

MULCAHY ANSWERS

for Community Associations

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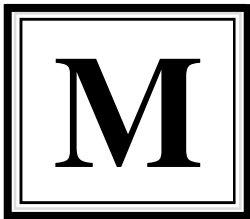
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Did You Know?



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How to Effectively Collect Delinquent Assessments

by Beth Mulcahy

Does your association board become concerned every month when it looks at the list of delinquent owners and the total amount of outstanding delinquencies? With the downturn in the economy and the slow down in the housing market, the number and amount of delinquencies in community associations have significantly increased. In response, community associations should adopt and strictly enforce a collection policy regarding non-payment of assessments by owners. In our experience, associations that act quickly before individual delinquencies skyrocket have a much easier time collecting delinquent assessments from owners and have lower total delinquency levels.

The collection process is typically started by the board or management company sending a late notice letter and imposing late fees. The next step is to record a notice of lien on the lot/unit. If these efforts are unsuccessful, the association may want to consider taking legal action to enforce its rights. Under most association CC&Rs, the board has two options to collect delinquent assessments: 1) obtain a personal judgment against the owner or 2) foreclose the assessment lien on the lot/unit.

Personal Judgment Against Owner– Justice Court

The first option is to obtain a personal judgment against the delinquent owner. Under this option, the association's attorney files a lawsuit in justice court and obtains a judgment against the delinquent owner personally. With that judgment, the association can garnish the owner's wages, bank accounts or rent payments (made from a tenant to the owner) or levy and execute on other real or personal property.

Benefits:

First, it is a relatively quick means of obtaining a judgment for delinquent assessments (it usually takes between four to six months to obtain a judgment). Second, it is a cost efficient means of obtaining a judgment for delinquent assessments (the estimated cost is approximately \$700.00 in attorneys' fees and court costs).

Disadvantages:

First, the judgment may not be collectible if the individual has no assets. Second, if a debtor files for bankruptcy, there is a chance that the debtor will be personally discharged from the entire debt. Further, the proceedings or efforts to collect the debt will be halted due to the automatic stay of the bankruptcy.

Foreclose the Lien on the Lot/Unit– Superior Court

The second option is to foreclose the lien on the lot/unit. An association has the right to lien a lot/unit for unpaid assessments and for late fees, attorneys' fees and collection costs on unpaid assessments. Under Arizona law, associations can only foreclose if assessments are delinquent for a period of one (1) year or if the owner owes \$1,200 or more in assessments (whichever occurs first). Under this option, the association records a lien on the lot/unit and then the association's attorney files a lawsuit in Superior Court to foreclose the lien. The association obtains a judgment against the owner which orders a sheriff's sale of the lot/unit and a deficiency judgment against the owner to the extent the sheriff's sale proceeds do not cover the judgment amount.

Benefits:

First, the delinquent owner no longer owns the property after the sheriff's sale and can be evicted after the statutory time period (30 days or 6 months, depending on whether the lot/unit is abandoned or not). Second, the delinquent owner frequently attempts to

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Collecting Delinquent Assessments *continued*

settle the lawsuit and pay in full before the sheriff's sale if he/she has equity in the property. Finally, if the property is sold to a third party at the sheriff's sale for an amount that exceeds the judgment amount, the association will recover the full amount owed to the association and the new owner will pay assessments from that point forward.

Disadvantages:

First, the estimated legal fees and court costs for a foreclosure action are approximately \$2,000.00 to \$2,500.00. All of these fees are recoverable against the owner (but the association fronts the money for these fees and costs until the owner pays them). Second, it takes approximately six months to a year from the date of filing the lawsuit to the sheriff's sale of the lot/unit. Third, if the delinquent owner files for bankruptcy, the foreclosure or

sheriff's sale will be halted due to the automatic stay of the bankruptcy. Fourth, if the delinquent owner stops paying his/her mortgage, the first deed of trust could foreclose before the association and wipe out the association's lien. Finally, if a delinquent owner pays the full amount owed to the association within thirty days or six months (depending on whether or not the property had been abandoned at the time of the judgment) after the sheriff's sale, he/she can redeem (or regain ownership) of the property.

Our law firm strongly suggests that associations research the credit history, status of the first deed of trust and the financial condition of all delinquent owners prior to instituting legal action. In doing this, the board can make an informed decision as to which option to pursue. *Answers*

What Can An Association Do About Dangerous Dogs?

by Beth Mulcahy

When a vicious dog attack is reported in the news, our law firm is often contacted by boards wanting to know what liability an association has if there is a known dangerous dog (a dog that has bitten or aggressively confronted other owners or pets) in the association.

Under Arizona law, associations have a duty to maintain the common areas in a reasonably safe condition. This responsibility extends to lot/unit owners, their tenants and their guests. In addition, associations have a duty to take reasonable measures to protect against foreseeable activities creating danger on the land it controls.

Therefore, if an association knows that there is a dangerous dog within the association and the association does not take measures to protect against the dangerous dog, it is my opinion that the association could be held liable for damages/injuries sustained due to the acts of a dangerous dog.

Under Arizona law, associations have a duty to take reasonable measures to protect against foreseeable activities creating danger on the land it controls.

Once an association becomes aware of a dangerous dog residing in the association, the association board should promptly contact the lot/unit owner in writing and request that the dog be properly restrained or removed from the premises (depending on the severity of the situation). If the owner does not comply, the association should

consider fining the dog owner (after notice and an opportunity to be heard) for as long as the dangerous dog remains in the association or for as long as the dog is unrestrained; and/or file a lawsuit against the owner requesting that the court order removal or restraint of the dog. Finally, the board should consider

contacting the proper local authorities (such as Maricopa County Animal Control) regarding the dangerous dog to see if this agency can take any action or give suggestions to alleviate the problem (it is a good idea to keep a written record of any transactions with the local authorities). *Answers*

Owners Have a Legal Right to Inspect Association Books & Records

by Beth Mulcahy

Has your association board ever received a request from a disgruntled owner demanding copies of the association's books and records? If so, your board needs to take this request seriously and respond promptly. Under Arizona law, all financial and other records of an association must be made reasonably available for examination by any member of the association (or any person designated by the member in writing as the member's

representative).

However, an association board can withhold from disclosure books and records kept by or on behalf of the association and the board to the extent that the portion withheld relates to any of the following:

1. Privileged communication between an attorney for the association and the association;
2. Pending litigation;

3. Executive session meeting minutes;
4. Personal, health or financial records of an individual member of the association, an individual employee of the association or an individual employee of a contractor for the association; and
5. Records relating to the job performance of, compensation of, health records of or specific complaints against an individual employee of the association or an individual employee of a contractor of the association who works under the direction of the association.

For example, members are entitled to review an association's regular session board meeting minutes, financial records (such as bank statements, reconciliations and ledgers), general correspondence files, owner files/delinquency lists (to the extent the owners are not

Once requested, an association has 10 business days to make records or copies available!

Answers

involved in litigation with the association) and membership rosters with the names and addresses of all members. Members are not entitled to review executive session meeting minutes, legal opinions from the association's or board's attorney, anything pertaining to pending litigation and employee/ independent contractor employment files. It is important to note that an association cannot charge a member for making books and records available for review. Further, the association has ten (10) business days from submittal of a request by an owner or the owner's designated agent to make records available or copies of the requested records. Finally, the association can only charge 15 cents per page for copies of records.

Answers

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BULLETIN BOARD

**All
Arizona Court of Appeals
Decisions pertaining to
Community Associations
from
January 1, 2007
to the present
can now be found on our
website:
www.mulcahylawfirm.net**

To obtain these written decisions: click on the Answers & Cheat Sheets Tab, click on Cheat Sheets, click on "2007 Arizona Court of Appeals Decisions."

**A Reminder!
The New 2007
Community Association
Legislation
went into effect on
September 19, 2007**

To obtain a summary of the new legislation go to www.mulcahylawfirm.net, click on the Answers & Cheat Sheets Tab, click on Cheat Sheets, click on "2007 Legislative Update."

Beth Mulcahy is the founding attorney and partner of the Mulcahy Law Firm, P.C. Beth's legal practice focuses exclusively on the representation of over eight hundred (800) community associations throughout the State of Arizona.

After receiving a Bachelor of Arts degree in Political Science from Marquette University in Milwaukee, Wisconsin, Beth earned her *Juris Doctor* degree from Marquette University Law School where she was on the Dean's List and a member of the Marquette University Law Review. A native of Wisconsin, Beth is licensed to practice law in the State of Wisconsin and the State of Arizona.

As the former editor/author of a weekly question and answer column in The Arizona Republic, Beth addressed hundreds of questions on association governance. In her three years with the paper, she became known for providing information and answers that communicate a clear understanding of the subject matter. Beth's Answers publication and periodic legal seminars on community associations continue to provide education and information for the industry. She has also published articles in Managers Report magazine, Community Association Institute's (CAI) Journal of Community Association Law, Strictly Legal newsletter, Common Ground magazine and Arizona Community Association Journal. Beth is a member of the National and the Central Arizona Chapter of CAI, a nonprofit organization supporting the interests of community associations and the Arizona Association of Community Managers. Beth regularly speaks on the topic of community associations for seminars, conferences and workshops at state and national levels.

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Kristen L. Rosenbeck graduated from Valparaiso University with a Bachelor of Arts degree in Biology where she actively supported her school as the Student Body President. Kristen graduated in the top third of her law class receiving her *Juris Doctor* degree from Marquette University in Milwaukee, Wisconsin in 2001. She maintains licenses to practice law in both the State of Wisconsin and the State of Arizona.

Kristen's legal practice focuses on the interpretation and enforcement of association documents and guidance on state and federal laws. She represents associations in general counsel matters, bankruptcy, collection of delinquent assessments and enforcement actions. Kristen also provides representation to office condominiums. Kristen is experienced in litigation and transactional law.

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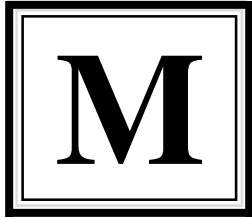
Elizabeth "Libby" Shillito is a native of Dayton, Ohio. Libby graduated from Indiana University with a Bachelor of Science degree in Sports Marketing and Management in May, 2003. While at Indiana, Libby was a student recruiting assistant for Indiana Football and had multiple internships with professional sports organizations including the Tampa Bay Devil Rays. Libby received her Juris Doctor and her Master of Business Administration from University of Toledo in May, 2006. Libby is licensed to practice law in the State of Arizona.

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Answers is not intended to offer specific legal advice or responses to individual circumstances or problems. If legal advice is required, please consult individually with the Mulcahy Law Firm, P.C.

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What is the Procedure for Removing Directors from Office?

On August 12, 2005, a new law regarding removing directors from office went into effect. Since that date, there has been a substantial increase in the number of disgruntled owners trying to remove their boards from office. It appears relatively easy to remove a director from office under this new law. However, in reality, it is actually very difficult to get the requisite vote to remove directors from office absent severe misconduct by the directors.

Set forth below is the procedure under Arizona law for removal of a director from office. This procedure does not apply to board members appointed by the developer or to condominium associations created before January 1, 1986 (assuming they have a removal procedure in their bylaws). This law supersedes any other provisions in the association's documents pertaining to removal of board members:

- 1) Petition for Removal of Director Requirements: (a) Associations with 1,000 or fewer members: A petition must be presented to the board for removal of a director(s) that is signed by the number of persons who are entitled to cast at least 25% of the votes in the association or one hundred votes in the association, whichever is less; (b) Associations with over 1,000 members: A petition must be presented to the board for removal of a director(s) that is signed by the number of persons who are entitled to cast at least 10% of the votes in the association or one thousand votes in the association, whichever is less;
- 2) Special Meeting: The special meeting shall be called, noticed and held by the board within 30 days after receipt of the petition for removal;
- 3) Quorum: A quorum for the removal meeting purpose is met if at least 20% of the votes, or one thousand votes, whichever is less, are present at the meeting in person or by mail-in ballot; and
- 4) Percentage Required to Remove Director: A member of the board can be removed from office with or without cause by a majority vote of the members entitled to vote and voting on the matter at a meeting of the members called for the removal purpose. A quorum must be present.

It is important to note that the board must retain documents related to proposed removal for at least one year after the special meeting and shall permit inspection of these records by members. Finally, there can only be one removal attempt of a board member per term (so a petition for removal of the same member of the board shall not be submitted more than once during each term of office for that member).

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