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On May 28, 2013, Governor John Hickenlooper signed HB 1276 which will go into effect on January 1, 2014. The bill was designed to provide protections for owners in homeowner associations. HB 1276 has been referred to as the HOA Debt Collection Bill, and it includes specific state mandated requirements for the contents of an association's collection policy. This article is intended to provide information as to the requirements of HB 1276, highlight problems, concerns and pitfalls for associations and management companies, and discuss the impact of this new law.

Collection Policy under HB 1276

The Colorado Common Interest Ownership Act ("CCIOA") already requires all associations to have a collection policy. HB 1276 now requires associations to have certain uniformed minimums within the required collection policy. These requirements are:

1. The date on which assessments become past due, as well as the date that assessments must be paid to the association;
2. If the association is entitled to charge late fees and interest on a past due account, the amounts that the association can charge must be stated in the collection policy;
3. If the association has the right to charge a returned check fee, the fee must be included in the collection policy;
4. The circumstances under which a delinquent homeowner is entitled to enter into a payment plan and the minimum terms of the payment plan;
5. How payments will be applied on the delinquent account must be set forth in the collection policy;
6. Additionally, before an association can turn over a delinquent account to an attorney or a collection agency, the association must send the delinquent owner a written notice specifying:
    a. The total amount of the arrearage, with an accounting of how the total arrearage is determined;
    b. Whether or not the opportunity for a payment plan exists (the association is only required to offer one payment plan to a debtor after January 1, 2014) and instructions for contacting the association to enter into the payment plan;
    c. The name and contact information for the individual the owner may contact to request a copy of the owner's ledger to verify the amount of the debt; and
    d. A statement stating what action is required to cure the delinquency and that failure to do so within 30 days, may result in the account being turned over to a collection agency, a lawsuit being filed against the owner, the filing and foreclosure of a lien against the owner's property and other remedies available under Colorado law.

The good news with HB 1276 is that many collection policies already include much of the required information. Most associations collection policies state when, what, and how many late fees can be charged as well as any returned check fees. However, the bill now provides that collection may not be pursued unless the association has adopted and followed a written collection policy that complies with all of the above stated factors. That is to say, unless your association has adopted a new policy that complies with HB 1276 by January 1, 2014, you will not be able to proceed with collection efforts against delinquent homeowners.

The legislature drafted HB 1276 as a form of consumer protection for homeowners as the legislature was trying to deal with the perceived public notion that associations and HOA boards have not been transparent with their homeowners. In going along with the idea of transparency, the legislature has determined that this bill will also apply to third party purchasers of an association's debt or lien. This means that third party purchasers must adopt the association's collection policy and comply with the terms of the collection policy prior to taking action to foreclose on the lien or collect on the debt. From a practical standpoint, the fact that third party purchasers will have to comply with this bill will not directly affect the association. Associations are not responsible for the actions of the third party purchaser after the lien or debt has been sold. However, since third party purchasers will have to comply with the statute, associations may see a decline in the amount of third party purchasers who are willing to take on the additional requirements of the bill and who are willing to purchase these liens.

Requirements of the Payment Plan

Since the legislature was trying to enact a consumer protection bill that would benefit homeowners, the legislature has now mandated that all homeowners who become delinquent on homeowner association assessments are entitled to be offered a one-time, six month payment plan. This is not a novel idea to homeowner associations, as most associations already offer delinquent owner's payment plans when they are requested. The difference now is that there are certain requirements that must be met with the mandated payment plan, and every homeowner must be offered the payment plan at least one time after January 1, 2014.

The circumstances under which each association will allow a payment plan must be contained in the collection policy and must be in place prior to turning the file over to an attorney or collection company and must establish the minimum requirements of the payment plan.

The legislative requirements of the payment plan are as follows:

1. The payment plan must allow the delinquent homeowner to pay off the past due balance in equal installments over a period that is no less than 6 months long. An association is always entitled to make arrangements with a homeowner that allow for a longer repayment period, but the collection policy must ensure that all homeowners will get 6 months to catch up on the past due balance;
2. The association must make a good faith effort to coordinate with the owner to set up a payment plan. This can be done by explaining the payment plan options in the association's notice of delinquency sent to the homeowner;
3. If the owner fails to make payment on any of the pay plan 6 month installments, or if the delinquent homeowner fails to stay current with the regular assessments during the pay plan, the owner will be in default of the payment plan, and the association may proceed with its remedies and no longer has to offer any further payment plans;
4. Regular assessments under the payment plan as referenced above include both regular and special assessments, fees, charges, late charges, attorney fees, fines, and interest.

The legislature has only required an association to enter into a payment plan with a delinquent homeowner one time after January 1, 2014. Ultimately it will be up to the association to determine if they would like to offer repeat or habitual delinquent homeowners multiple pay plans. If an association wants to only offer the payment plan to the delinquent homeowner once, the Association will need to develop a system that keeps track of which homeowners have been offered payment plans. This system will need to transfer from management company to management company if necessary. The easiest solution to this problem would be to offer a new payment plan to each homeowner every time they become delinquent.

When drafting this bill, the legislature was primarily concerned with protecting individuals who actually live in an association. With this in mind, the legislature carved out exceptions to the payment plan requirement. Payment plans are not required to be offered to homeowners who do not occupy the property. Therefore it is important that the association has a current list of homeowners who are renting properties in the association. Additionally, if the owner of the property obtained title by either a foreclosure or a deed-in-lieu

of foreclosure the association is not required to offer a payment plan to these owners. Please note that this is only for owners who first received title to the property through foreclosure or a deed-in-lieu of foreclosure and that once the property has been foreclosed on or turned over via a deed-in-lieu of foreclosure (normally to a bank or investor), it likely will be sold to a new owner shortly thereafter. The new owner who purchases the property from the bank or investor is now entitled to a payment plan under the legislature if they become delinquent. This is one reason why it is so important to have a system in place that will track to whom and when payment plans have been offered. If the association does not offer the new homeowner a payment plan, the association will be violating this new law.

Requirements Before Proceeding With Foreclosure

HB 1276 has also enacted rules that will affect an association's right to foreclose on its lien. The legislation is now adding two requirements before an association can foreclose on a lien. First, the association cannot foreclose on a past due amount that is not equal to or more than six months of budgeted common expense assessments. It is important to realize that the statute does not require the home owner to be delinquent for six months or longer, but rather that the amount owed be equal to 6 months of assessments. Therefore, the homeowner could be current on their assessments, but if they had covenant enforcement fines or attorney fees that were outstanding the association could still foreclose as long as the total amount owed equaled 6 months of assessments.

The second new requirement has to do with the overall theme of transparency that the bill is trying to instill in associations. The legislature is requiring that the board must resolve, by a recorded vote, to authorize foreclosure against a property. Additionally, the authority to foreclose, resides solely with the board. The board cannot delegate this authority to any other individual or entity, such as a lawyer, a manger or a collection agency.

Any foreclosure attempted by the association without evidence of the vote authorizing the foreclosure must be dismissed. Associations will not be allowed to recover from the owner of the property any court costs, attorney fees or other charges in connection with an action that is dismissed for failure to have authorization of the foreclosure decision. It is extremely important that any foreclosure decision be documented, and that record be kept by the association. We would recommend a formal resolution be utilized.

Summary

The Colorado legislature did not feel that homeowners associations were being fair and consistent with the members of the associations in terms of collecting past due assessments. In order to remedy this, the Colorado legislature enacted HB 1276 to protect homeowners.

It is imperative that all associations update the association's collection policy so that it conforms to HB 1276 by January 1, 2014. Failure to update an association's collection policy will prohibit the association from collecting past due balances from homeowners.

Additionally all delinquent homeowners must be offered a payment plan of no less than six months to allow the homeowner to get current with their outstanding balance. Failure to offer a payment plan will preclude the association from collecting delinquent balances from homeowners.

Finally, if an association wants to foreclose on a property, the board must make the decision by a vote, and the balance of the debt must be equal to or greater than 6 months of assessments. The Board cannot delegate this decision, and the Board should maintain a record of this decision. Failure to have a record of this decision will lead to the lawsuit being dismissed and the attorney fees associated with the foreclosure action cannot be charged back to the owners account.

While these changes may be cumbersome at first, the ultimate goal of the legislation is to create a more unified and transparent collection practice across the state of Colorado, and ultimately this will hopefully help to change the perception that the public has toward homeowner associations.