

Questions & Answers

Regarding Assessment Collections for Community Associations

Where does the Association derive the power to assess homeowners?

The power to assess homeowners is derived from the Association's governing documents, deed restrictions, and the California Civil Code. Usually, the power to assess is found in the Association's Declaration of Covenants, Conditions and Restrictions ("CC&Rs"). However, the California Civil Code also provides the Association with the power to assess. In older projects, the power to assess may actually be in the homeowner's Grant Deed.

Can assessments be increased without a vote of the membership?

Under the California Civil Code, the Board of Directors may increase regular and special assessments without a vote of the membership under certain circumstances, despite what the CC&Rs provide. If the Board of Directors has complied with the Civil Code, it may impose a regular assessment that is up to twenty percent (20%) higher than the regular assessment for the Association's preceding fiscal year, or it may impose a special assessment which, in the aggregate, does not exceed five percent (5%) of the budgeted gross expenses of the Association for that fiscal year. To exceed these limits, approval of the owners is required, according to the voting requirements set forth in the Civil Code. However, the Board can still increase the assessments in certain emergency situations. For example, an extraordinary expense required by a court order, an extraordinary expense necessary for repair or maintenance where there is a threat of personal safety, or where an extraordinary expense is necessary for repair or maintenance and the Board could not have reasonably foreseen it when preparing the budget. Whenever you are proposing an emergency assessment, you should seek the advice of legal counsel. Strict compliance with the Civil Code is necessary in order to take advantage of the assessment increase provisions.

When can late fees and interest be charged on delinquent assessments?

First, you must review the Association's governing documents to determine what late fees and interest may be imposed. If the Association's governing documents set forth both the late fee amount and the interest amount, you must abide by the governing documents. However, if your governing documents are silent on one or both of the

prongs, then you follow the Civil Code. The Civil Code states that a late charge not exceeding ten percent (10%) of the delinquent assessment, or \$10.00, whichever is greater, may be charged unless the CC&Rs specify a late charge in a smaller amount, in which case any late charge imposed shall not exceed the amount specified in the CC&Rs. Interest may also be charged on all the sums owed, including the delinquent assessments, reasonable costs of collection and late charges, at an annual rate not to exceed twelve percent (12%), commencing thirty (30) days after the assessment becomes due unless the CC&Rs specify a late charge in a smaller amount, in which case any interest imposed shall not exceed the amount specified in the CC&Rs. The Civil Code provides that assessments are delinquent fifteen (15) days after they become due. However, if your governing documents state that the assessments are delinquent thirty (30) days after they become due, your documents take precedence over the Civil Code.

What are the options for collecting delinquent assessments?

Basically, there are three (3) ways to collect delinquent assessments. The first is through Small Claims Court to obtain a money judgment against the delinquent owner. The second is to bring a nonjudicial (i.e. not involving court action) foreclosure action. The third is to bring a Superior Court action to either foreclose the property or obtain a monetary judgment.

What are the advantages and disadvantages of each collection option?

A book could be written as to the advantages and disadvantages of each of the different collection options. In summary, the Small Claims Court allows the Association to represent itself and obtain a monetary judgment against the owner. In pursuing a Small Claims action, you may be waiving your right to foreclose on the property. It is inexpensive and can be quite successful. It is typically utilized when property has already been foreclosed by a lender, or there are small amounts owed to the Association. The nonjudicial foreclosure is a process similar to foreclosing a trust deed. The procedure entails the recording of a Notice of Default and subsequently a public sale of the property. However, to proceed with nonjudicial foreclosure, the amount of delinquent assessments must equal or exceed \$1,800.00 or one year. Another major disadvantage to the

nonjudicial foreclosure is that once the sale is completed, if title reverts to the Association, it is difficult to obtain title insurance unless you bring a separate lawsuit to confirm title. If the lender begins foreclosure, it could extinguish the Association's lien. In that event, if the Association has not already foreclosed, the Association will be forced to switch to a Small Claims action or a Superior Court action. The advantages to nonjudicial foreclosures are that they are quick with definite time deadlines, and can be handled entirely by legal counsel. Nonjudicial foreclosures are probably the most popular method of collecting delinquent assessments. The final method is the Superior Court action. The process entails the filing of a Superior Court lawsuit to either foreclose on the property or alternatively to seek a monetary judgment against the unit owner. The disadvantage to the Superior Court lawsuit is the risk of a cross complaint by the homeowner, usually for the Association's alleged failure to fulfill some responsibility, often the maintenance of the common area or the homeowner's property. All these methods have advantages and disadvantages. It is important to consult with legal counsel to find which is the best option in each particular situation.

Can a monetary penalty be considered an assessment?

No. California Civil Code Section 1367.1(e) provides that a monetary penalty cannot be treated as an assessment for which the property can be liened and foreclosed, even if the governing documents state otherwise. The exception is a monetary penalty imposed to reimburse the Association for costs incurred to repair damage to common area caused by a member.

Can the Association assess the homeowner for damages he or she causes to the common area?

This depends upon what your governing documents allow. Most CC&Rs allow the Association to assess a homeowner for damages he or she has caused to the common area. Such an assessment may be lienable. In the event it is not lienable, the Board of Directors should actively pursue the collection of this money through Small Claims Court if it is within the monetary jurisdiction limits (up to \$5,000.00). This type of "special assessment" usually requires a hearing.

Can the Board of Directors determine how payments are applied to a delinquent account?

No. California Civil Code Section 1367.1(b) requires payments

to be applied first to assessments owed, and only after the assessments are paid in full may payments be applied to interest, late charges, and the costs of collection.

Are there any restrictions on recording and foreclosing a lien other than what may be in the governing documents?

Yes. California Civil Code Section 1367.1 provides that before an Association may record an assessment lien, the Association must make a laundry list of disclosures to the owner in writing. Please contact our assessment recovery department for a complete list of requirements. The lien itself must contain the following information: (i) the amount of the assessment and other sums imposed, (ii) a legal description of the owner's interest in the project (not just the address), (iii) the name of the record owner or owners, and (iv) in order for the lien to be enforced by nonjudicial foreclosure, the name and address of the trustee authorized by the Association to enforce the lien by sale, and a copy must be mailed via certified mail to record owners within ten (10) days of recordation. The Association must offer the homeowner internal dispute resolution and alternative dispute resolution throughout the process. If an owner requests internal dispute resolution pursuant to Civil Code Section 1363.810 et. seq., the Association must participate before recording a lien. If an owner requests alternative dispute resolution pursuant to Civil Code Section 1369.510 et. seq., the Association must participate before initiating nonjudicial foreclosure.

Does a homeowner have the right to withhold payments if he or she disputes what is owed?

No. However, the homeowner is entitled to internal dispute resolution and alternative dispute resolution, as set forth above.

Should the Board of Directors adopt a collection policy?

Absolutely. The California Civil Code requires that the Association provide to the members during the sixty (60) day period immediately preceding the beginning of the Association's fiscal year an annual statement describing the Association's policies and practices in collecting; delinquent assessments.