil Code section 1366(d)) and by the declaration of restrictions, to recover not only the amount in default, plus late charges and interest, but also all reasonable costs of collection, including title company charges and attorney fees. Currently the Association's legal counsel charges $50.00 for the preparation and mailing of demand letters; $130.00 for the preparation and recordation of a Notice of Delinquent Assessment; and $400.00 for the preparation and recordation of a Notice of Default (with associated required statutory mailings). Title Company and charges incurred by the Association with foreclosure service companies (following recordation of a Notice of Delinquent Assessment) typically average about $???. The estimated charges and fees set forth in this paragraph are subject to change.

3. **Authority of the Association To Publish List of Delinquent Owners**. In addition to the foregoing remedies, the Association intends to publish a list in the Association's newsletter of the names of all owners whose assessment payments are delinquent more than 60 days after the Association has complied with subparagraph 2(a) of this policy.

4. **Charge for Returned Checks**. A $10.00 [$5.00] charge shall be posted to an owner's account for any checks that are returned.

5. **Effective Date of This Policy**. This policy was duly adopted by action of the Board of Directors on _____, 1999, and shall be effective January 1, 2000.

Sunset Place Association of Carlsbad

Review of Height Restrictions in Association's Governing Documents

The purpose of this memo is to establish my personal views as a Director relative to the height of landscaping in the Association, to generate discussion and after due consideration establish a consistent policy for dealing with the problems associated with maturing properties.

The Association's Governing Documents are:

Declaration of Covenants, Conditions and Restrictions ("Declaration")
Articles of Incorporation ("Articles")
Bylaws ("Bylaws")
Association Rules and Regulations as established from time to time.
For example: Collection Policy
Architectural Guidelines

State and Federal laws or regulations may modify the Governing Documents.
For example: Notice of Meeting Requirements
Solar Heating or Satellite Dishes

No review of any laws or regulation which may affect this specific issue has been done.

Declaration of Covenants, Conditions and Restrictions.

The Declaration is the document recorded with the county recorder and sets forth the benefits and restrictions on use or enjoyment of any portion of the project. The restrictions contained in a recorded declaration are enforceable as an equitable servitude unless unreasonable and they bind all of the individual owners of separate interests in the project. The document is broken into Articles and some are discussed below:

Article XII Maintenance Of Lots and Improvements. provides in part:

> "..... No landscaping on any lot (including the Pedestrian and Bicycle Trail and Slope Area) shall be allowed to attain a height in excess of twenty-four (24) feet."

Article I Definitions. provides in part:

> "4. 'COMMON AREA' means that portion of the Real Property which is owned by the Association. Lot 141 of the Real Property will constitute the Common Area if and when Phase 3 is annexed to the Project"

> "11. 'LOT' means a plot of land shown upon the subdivision map of the Real Property recorded in the Official Records of the County Recorder of the county where the Project is located; provided however that the term "lot" shall not include any portion of the Common Area'

" 20. 'SLOPE AREA' means the area located on certain of the lots within the Project which is to be maintained by the Association. The Slope Area is described on Exhibit C attached hereto and by this reference made a part hereof."

Article XIV Requirements of City of Carlsbad and Establishment of Pedestrian and Bicycle Trail provides in part:

"5. Declarant hereby establishes an easement for the purposes of a pedestrian and bicycle trail across that portion of the Real Property which is described on Exhibit B attached hereto and by this reference made a part hereof. ..."

The Declaration makes a distinction between lots (private) and common areas used broadly to include the slopes and the trail. Therefore we see that Article XII of the Declaration established a maximum landscape height limit for lots; including (i) Pedestrian and Bicycle Trail; and, (ii) Slope Area. However, Article XII did **not** establish a landscape height limits for the Common Area. (This may have been a drafting error but seems to have been intentional, since broad authority is granted to the Association in Article IV, see below.)

Article IV Authority Of Association. provides in part:

"....the Association shall have the right and authority to: ... 6. Adopt reasonable rules not inconsistent with this Declaration relating to the use of the Common Area, all facilities located thereon, and the conduct of owners and their tenants and guest with respect to the Common Area."

Not defined in the Articles is the word "height", or for that matter is "attain" or "feet" so in most cases you refer to plain meaning or common usage of the word.

Webster's 7th New Collegiate Dictionary, 1965, defines "height" as: 2.a the distance from the bottom to the top of something standing upright; 2.b the extent of elevation above a level. Webster's Pocket Dictionary, 1990, defines height as: the distance or measurement from the base or foot to the top.

Article X General Provisions provides in part:

"4. ...this Declaration may be amended only by the vote or written consent of ... at least seventy-five percent (75%) of the voting power... . Any amendment must be recorded and shall become effective upon being recorded in the Office of the County Recorder..."

Articles

The Articles of Incorporation is the document filed with the Secretary of State to form the corporation, does not contain provisions for internal management or restrictions which are enforceable against members. In this factual situation have no effect.

Bylaws

The bylaws contain provisions concerning the operation of the project and the association

Article XIV Miscellaneous. provides:

> "In the case of any conflict between the Articles and these Bylaws, the Articles shall control. In the case of any conflict between the Declaration and these Bylaws, the Declaration shall control . In the case of any conflict between the Articles and the Declaration, the Declaration shall control.

Article VII Powers and Duties of the Board of Directors. provides in part:

> "Section 1. Powers and Duties. The Board of Directors shall have the power and duty to: .... (b) adopt and publish rules and regulations governing the use of the common area....

Article XIII Amendments provides in part:

> "... these Bylaws may be amended only by the vote or written consent of ...at least a bare majority of the voting power of the Association, ..."

Association Rules-Architectural Guidelines

These are internal rules and regulations to implement the provisions of other governing documents. The internal rules are not recorded and are not enforceable as servitudes.

While I think it may be in the wrong place to address the landscape height issue, most version of the Architectural Guidelines have included some reference to it. These guidelines have been adopted or ratified by the series of Boards of Directors if not the Members themselves.

However, I believe that most of the Members do not understand or at least disagree relative to the function, purpose or authority of the Architectural Guidelines.

In one version of the Architectural Guidelines, Article III. Material & Styling provides in SECTION C. HEIGHT of LANDSCAPING In the interest of protection of views on lots of higher elevation, all trees, shrubs, or plants shall not exceed a height of 24'. When the tree or shrub in question is located on a bank, the 24' shall be measured from PAD Level, not the height at the base of the tree.

In another version of the Architectural Guidelines, dated March 10, 1989 and marked "Draft" I find the same language as above except the end of the first sentence is "...a height of 24'(except palm trees)."

The draft is attached to the Notice of the Special Meeting dated April 10, 1989. The Board on May 8, 1990 felt the Draft version had been adopted by the Members at the June 8, 1989 meeting. While there is substantial question whether the guidelines should be adopted by the Board or the

Membership, for all practical purposes, I think we should consider the "Draft" guidelines the currently effective documents as a baseline. The Declaration as written anticipated that the guidelines would be adopted and therefore subject to amendment, revocation or expansion by the Board. Following Boards have adopted amendments to these guidelines. Whether a Board can adopt an amendment, to a policy adopted by the Membership is open to question. The question was put to counsel for the Association recently and he indicated that the Board had authority to amend the guidelines. Whether he was fully aware of the history of the guidelines, I'm not sure.

While the "March 10" Guidelines may now be the official set, it would appear that Lindsay has been sending the prior set as the Guidelines.

It is not clear whether the Guidelines were really an amendment to the Bylaws that has not been properly documented or are just a policy adopted by a Board, it is clear that they are at most equal to the Bylaws, which are subordinate to the Articles, which are in turn subordinate to the Declaration, so whatever the Declaration clearly states controls (provided it is reasonable and not superceded by law) and as to the individual lots, trail and slope, it seems to clearly state landscaping is limited to 24 feet with no exceptions.

In the case MaJor v Miraverde Homeowners Ass'n (1992) 7 CA4 618, 9CR2 237 the Court essentially said if the Board exceeds it's authority, even if it is reasonable, it is invalid. When a circumstance arises that is not adequately cover by the declaration, the remedy is to amend the declaration.

If we want to change the Declaration it would take the affirmative vote of 75% of the Owners, attempts to circumvent amending the Declaration will raise more problems than it solves. However there is also the problem of whether even an amendment could be effective now and certainly it would raise the question whether it can be effective retroactively.

On the other hand it looks like any Board has the right to chose what they want relative to the Common Area, and so long as they stay within the 24 foot limit, the Trail and the Slopes and they are reasonable. **The limiting factor is "reasonable".**

It would seem that the current rules relative to landscape height goes something like:
>on individually owned lots-24 ft measured from the base of the plant;
> on Slopes and the Trail-24 ft measured from the Pad below except Palm Trees which are 24 ft measured at the base;
> on Common Area-24 ft measured from the Pad below except Palm Trees which have no limit.

Other view rights

There seems to be a developing view right under case law but it seems to be based on local government rules and regulations. The general rule that there are no individual view rights seems still to be valid. Of course it is clear that view rights contained in CC&R's or easements will continue to be upheld. See; Kucer v Lizza (1997) 59 CA4 1141, 69 CR2 582 and for discussions of local government regulations and their interpretation by the courts.