

SHARED BURDEN:

An Overview of Common-Interest Community Finances

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In 1991, the Nevada Legislature adopted the Uniform Common-Interest Ownership Act (UCIOA). The UCIOA was originally created by the Uniform Law Commissioners. It was codified in Chapter 116 of the Nevada Revised Statutes and became effective Jan. 1, 1992. This statute is the guiding determination for the majority of common-interest communities in Nevada. Although there are some associations that may not be subject to chapter 116, those associations are not the subject of this article.



A common-interest community,¹ (commonly referred to in Nevada as a homeowners' association), is a not-for-profit entity that is responsible for the enforcement of the governing documents, preservation of common area, and other responsibilities associated with the particular association. The funds necessary to perform these important functions derive solely from the payment of assessments by the members of the common-interest community.² Accordingly, if the assessments are not paid or not collected, the association has no other choice but to raise assessments higher to make up the budget deficit from the non-paying members. Of course, raising assessments is the last thing that a board of directors of a homeowners' association wishes to do. After all, the members of the board of directors are also members of the association and any increase in the assessments is an increase for them as well. As a result, the enforcement and collection of assessments, from as many owners as possible, is one of the important goals of the common-interest community.

Assessments

In order to understand the collection of assessments, it is important to understand how the assessments are set. Every fiscal year, each common-interest community develops a budget for the operating and reserve accounts.³ The operating budget includes the day-to-day expenses of running the association, including the expense of the community management of the association, accounting expenses, legal expenses, and other applicable expenses to the particular community, such as landscaping, utilities, pools, clubhouses, streets, parking areas and the like. In addition, each association is required to provide for sufficient funds to be set aside for the repair, replacement and restoration of the major

components of the common elements and any other portion of the common-interest community that the association is obligated to maintain, repair, replace or restore.⁴ This is the reserve budget. The reserves are not to be used for daily maintenance or operating.⁵ The reserves are established in reliance on a reserve study that must be conducted at least once every five years and reviewed at least annually.⁶ To establish adequate reserves as required by Nevada law, the board may impose any necessary and reasonable assessments called for, under the reserve study, without a vote of the members.⁷

Once the budgets have been adopted by the board, they are distributed to the members and a member meeting is conducted to ratify the budgets.⁸ Unless a majority of all of the units' owners vote to reject the budgets at that meeting, the budgets are ratified.⁹ The assessments, which constitute the income for the association in the budget, are then established for the following year, unless some event occurs requiring emergency funds. The association's governing documents sometimes dictate whether the annual operating and reserve assessments are paid monthly, quarterly, semi-annually or annually. If the governing documents are silent, the board may determine at its discretion how the assessments will be paid. This constitutes the levying of the assessments.

Liens

The moment that an assessment is levied, it is a lien on the unit until paid.¹⁰ No further action is required in order for the assessment to be a lien.¹¹ The recording of the declaration constitutes record notice and perfection of the lien.¹² No further recordation of any claim of lien for assessment under NRS 116.3116 is required.¹³ This is, of course, different from other statutory liens. For example, in order to perfect a mechanic's lien, it is necessary, among other things, to record the claim of lien.¹⁴

The association's lien is superior "to all other liens and encumbrances on a unit except:

- a. Liens and encumbrances recorded before the recordation of the declaration and, in a cooperative, liens and encumbrances which the association creates, assumes or takes subject to; and
- b. A first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent or, in a cooperative, the first security interest encumbering only the unit's owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent; and
- c. Liens for real estate taxes and other governmental assessments or charges against the unit or cooperative."¹⁵

"The lien is also prior to all security interests described in paragraph (b) to the extent of any charges incurred by the association on a unit pursuant to NRS

116.310312¹⁶ and to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the nine months immediately preceding institution of an action to enforce the lien, unless federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien."¹⁷ This is frequently referred to as the "super-priority" lien.

Chapter 116

Since the adoption of chapter 116, the lien of an association has always included any penalties, fees, charges, late charges, fines and interest charged pursuant to NRS 116.3102(1)(j) through (n).¹⁸ As further clarification of the additional charges that are included in the lien, the 2009 amendments included the addition of NRS 116.310313. This simply made it clear that the association could also charge the costs of collecting any delinquent assessments and the lien continues to include these additional collection charges.

Another 2009 amendment to chapter 116 was the requirement that each association adopt a collection policy. This collection policy is required to be mailed annually to the members.¹⁹

Collections

Under the majority of governing documents of record, the association has the right to exercise a remedy of a personal action against the owner not paying the assessments. However, the common remedy exercised by the association is non-judicial foreclosure of the lien. Under most collection policies adopted by an association, the first step in the process of collection is a letter or notice to the owner (whether it be an institution or individual) that the association intends to proceed with a notice of intent to foreclose the lien. Thus, this becomes the action to enforce the lien.

By statute, in order to continue to proceed with the foreclosure process, the association must record a Notice of Delinquent Assessment and Claim of Lien.²⁰ The Notice of Delinquent Assessment and Claim of Lien is recorded and served on the unit's owner. The Notice of Delinquent Assessment and Claim of Lien must state the amount of the assessments and other sums which are due, a description of the unit, and the name of the record owner. Thereafter, if the amount due remains unpaid in full, the association records a Notice of Default and Election to Sell the Unit. The information to be included is the same information as the Notice of Delinquent Assessment and must also describe the deficiency in payment, state the name and address of the person authorized by the association to enforce the lien, and contain warning language specified by NRS 116.31162(1)(b)(3).²¹

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If the unit's owner fails to pay the amount of the lien, including costs, fees and expenses incident to its enforcement, for 90 days following the recording of the Notice of Default and Election to Sell, the association may notice the foreclosure sale.²²

Once again, the statute is very specific as to the language that must be included in the notice of sale and the required service of the notice of sale.²³ The sale must be conducted in the county in which the common-interest community is located.²⁴ The association may credit bid the amount of unpaid assessments and any permitted costs, fees and expenses incident to the enforcement of its lien.²⁵

To many people, the enforcement of the amount due the association, together with the additional expenses as provided by NRS 116.3116(1) and NRS 116.31031, by foreclosure seems a harsh result. However, absent the ability of the association to enforce its lien through foreclosure, many non-paying members would not pay. This would have harsh and unfair results on the majority of the unit owners who pay their assessments, or detrimental results in a community where the payments are not made.

Conclusion

For every dollar that is not collected from a unit owner, a lender after foreclosure, or a third party that purchases the property either at a foreclosure sale or later, the paying members of the community will have to make up that deficit. The income must be paid by the members of the association, whether that member is a homeowner, lender after foreclosure, or a third-party investor. The failure or inability to enforce the assessments and collect the necessary funds to meet the operating and reserve requirements of the association simply puts added burdens and stresses on the members of the association who are paying their assessments. Frequently, these members are themselves struggling to make ends meet, and the failure to enforce the assessments from other homeowners, a lender or a third party that purchases at a foreclosure sale, simply results in greater assessments for the homeowners. Accordingly, it is important to recognize the importance of enforcement of the assessments in order to avoid placing ever-increasing financial burdens on the homeowners within the community. ■

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1 NRS 116.021 defines a common-interest community as "real estate described in a declaration with respect to which a person,

by virtue of the person's ownership of a unit, is obligated to pay for a share of real estate taxes, insurance premiums, maintenance or improvement of, or service or other expenses related to, common elements, other units or other real estate described in that declaration."

- 2 NRS 116.3115 provides that "[u]ntil the association makes an assessment for common expenses, the declarant shall pay all common expenses. After an assessment has been made by the association, assessments are made at least annually, based on a budget adopted at least annually by the association in accordance with the requirements set forth in NRS 116.31151."
- 3 NRS 116.3115 provides that the declaration may have provisions that include additional more stringent requirements for setting budgets.
- 4 NRS 116.3115(2)(b) provides: "The association shall establish adequate reserves, funded on a reasonable basis, for the repair, replacement and restoration of the major components of the common elements and any other portion of the common-interest community that the association is obligated to maintain, repair, replace or restore. The reserves may be used only for those purposes, including, without limitation, repairing, replacing and restoring roofs, roads and sidewalks, and must not be used for daily maintenance. The association may comply with the provisions of this paragraph through a funding plan that is designed to allocate the costs for the repair, replacement and restoration of the major components of the common elements and any other portion of the common-interest community that the association is obligated to maintain, repair, replace or restore over a period of years if the funding plan is designed in an actuarially sound manner which will ensure that sufficient money is available when the repair, replacement and restoration of the major components of the common elements or any other portion of the common-interest community that the association is obligated to maintain, repair, replace or restore are necessary. Notwithstanding any provision of the governing documents to the contrary, to establish adequate reserves pursuant to this paragraph, including, without limitation, to establish or carry out a funding plan, the executive board may, without seeking or obtaining the approval of the units' owners, impose any necessary and reasonable assessments against the units in the common-interest community. Any such assessments imposed by the executive board must be based on the study of the reserves of the association conducted pursuant to NRS 116.31152."
- 5 *Id.*
- 6 See NRS 116.31152(1).
- 7 NRS 116.3115(2)(b).
- 8 The contents and requirements for the budgets are set forth in NRS 116.31151(1).
- 9 NRS 116.31151(3).
- 10 NRS 116.3116(1) provides: "The association has a lien on a unit for any construction penalty that is imposed against the unit's owner pursuant to NRS 116.310305, any assessment levied against that unit or any fines imposed against the unit's owner from the time the construction penalty, assessment or fine becomes due. Unless the declaration otherwise provides, any penalties, fees, charges, late charges, fines and interest charged pursuant to paragraphs (j) to (n), inclusive, of subsection 1 of NRS 116.3102 are enforceable as assessments under this section. If an assessment is payable in installments, the full amount of the assessment is a lien from the time the first installment thereof becomes due."
- 11 NRS 116.3116(4).
- 12 *Id.*
- 13 *Id.*
- 14 NRS 108.226(1).

- 15 NRS 116.3116(2).
- 16 NRS 116.310312 provides for an assessment on the unit to maintain the exterior of the unit, remove or abate a public nuisance on the exterior of the unit. This enables the association to protect the community from abandoned homes and improvements such as swimming pools threatening the public health of the community.
- 17 NRS 116.3116(2)(c).
- 18 NRS 116.3116(1); *See also* Hudson House Condo. Ass'n, Inc. v. Brooks, 223 Conn. 610, 61 A.2d 862 (1992).
- 19 NRS 116.31151(4).
- 20 NRS 116.31162.
- 21 The specific warning language must be in 14-point bold type as follows: **WARNING! IF YOU FAIL TO PAY THE AMOUNT SPECIFIED IN THIS NOTICE, YOU COULD LOSE YOUR HOME, EVEN IF THE AMOUNT IS IN DISPUTE!**
- 22 NRS 116.31162(1)(c).
- 23 Specifically, NRS 116.311635 provides as follows: "(1) The association or other person conducting the sale shall also, after the expiration of the 90 days and before selling the unit: (a) Give notice of the time and place of the sale in the manner and for a time not less than that required by law for the sale of real property upon execution, except that in lieu of following the procedure for service on a judgment debtor pursuant to NRS 21.130, service must be made on the unit's owner as follows: (1) A copy of the notice of sale must be mailed, on or before the date of first publication or posting, by certified or registered mail, return receipt requested, to the unit's owner or his or her successor in interest at his or her address, if known, and to the address of the unit; and (2) A copy of the notice of sale must be served, on or before the date of first publication or posting, in the manner set forth in subsection 2; and (b) Mail, on or before the date of first publication or posting, a copy of the notice by first-class mail to:

- (1) Each person entitled to receive a copy of the notice of default and election to sell notice under NRS 116.31163; (2) The holder of a recorded security interest or the purchaser of the unit, if either of them has notified the association, before the mailing of the notice of sale, of the existence of the security interest, lease or contract of sale, as applicable; and (3) The Ombudsman. (2) In addition to the requirements set forth in subsection 1, a copy of the notice of sale must be served (a) By a person who is 18 years of age or older and who is not a party to or interested in the sale by personally delivering a copy of the notice of sale to an occupant of the unit who is of suitable age; or (b) By posting a copy of the notice of sale in a conspicuous place on the unit. (3) Any copy of the notice of sale required to be served pursuant to this section must include: (a) The amount necessary to satisfy the lien as of the date of the proposed sale; and (b) The following warning in 14-point bold type: **WARNING! A SALE OF YOUR PROPERTY IS IMMINENT! UNLESS YOU PAY THE AMOUNT SPECIFIED IN THIS NOTICE BEFORE THE SALE DATE, YOU COULD LOSE YOUR HOME, EVEN IF THE AMOUNT IS IN DISPUTE. YOU MUST ACT BEFORE THE SALE DATE. IF YOU HAVE ANY QUESTIONS, PLEASE CALL (name and telephone number of the contact person for the association). IF YOU NEED ASSISTANCE, PLEASE CALL THE FORECLOSURE SECTION OF THE OMBUDSMAN'S OFFICE, NEVADA REAL ESTATE DIVISION, AT (toll-free telephone number designated by the Division) IMMEDIATELY.** (4) Proof of service of any copy of the notice of sale required to be served pursuant to this section must consist of: (a) A certificate of mailing which evidences that the notice was mailed through the United States Postal Service; or (b) An affidavit of service signed by the person who served the notice stating: (1) The time of service, manner of service and location of service; and (2) The name of the person served or, if the notice was not served on a person, a description of the location where the notice was posted on the unit."
- 24 NRS 116.31164.
- 25 *Id.*