

Subject: The HOA Assessment Collection Process

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To The Homeowners of Willow Brook 1,2,3:

Overview of The Assessment Collection Process.

When you purchase a property in a community with a homeowners' association, you're also acquiring the obligation to pay regular assessments. Assessments aren't necessarily a bad thing - - they allow the Willow Brook board to operate for the community's shared interest and to perform its core maintenance functions.

Unfortunately, though, homeowners are sometimes financially unable to pay assessments. And sometimes they just choose not to. Because assessment revenue is vital to an Willow Brook Home Owners Association's functioning, community associations are afforded significant legal remedies in the event of non-payment.

Whether a homeowner is serving on an Willow Brook Home Owners Association (HOA) board or faced with potential collections action, understanding how the HOA collections process works—and the legal rights and redress available to both homeowners and the association—can go a long way toward resolving conflict and avoiding escalation.

HOA Collection Policies:

An HOA collection policy is its internal protocol for determining how the association will handle unpaid assessments. By necessity, an HOA collection policy must be derived in part from the legal and contractual authorities governing collection by the HOA. Relevant authorities include the applicable HOA declaration and bylaws; and any relevant rules or regulations adopted by the HOA board.

Among other things, a homeowners' association's collection policy should

- define when assessments are due and when they are considered "delinquent;"
- describe any fees charged by the HOA and when they can be imposed;
- establish steps taken by the HOA to collect delinquent assessments, including any required written notices; and
- identify any third-party vendors whose services the HOA uses for collection—such as collections agencies and lawyers.

A mandatory collection procedure can also help avoid homeowner claims of uneven enforcement. In general, an HOA board's enforcement activities must be "procedurally fair and reasonable," and its decisions must be made in "good faith ... reasonable and not arbitrary and capricious."

Notice of Delinquent Assessment.

In most cases, an HOA first step to collect assessments is to send homeowners a statement identifying the assessment amount due and the date by which it must be paid. The majority of homeowners send a check, in response to the statement, and the assessments never become “delinquent.”

For homeowners who fail to pay the initial statements, the next step is usually a “Notice of Delinquent Assessment,” or similarly titled document. The Notice advises the homeowner of the past-due amount and typically informs the homeowner of any collection actions the HOA will take if assessments remain unpaid.

Many HOA state in their Notice of Delinquency that the board will record an assessment lien if the amounts are not promptly paid. A notice might also inform the homeowner of any late charges or interest that will be charged or which have already been charged.

Late Charges, Interest, Fines, and Administrative Fees.

The authority to include late charges, fines, and interest as part of a homeowner’s financial obligation to an HOA comes from the HOA recorded declaration and the state’s HOA statute.

An HOA cannot arbitrarily charge late fees, fines, or interest. They must be authorized by state law and/or the association’s declaration and must be charged consistently with the applicable authority.

Interest rates and late fee amounts are frequently set or restricted by statute. A common approach is for the state’s HOA statute to allow for accrual of interest on unpaid assessments at the rate established in a community’s declaration, up to a defined maximum rate.

Late fees normally work in the same way. They can be imposed if included in the declaration up to a statutory maximum

In some but not all states, HOA are empowered to charge fees to cover administrative costs caused by late payments, such as the cost of administering a payment plan. Administrative fees are usually not subject to a definite maximum amount but must be “reasonable” in light of the actual burden and additional cost on the association.

Collection Costs and Attorney’s Fees.

In the HOA assessment collection process, “collection costs” and “attorney’s fees” refer to the additional costs incurred by an association in collecting on a delinquent assessment.

If, for instance, an HOA refers an unpaid assessment account to a collection agency and the agency charges as its fee 20% of the amount collected, the “collection cost” is the additional 20%, which in some cases can then be charged to the property owner.

As a general rule, an HOA can recover its collection costs if recovery of collection costs is permitted by either the association's declaration or the applicable state HOA statute.

This means that, unless either the declaration or state HOA law expressly allows for recovery of collection costs, a collection agency cannot charge or collect the collection costs from the homeowner.

Many state **HOA laws** specifically authorize homeowners' associations to recover collection costs or attorney's fees if the HOA has to refer a delinquent account for collection.

Whether a specific HOA has the right to recover attorney's fees and collection costs depends on the language of the association's declaration and the laws of the state in which it is located. In many states, if either source allows recovery of collection costs and attorney's fees, they can be charged.

Collection Demand Letters and the FDCPA.

If assessments remain unpaid after one or two notices, many HOA refer the account to a third party for collection. When that occurs, the debt is turned over to a collection agency or a law firm, either of which is typically governed by the **Fair Debt Collections Practices Act** ("FDCPA,") in their attempt to collect the unpaid assessments from the homeowner. The FDCPA is a federal statute governing the collection of debts from "consumers" by "debt collectors." In addition to prohibiting a variety of actions defined as "abusive," "unfair," or "misleading," the FDCPA also requires specific disclosures to consumers by debt collectors.

A debt collector's initial demand letter (or another communication within five days of the debt collector's first communication with the consumer) must inform the consumer of the amount of the debt, the identity of the creditor, and the consumer's right to request debt verification.

HOA fees owed by homeowners who reside in the community are, for the most part, considered consumer debts for purposes of the FDCPA.

Payment Plans and Partial Payments.

An HOA board usually has the authority to approve payment plans for homeowners. If the assessment debt has been referred to a collection agency or law firm for collection, the homeowner may need to work through the agency or firm, but the board remains the ultimate decision-maker.

For the most part, payment plans are a matter of private agreement between the HOA and the member.

Traditionally, partial payments, when made, are applied first to outstanding fees and costs, then to interest owed, then to principal.

If an HOA board makes payment plans available, it needs to offer them to owners in a consistent, non-discriminatory manner, always bearing in mind the board's fiduciary duty to the association and its members.

HOA Assessment Liens.

As security for the obligation to pay assessments, state HOA laws and association declarations grant HOA a lien on the properties of non-paying owners. Technically, an assessment lien attaches to the property as soon as the assessments become delinquent. However, to "perfect" a lien (and to give notice of the claim to third parties), the board must record a notice of the lien in the land records of the county where the community is located.

Once a lien notice has been recorded, the HOA lien will show up whenever anyone conducts a title search on the property. If a property owner with a lien in place wants to sell the home or refinance the mortgage, the lien will almost always have to be paid first. If the assessments remain unpaid, the HOA will need to "enforce" its lien by filing a civil lawsuit against the homeowner. Usually, that means asking a court to allow the association to foreclose the lien.

The procedural rules governing how HOA record and enforce liens vary from state to state, but there are almost always some statutory requirements. Properly following mandatory procedures isn't just a formality—HOA must respect homeowners' due process rights.

After assessments secured by a lien are paid, the HOA needs to ensure that a lien release is promptly recorded in the county land records.

The cost of recording the release can usually be charged to the homeowner if permitted under the association's governing documents and state law.

Pre-Lien Notice of Intent to File.

Although not required in every state, advance notification of an HOA intent to record a lien is necessary in many jurisdictions. Where pre-lien notice is required, the content and timing vary, though notice must usually be made in writing, state

Notably, the **Uniform Common Interest Ownership Act** ("UCIOA")—a model statute adopted at least in part by Colorado, Nevada, Washington, and several other states—does not require written notice before lien filing. However, even in those states, some associations' declarations require written pre-lien notice before a board files a lien.

Contents of Notice of Lien.

The specific content of the document is governed by state law. In general, it must sufficiently describe the property, debt, and involved parties to put any prospective purchasers on fair notice of the lien's existence.

Lien Priority.

A lien's "priority" is the position it holds in relation to other liens on a property. Priority determines which liens get paid first in the event of a sale or foreclosure. In general, the earlier a lien was recorded, the higher its priority—this is called the "first-in-time" rule. So, a lien has a lower priority than earlier-recorded liens and higher priority than later-filed liens.

In many states, though, HOA assessment liens enjoy "super lien" status, letting HOA liens sometimes hold a higher priority than they otherwise would. A common approach is for an HOA lien to "relate back" to the date on which the community's declaration was recorded.

In determining the lien's priority, the relevant date becomes the date when the association's declaration was initially filed, rather than the date when the specific lien notice was recorded.

Lien Enforcement.

An HOA enforces its lien by filing a civil lawsuit against the delinquent homeowner asking the court to enter judgment against the owner for the amount owed and/or to sell the property subject to the lien to satisfy the debt.

Statutes of limitations for enforcement of HOA liens are often shorter than for many other debts and liens. Where a judgment lien usually remains valid for ten or twenty years and can be renewed, an assessment lien expires if a suit is not filed to enforce the lien within six years of delinquency.

Pre-Foreclosure Requirements.

Before moving forward with a foreclosure, an HOA must satisfy any applicable statutory pre-foreclosure requirements. Though the timing and content of the notice can vary, the general requirement that HOA provide advance notice to delinquent homeowners (and usually other lien holders) before commencing foreclosure applies in nearly every jurisdiction.

And, if the unpaid assessments total more than \$100,000, the HOA board must first approve foreclosure by majority vote at a board meeting at which a quorum is present. In some states law mandates that unpaid assessments total at least \$2,000 before foreclosure is permitted and assessments must also be at least 90 days past due.

Judicial vs. Non-Judicial Foreclosure.

In most states, HOA must foreclose on their liens judicially. This means that the association needs to file a civil suit and ask the court to order a sale of the property, with the proceeds used to pay off the lien.

As a general matter, judicial foreclosures proceed similarly to other civil actions. The HOA must file a complaint with the court clerk and serve the defendant-homeowner with the legal process. Homeowners have the opportunity to contest the foreclosure if appropriate and assert any counterclaims they may have against the association.

If the court approves the foreclosure, it will enter an order directing that the property be sold, and the sale itself will be conducted by an authorized official—often the local sheriff. After the sale, and after any applicable redemption period, the sheriff, clerk of court, or another official responsible for the sale will issue a new deed recognizing the purchaser as holding title to the property.

In a minority of states, associations can foreclose non-judicially—in which case the sale occurs outside of court and is conducted by a trustee (usually a local attorney specializing in real estate law) under a power of sale included within the community's declaration.

Homeowner Right of Redemption.

In many, but not all, jurisdictions, delinquent homeowners facing foreclosure have an opportunity to “redeem” the property by tendering the amounts due after foreclosure proceedings have already commenced. The duration of the right and the amounts that must be paid vary between states.

Usually, the right of redemption ceases when a new deed is issued to the purchaser or soon thereafter.

Redemption requires the homeowner to pay all outstanding amounts, including assessments, interest, court costs, and any costs of foreclosure that have been incurred.

Small Claims Collection Actions and Money Judgments.

As an alternative to foreclosing on a lien, HOA also have the option of pursuing legal collections actions for delinquent assessments against homeowners. The objective of the civil suit is to obtain a money judgment on behalf of the HOA against the delinquent homeowner.

Usually, HOA can pursue delinquent assessments in small-claims court (or the equivalent in the applicable state).

If the amount owed exceeds the state's small-claims jurisdictional limit (generally between \$5,000 and \$20,000), the HOA can file in the county court with jurisdiction over higher amounts.

Small-claims procedures vary among states. The basic process is that the HOA must first file its complaint with the court clerk and serve the complaint on the delinquent homeowner. Once served, the homeowner has the opportunity to file an answer admitting or contesting the debt. If the complaint is contested, the small-claims court sets a hearing and/or enters an order directing the parties to exchange documents and information.

In cases proceeding before a higher-level court, the parties will have the opportunity to conduct additional discovery.

If the court enters judgment for the homeowners' association, it will have a judgment against the defendant homeowner personally, with all the rights that entail in the applicable state.

Depending on the state, a judgment can enable a successful plaintiff to garnish the defendant's wages, attach personal property or bank accounts, and record a lien against any real estate owned by the defendant.

Absent a genuine error in the association's calculation of assessments, HOA suits for unpaid assessments are normally difficult to defend against. The courts in most states have held that a homeowner's assessment obligation is independent of the association's duties.

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