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I. Introduction

In a short sale or a sale of a property after foreclosure in a common interest development, unpaid homeowners' association ("HOA") assessments and HOA liens can complicate a transaction and may sometimes prevent a transaction from taking place. This Q&A will review the applicable law and address many of the frequently asked questions relating to HOA liens and assessments and their impact on short sales and sales of properties after foreclosure that C.A.R. member legal attorneys receive from REALTORS® who call the C.A.R. legal hotline.

II. Homeowners' Associations Liens and Assessments

Q 1. What are HOA assessments?

A An assessment is a levy of money imposed by a HOA against the owner of a unit in a common interest development. An example of an assessment is the monthly dues payment that most homeowners pay in a condominium complex. HOAs are empowered by California law to levy such assessments so that the association may perform its duties as required by the governing documents of the association (such as the covenant, conditions and restrictions ("CC&Rs") and bylaws) and California law. (Cal. Civ. Code section 5600(a).)

Q 2. How often are a HOA's assessments due?

A HOAs typically will have regular assessments which are due on a monthly basis (sometimes less

than monthly, typically in resort properties). HOAs will also at times have special assessments which are due on the date determined at the time the special assessment is enacted by the board of the HOA.

Q 3. *When does an assessment become a debt of the owner?*

A The assessment becomes a debt of the owner at the time the assessment is levied. For example, if a regular assessment is due on the first of the month, the unit owner owes the debt as of that date. (Cal. Civ. Code section 5650(a).)

Q 4. *Is an unpaid assessment the responsibility and debt of the owner even if he or she ceases to own the property?*

A Yes, the debt belongs to the person who owns the property at the time of the assessment. (Cal. Civ. Code section 5650(a).) A HOA can pursue a person for unpaid assessments even if he or she is no longer the owner of the property.

Q 5. *When is an assessment considered delinquent?*

A An assessment is delinquent 15 days after it is due, unless the governing documents provide for a longer time period. (Cal. Civ. Code section 5650(b).)

Q 6. *Once an assessment is delinquent what penalties or charges can a HOA charge the homeowner?*

A Once an assessment is delinquent, the HOA may collect the following charges:

1. Reasonable costs incurred collecting the delinquent assessment including reasonable attorney fees.
2. A late charge not exceeding 10 of the delinquent assessment or \$10.00 whichever is greater, unless the governing documents specify a lower amount.
3. Interest on all sums imposed including the delinquent assessment at an annual interest rate not to exceed 12% commencing 30 days after the assessment comes due, unless the governing documents specify a lower amount.

(Cal. Civ. Code section 5650(b).)

Q 7. *What are the collection choices available to a homeowners' association if a unit owner refuses to pay assessments in response to a notice of delinquent assessment?*

A HOAs have various ways to collect payments from delinquent homeowners.

Perhaps most importantly for those involved in short sales, a HOA can record a lien against the

delinquent homeowner's property for unpaid assessments and other fees, such as late charges and interest, if applicable.

A lien may only be recorded 30 days after the HOA has sent a statutorily required notice to a homeowner regarding any delinquent assessments. The notice reviews the law and gives the owner various options to try to resolve the problem of the delinquent assessment prior to the association recording the lien. (Cal. Civ. Code section 5650.)

The decision to record a lien for delinquent assessments must be made only by the board of directors of the association and may not be delegated to an agent of the association. The board must approve the decision by a majority vote of the board members in an open meeting. The board must record the vote in the minutes of that meeting. (Cal. Civ. Code section 5673.)

The association may enforce the lien if the CC&Rs permit through a nonjudicial foreclosure (a trustee's sale) or a judicial foreclosure proceeding. (Cal. Civ. Code section 5700.) For delinquent assessments arising on or after January 1, 2006, if the amount of the delinquent assessments is less than \$1,800, not including accelerated assessments and specified late charges and fees, the HOA may file a lien, but is prohibited from foreclosing on the lien until the amount equals or exceeds \$1,800 or in the event the assessments are more than 12 months delinquent. (Cal. Civ. Code section 5720.)

A HOA may also take legal action against the homeowner to collect the delinquent assessments in small claims or superior court. (Cal. Civ. Code section 5700). The one action rule under Code of Civil Procedure sec. 726(a) does not prohibit the filing of an action directly against the owner on the debt, regardless of whether a lien has been recorded.

Q 8. *Can a HOA foreclose not based on unpaid assessment but based on unpaid fines or penalties?*

A A HOA cannot use a nonjudicial foreclosure for a lien based on fines or penalties imposed on a homeowner as a disciplinary measure for failing to comply with the governing documents, with the exception of late payments.(Cal. Civ. Code section 5725.)

Q 9. *Can a HOA foreclose on a homeowner for reimbursement of costs if a homeowner or homeowner's guest or tenant damages the common area?*

A Yes, if a homeowner or homeowner's guest or tenant damages the common area and the homeowner does not pay the costs of the damages, the monetary charge assessed by the HOA for repairing the damage may become a lien against the property on which the HOA may foreclose, if it remains unpaid..

Q 10. *If a HOA forecloses on a homeowner, does the homeowner have a right to try to get the property back?*

A Yes. If the HOA forecloses on the homeowner using a nonjudicial foreclosure, the foreclosure is subject to a 90 day right of redemption. This allows the homeowner who has been foreclosed on to try get the property back by in effect buying it back for the amount of the lien, costs, fees and other allowable charges. (Cal. Civ. Code section 5715(b).)

If the foreclosure is judicial (which is not common) there is a redemption right, of three months if the HOA waives its right to deficiency judgment or one year if it is pursuing a deficiency judgment on the lien.

Q 11. *If a HOA places a lien on a homeowner's property can it foreclose on that lien even if there is a first or a first and second mortgage on the property?*

A Yes. Assuming the action is permitted by the HOA's documents, which it usually is, a HOA may, after following the appropriate procedures foreclose through judicial foreclosure or a trustee's sale.

A HOA lien will almost always be junior (recorded after) a first or second or other mortgage. Even if the HOA lien is not recorded after the mortgage(s), the CC&Rs of most HOAs contain provisions making any HOA lien subordinate to any mortgage in order to make financing easier for homeowners, effectively making it a junior lien.

Q 12. *If a HOA forecloses what happens to the first or other mortgages which are senior (were recorded prior to the HOA lien)?*

A Those senior mortgages will remain on the property after foreclosure. The HOA, or any purchaser at the foreclosure sale, takes the property subject to those liens.

Q 13. *Once a HOA forecloses upon the property can it rent it out?*

A Yes, a HOA can rent the property, however, it must pay the rents to the senior lienholders. If it keeps the rents the HOA would be engaged in rent skimming. (Cal. Civ. Code section 890.)

Q 14. *Why would a HOA foreclose on a property where there is insufficient equity to pay off the senior liens?*

A This is no definitive answer to this question. A HOA may believe that it can rent the property and make a profit, but this would only make sense in the unlikely situation that the rent collected by the HOA exceeded the amount the HOA is required to pay from the rent to any senior mortgages on the property(see question 9) . In some cases distressed homeowners may rent out the property to troublesome tenants who they now do not wish to evict due to the cost, and the HOA sees no alternative but to take possession to stop the conduct. REALTORS® involved in short sales should remind HOAs that there is often no benefit to them to foreclosing, assuming the property owner is not misusing the property.

Q 15. Does a HOA lien survive a foreclosure by a senior lien, such as the first mortgage?

A No, the lien as with any junior lien will be “wiped out” by the senior lien foreclosing.

Q 16. If a HOA lien is “wiped out” during a foreclosure by a senior lienholder can the HOA pursue the homeowner even after the homeowner no longer owns the property?

A Yes. HOA assessments are the personal debt of the homeowner. The association can file a lawsuit in small claims court or superior court depending on the amount of money involved in order to recover the amount of money due after the foreclosure by a senior mortgage or lienholder.

III. Short Sales and Homeowners Associations’ Liens and Assessments

Q 17. If a HOA has a lien on the property does it have to remove it if the other mortgage holders on the property agree to terms on a short sale?

A No. The listing agent will have to negotiate with the HOA to remove the lien in order to permit the short sale to go through.

Q 18. Could a HOA which refuses to accept what is offered to them by a lender during a short sale cause the whole short sale to fail?

A Yes. That is why it is advisable for a listing agent or the seller to discuss in advance with the HOA what terms might be acceptable to it to remove a lien.

Q 19. If a HOA does agree to remove its lien for an amount less than the amount due, is the HOA allowed to try to collect the deficiency from the homeowner?

A The HOA may be able to try to collect the deficiency from the homeowner absent express language in the release of lien agreement waiving the HOA’s ability to collect any deficiency amount. Depending on the circumstances of the removal of the lien the homeowner may have defenses to a HOA attempt to collect the deficiency after the sale, but for a homeowner to feel safe, there should be language in any agreement to release the lien where the HOA gives up its right to pursue a deficiency.

Q 20. Doesn’t California law prevent lienholders from recovering a deficiency if they consent to a short sale?

A California Code of Civil Procedure 580e only prevents trust deed holders such as mortgage lenders from pursuing deficiency judgments after a short sale. A HOA may try to pursue the deficiency amount after a short sale absent express language in an agreement prohibiting it from doing so.

Q 21. *In order to obtain a release of lien could a homeowner agree to pay the sums due at a later date or enter into some other way to obtain a release of a lien to permit a short sale?*

A Yes. A homeowner could agree to pay other sums to a HOA lienholder in order to obtain a release of lien.

Q 22. *Does an agreement between a homeowner to pay the HOA or other arrangement have to be disclosed to the first or other lienholders in a short sale transaction?*

A Yes. There can be no hidden arrangements. Most lender short sale affidavits make it clear that all agreements must be disclosed to the lender. Agents, buyers or sellers who sign a short sale affidavit falsely representing to the lender that all arrangements concerning the property have been disclosed, could face both criminal and civil liability and licensees could additionally face the risk of DRE discipline.

Furthermore the law requires that the HUD settlement statement reflect all charges which are part of the settlement. Even if sums are paid outside of escrow, that must be noted on the HUD settlement statement as POC ("Paid Outside Close").

Q 23. *Could a person who buys a property through a short sale be responsible for the unpaid dues of a former owner?*

A Possibly. Under California law a homeowner is not responsible for breaches of covenants by a prior owner. (Cal. Civ. Code section 1466.) As an assessment is a covenant, the new homeowner should not be responsible for the prior owner's breach of the covenant to pay the assessments. Furthermore the law states that an assessment is the debt of the person who owns the property. (Civ. Code section 5650(a).)

However, recently more HOAs are trying to make new owners responsible along with the former owner for the unpaid assessments. HOA are adding provisions to CCRs which state that, for example, any new owner agrees to pay and assume any outstanding assessments. Therefore, by purchasing the property the buyer is effectively agreeing as a condition of ownership to assume the obligation for the former owner's debt. A HOA is likely to argue that a potential buyer could evaluate that potential cost in deciding what to offer for the property and therefore, it is fair to hold him or her liable for those assessments. It is not clear at this time whether such covenants are enforceable as they go against existing California law. Whether those provisions can be waived has not been tested.

Q 24. *What are some points that can be raised with a HOA to try to encourage them to reduce their demands for full payment of any homeowner debts and agree to a short sale?*

A Some potential points that can be made with the HOA to get them to agree to less than the full amount of the HOA assessments due are:

- If the short sale lender will allow only a partial payment of the delinquent dues, an agent can argue that at least the HOA will get some of the money they are owed without much effort. Collecting money from a homeowner can be time consuming and uncertain. Even if a HOA obtains a judgment against a homeowner collecting it can be very difficult and uncertain.
- If your client is willing to make arrangements to pay the past due assessments over time and the lenders have no objection, the HOA can then get their whole payment without much effort.
- The HOA will be able to avoid problems associated with a foreclosed property. A person who buys a property in a short sale, is generally going to be a homeowner who has an interest in keeping up the property and being a good member of the community. Even an investor who wants to flip the property will generally improve the property prior to sale. However, if a foreclosure occurs and the property becomes REO, the bank's only interest is in selling the property. Banks generally do not have any interest in improving the property and do not care much about the community
- Some HOAs wrongly believe they can rent the property and keep all the rent money. HOAs may need to be reminded that any rent they collect when they take on the responsibilities of being a landlord will have to be paid to senior lienholders, otherwise the HOA would violate the rent skimming laws.

IV. Foreclosed Properties and Homeowners Associations' Liens and Assessments

Q 25. *Is the new owner of a property after a foreclosure responsible to pay assessments that were owed by a prior homeowner?*

A No. As mentioned in question no. 12, California law states generally that a homeowner is not liable for a breach of covenant, an example of which would be the failure to pay an HOA assessment by a former owner of the property. (Cal. Civ. Code section 1466.) Some HOAs as mentioned in question 12 have enacted CC&Rs which state that any new owner is responsible for the unpaid assessments on that property. On the question of the responsibility of a new owner after a foreclosure (as opposed to in a sale or short sale), the Court in *Mountain Home Properties v. Pine Mountain Lake Assn*, (135 Cal. App. 2d 959) ruled that Civil Code section 1466 applies. The Court stated that despite CC&Rs which held the new owner's liable, those CC&Rs could not be enforced against an owner who took title after a foreclosure sale.

Q 26. *Can a HOA prevent the new owner after a foreclosure from enjoying the amenities of the association?*

A No. The court ruled in *Mountain Home Properties v. Pine Mountain Lake Assn*, that the association could neither enforce its CC&Rs holding the owner liable for the unpaid assessment of the prior owner nor deny the use of the amenities and facilities of the HOA. *Mountain Home Properties v. Pine Mountain Lake Assn*, (135 Cal. App. 2d 959).

Q 27. *If the HOA is the party who foreclosed as opposed to a lender is there anything a buyer should be aware of?*

A Yes, as stated in question 9, the homeowner has a 90 day redemption period after the sale

allowing the homeowner to regain his property. This is unusual since an owner of a property foreclosed on in a nonjudicial foreclosure typically does not have a redemption right. An investor or buyer who purchases a home after a foreclosure by a HOA should be aware of the risks that if he or she buys a property at a HOA nonjudicial foreclosure, there is a chance the homeowner will be able to get the property back.

There is also a redemption period depending on whether a deficiency judgment is sought in a judicial foreclosure sale of either 90 days or one year. However, that is no different than any judicial foreclosure.

Q 28. *Where can readers get more information?*

A This legal article is just one of the many legal publications and services offered by C.A.R. to its members. For a complete listing of C.A.R.'s legal products and services, please visit [car.org](http://www.car.org).

Readers who require specific advice should consult an attorney. C.A.R. members requiring legal assistance may contact C.A.R.'s Member Legal Hotline at (213) 739-8282, Monday through Friday, 9 a.m. to 6 p.m. and Saturday, 10 a.m. to 2 p.m. C.A.R. members who are broker-owners, office managers, or Designated REALTORS® may contact the Member Legal Hotline at (213) 739-8350 to receive expedited service. Members may also submit online requests to speak with an attorney on the Member Legal Hotline by going to <http://www.car.org/legal/legal-hotline-access/>. Written correspondence should be addressed to:

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