# Understanding the Collection Process

# One of the main fiduciary responsibilities of any board is the collection of assessments. Owners also have a strong fiduciary responsibility to pay their assessments in a timely manner. When owners do not pay their assessments in a timely manner, it has an outsized effect on the association’s finances because of the zero-based budgeting. With zero-based budgeting, the association has no flexibility built into the system for owners who do not pay. Unpaid assessments immediately compromise the financial integrity of the association, undermine its ability to meet its financial obligations in a timely manner, and degrade the levels of liquidity.

# The Bylaws are clear on an owner’s obligation to pay. Most Bylaws provide for a financing mechanism allow him to pay over 12 months instead of in one lump sum.

# Assessment and Payment of Common Expenses. The total amount of the estimated funds required to pay the Common Expenses of the Condominium set forth in the Annual Budget adopted by the Board of Directors for the fiscal year shall be assessed against each Unit in proportion to the Par Value of the Unit, shall be a lien against such Unit as of the first day of the fiscal year to which such annual budget applies. A Unit Owner shall be personally liable for all lawful assessments, or installments thereof, levied against his Condominium Unit which become due while he is the owner of a Unit; and this liability of the Unit Owner is in addition to the lien for assessments in favor of the Association on the Condominium Unit created by the Act. On or before the first day of each fiscal year, and on the first day of each of the succeeding 11 months in such fiscal year, each Unit Owner shall be obligated to pay to the Board of Directors or the Managing Agent (as determined by the Board of Directors), one-twelfth of the assessment for such fiscal year.

# Congruently, the bylaws also layout the actions that a board must take when owner does not pay their assessments in a timely manner.

# The Board of Directors shall take prompt action to collect any assessments for Common Expenses due from any Unit Owner which remain unpaid for more than 30 days after the due date for the payment thereof, and may impose penalties for late payment.

# Upon written request to the Board of Directors by a Unit Owner or purchaser of a Unit, the Board of Directors, or a duly designated agent thereof, or the Managing Agent, shall furnish (within the time period prescribed by the Act) a recordable statement setting forth the amount of unpaid assessments levied against such Unit.

# B. The Board of Directors may impose a reasonable fee not to exceed $30 for each such statement requested and payment thereof shall be a prerequisite to the issuance of a statement.

# Another example

# The Board of Directors shall take prompt action to collect any assessments for Common Expenses due from any Unit Owner which remain unpaid for more than thirty (30) days after the due date for the payment thereof, and may assess a late charge against any Unit for which payment of any monthly or special assessment is more than fifteen (15) days late, and/or accelerate all monthly and special assessments for the year and send a notice of default to the First Mortgagee. Any payment of a late charge due shall be deemed paid when received by the Board of Directors or the Managing Agent. The Board of Directors may also impose interest on any unpaid balance owed to the Association.

The following is an example of how bylaws might address non-payment issues;

ARTICLE XI

COMPLIANCE AND DEFAULT

11. 1 Relief

Each Unit Owner shall be governed by, and shall comply with the Act, all of the terms of the Condominium Instruments, the Rules and Regulations, and any amendments of the same. A default or violation by a Unit Owner shall entitle the Association acting through the Board of Directors or Managing Agent, to the following relief:

A. Legal Proceedings. Failure to comply with any of the terms of the Act, the Condominium Instruments and the Rules and Regulations shall be grounds for relief which may include, without limiting the same, an action to recover any sums due for money damages, injunctive relief, fines, sanctions, foreclosure or power of sale of the lien for payment of all assessments, any other relief provided for in these Bylaws, the Act, the Rules or any combination thereof, and any other relief afforded by a court of competent jurisdiction, all of which relief may be sought by the Association, the Board of Directors, the Managing Agent, or, if appropriate, by an aggrieved Unit Owner and shall not constitute an election of remedies.

No suit or other proceeding may be brought by the Association to foreclose the lien for any assessments levied pursuant to the Declaration or these Bylaws except after fifteen (15) days' written notice to the First Mortgagee on the Unit which is the subject matter of the proceeding.

B. Additional Liability. Each Unit Owner shall be liable for the expenses of all maintenance, repair or replacement rendered necessary by his or her act, neglect or carelessness, or the act, neglect or carelessness of any member of his or her family or his or her employees, tenants, agents, or licensees, but only to the extent that such expense is not covered by the proceeds of insurance carried by the Board of Directors. Such liability shall include any increase in fire insurance rates occasioned by use, misuse, occupancy or abandonment of any Unit or its appurtenances. Nothing contained herein, however, shall be construed as modifying any waiver by an insurance company of its rights of subrogation. Any costs, including without limitation, legal fees incurred as a result of a failure to comply with any of the terms of the Condominium Act, the Declaration, these Bylaws or the Rules and Regulations by any Unit Owner (or such Unit Owner's guests, invitees, tenants, agents or employees) may be assessed against such Unit or Unit Owner.

Costs and Attorneys' Fees. In any proceeding arising out of any alleged default or violation by a Unit Owner, the prevailing party shall be entitled to recover the costs of the proceeding, and such reasonable attorneys' fees as may be determined by the court.

D. No Waiver of Rights. The failure of the Association, the Board of Directors or any Unit Owner to enforce any right, provision, covenant or condition which may be granted by the Condominium Instruments or the Rules and Regulations shall not constitute a waiver of the right of the Association, the Board of Directors or any Unit Owner to enforce any right, provision, Covenant or condition of the Condominium Instruments or the Rules and Regulations in the future. All rights, remedies and privileges granted to the Association, Board of Directors or any Unit Owner pursuant to any term, provision, covenant or condition of the Condominium Instruments or Rules and Regulations shall be deemed to be cumulative and the exercise of any one or more thereof shall not be deemed to constitute an election of remedies, nor shall it preclude the party exercising the same from exercising such privileges as may be granted to such party by the Condominium Instruments or the Rules and Regulations, or at law or in equity.

Interest and Late Fees. In the event of a default by any Unit Owner which continues for a period in excess of fifteen (15) days, such Owner shall be obligated to pay interest on the amounts due at the lesser of twenty percent (20%) per annum or the maximum rate of interest permitted to be charged to natural persons in the District of Columbia with respect to first mortgage loans at the time of the due date of such amount. Late Fees, as determined by the Board of Directors, may also be imposed on the Unit and the Unit Owner.

B. In any case where an assessment against a Unit Owner is payable in installments, upon a default by such Unit Owner in the payment of any single installment, which continues for ten (1 O) days after written notice of such default has been sent to the Unit Owner, the maturity of the remaining total of the unpaid installments of such assessments may be accelerated, at the option of the Board of Directors, and the then balance owing may be declared due and payable in full together with interest thereon at the lesser of twenty percent (20%) per annum or the maximum rate of interest permitted to be charged to natural persons in the District of Columbia with respect to first mortgage loans at the time such installment or assessment became due, and the cost of collection thereof, by the service of notice to such effect upon the defaulting Unit Owner by the Board of Directors or Managing Agent. The Unit Owner who is delinquent shall be prohibited from voting at any meeting of the Unit Owners Association until the amount necessary to release the lien has been paid.

C. The lien for assessments may be enforced and foreclosed in the manner provided by the Condominium Act or any other applicable law by power of sale or action brought in the name of the Board of Directors, acting on behalf of the Association. During the pendency of such action the Unit Owner shall be required to pay a reasonable rental for the Unit for any period prior to sale pursuant to any judgment or order of any court having jurisdiction over such sale. The plaintiff in such proceedings shall have the right to the appointment of a receiver, if available under the then laws of the District of Columbia.

D. The lien for assessments shall be prior to all other liens and encumbrances except: (i) liens and encumbrances recorded prior to the recordation of the Declaration; (ii) liens of any first priority mortgage or deed of trust on such Unit recorded prior to the due date of such assessment or the due date of the first installment payable on such assessment, except as provided by law; and (iii) liens for real estate taxes and municipal assessments or charges against the Unit.

All boards should be familiar with the steps and protocol outlined and their bylaws to address nonpayment of assessments. Some associations may also have an independent collections policy. An independent collections policy will provide a more detailed outline of how non-payment issues will be handled.

The main components of the collections process are:

**Notification**

-The most efficient and cost-effective way to solve a collection issue is with proper notification within the first 30 days **BEST PRACTICE**

-The majority of non-payment issues can be resolved immediately and are the result of oversight or some other innocent reason for not paying

-The collections process falls under local, state, and federal regulations with a labyrinth of deadlines and requirements

-After the grace period outlined in the bylaws expires, EJF automatically sends by mail and email a friendly reminder; this is a gentle nudge to remind owners that their payment was not received by our office and is usually enough for an owner to investigate and resolve the situation

-As outlined in the bylaws, a second third and possibly fourth notification will be sent to the owner on specific dates; the letters take on an increasingly legal tone outlining serious repercussions for the owner for non-payment

**FUN FACT** In DC the statute of limitations for collecting unpaid assessments is three (3) years! Boards should act quickly-delays cost money in more ways than one.

**Turn Over to a Collection Attorney**

-failure to bring an account up-to-date after several notices will result in the account being turned over to a collection attorney

-this should be an automatic process that is triggered by specific amounts and dates; Boards and managers should avoid intervening in the process to avoid any semblance of favoritism

-once an account is turned over to the attorney, all communication, ledger maintenance and payments will go through the attorney

-to obtain an accurate payoff amount, the owner must communicate with the attorney; EJF will note the account has been turned over to the attorney and any attempt by the owner to pay or communicate with EJF will be re-directed to the attorney

-while periodic updates to the EJF ledger may happen, the Board should not rely on the EJF ledgers for owners in the legal process

-the legal process will start with a demand letter sent certified (and often regular mail as well) to the owner; at this point the legal costs are minimum and the owner no can still enter a payment plan to resolve the situation; Federal collection laws dictate a minimum of 30 days the owner has to respond

**Acceleration, interest, and fees**

-most bylaws allow for the acceleration of condo dues if an owner does not pay; essentially the owner loses the benefit of paying over 12 months

-condominium often has the right to charge interest and recoup any legal or other fees that are incurred in the process of collecting assessments from an owner; the collection of these fees is not guaranteed, and the board does have some risk that these expenses will not be reimbursed

-Super lien – what is it?

-in front of all other liens except real estate taxes

-4 months in MD and 6 months in DC

-when using a super lien are pursuing a limited dollar amount-not the entire amount

-even if successful in the super lien foreclosure, a “quiet title” suit is still necessary

-if foreclose on super lien, amounts collected over the super lien are open to a claim from the other lien holders

**Starting the Foreclosure Process**

If after several attempts to notify and work out a payment plan with an owner fail, the attorney will send a final notice before collections letter. After this final attempt, the attorney will record a lien against the individual unit. While assessments are always considered a lien against the unit, they are not recorded.

After recording lien, Board and attorney work together on a strategy to move forward that fits under the guidelines in the bylaws.

Possible Movements:

-run title and understand if any equity exists

-decide if a judicial strategy is needed (MD, for example, almost always will be a judicial process) or foreclosure

-understand the super lien opportunities (4 months in MD and 6 months in VA)

**Foreclosure**

An Owner can stop the foreclosure process at any point up to the moment the property is auctioned by paying or entering into a board approved payment plan.

Moving a property to the foreclosure process can be complicated by factors such as bankruptcy, death, and an unclear title. To move the collections process to a fruitful end, an association may incur significant legal fees.

Often times a mortgage holder will have stepped in by this point in order to prevent additional fees and legal entanglements.

If an owner continues to not respond, the attorney will record the foreclosure notice and send a certified letter to all involved parties (owner, bank, or other lien holders).

After the required time to respond passes, the attorney will engage in auctioneer, set a date, and arrange for the advertisement requirements to be met.

If a payment plan or payoff is not obtained, the property will be brought to auction and sold to the highest bidder. The attorney will be present in order to bid in the price of the association’s lien in order to preserve its value. In 95% of the cases, either the mortgage holder or an investor will purchase the lien right at auction

**Taking Control of the Unit**

If a mortgage holder or an investor does not purchase the property, the Association will gain a title interest in the property. This should not be confused with ownership. If other liens exist, the association will have to work through the legal process to determine how and if it can gain clear title to the property. This is often a lengthy and expensive process which can be jeopardized by many different factors.

Should an association end up with a title interest in the property, it will often need to take physical and financial control of the unit. Physical and financial control of the unit can be complicated if a tenant is present, an owner is actually living in the unit, or a squatter is present. An eviction may be required, and the eviction process is another specific, lengthy, and often costly process.

**Managing or Disposal of the Unit**

Many Boards will hire a professional management company to manage the unit and tenant. The association may gain some rental income but will also lose the assessment income.

In order to sell the unit, the association will need clear title to the property. If other parties have an interest in the unit, the association’s attorney will attempt to negotiate a settlement agreement to clear the title.

**Possible ways to strengthen the collection process;**

* Review and understand what the bylaws outline and pass board resolutions to clarify any inconsistencies or inadequacies in the policy.
* Impose harsher late fees as a deterrent for owners to not miss payments.
* Pass board resolutions that empower the board to collect rent from non-owner occupied units when the owner does not pay their association fees.