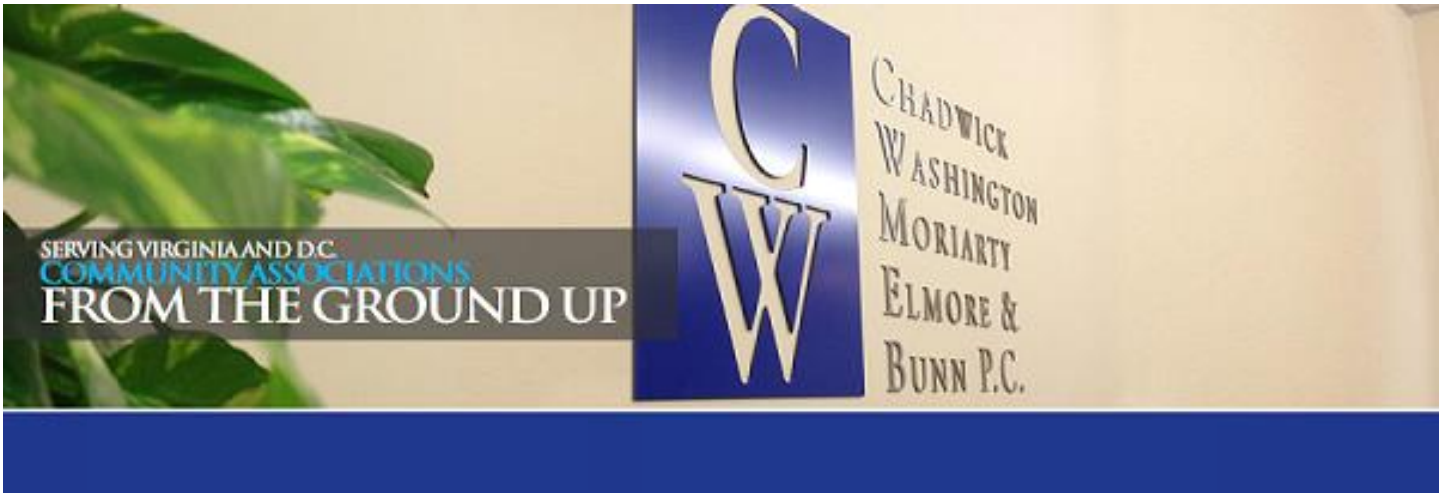


The Special Assessment
September 2022 Edition

The Most Important Thing Any Association Does

By Brad M. Barna

I will often ask clients what they think is the most important thing that common interest community associations do. Many will say maintaining desirability via maintenance of common areas. Others will say the provision of amenities is most important or that the protection of a common aesthetic by regulating architectural design is the primary purpose of their association. These are all important functions of community associations but selecting them as the most important action that an association takes ignores a fundamental reality and something they all have in common: they require funds.

The association is generally responsible for providing maintenance, repairs, and other services to benefit the community. Assessments sustain operation of an association's affairs, pay for upkeep of facilities on common areas/elements, and enable the association to provide a variety of services to its members. Non-payment of assessments by several owners can have negative consequences on the community as a whole and cut into an association's budget and cause a crisis for community-supplied services.

The association is, ultimately, a business tasked with carrying out its purposes for the benefit of its community, all of which requires funding. The association's board of directors is responsible for ensuring the association's financial health and that it possesses sufficient resources to fulfill its responsibilities pursuant to the association's governing documents and applicable law. To this end, one of the most important functions of the association is collection of assessments owed so that it possesses money to pay for its obligations. Without proper funding and collection of assessments, common areas/elements can become unkempt, amenities can degrade, and enforcement of violations of the covenants and design standards may fall by the wayside.

Accordingly, one of the most important decisions for a board is what to do when owners aren't paying assessments timely. Fortunately, there are a variety of avenues for an association to pursue collection of assessments. The remedies which an association utilizes may be limited by applicable law, and the methods for collection should be consistent with the association's governing documents and any applicable rules or resolutions, such as a collections policy, adopted by the board.

The remedies available for most associations come in two general forms: 1) administrative; and 2) legal.

Administrative Remedies:

On the administrative side, the most common remedies related to collections are those having to do with ***suspension of rights and privileges***. For example, if the association's governing documents establish sufficient authority under applicable law, an association may suspend an owner's right to use association facilities and/or services for delinquencies greater than 60 days (subject to the provision of certain notice and due process requirements under applicable law and/or the association's governing documents). Many governing documents further provide the association with the ability to suspend voting rights or the right to hold office based on delinquencies to the association. Associations with pool facilities that have the authority to suspend use rights often have remarkable success in bringing accounts current right before pool season as owners scramble to ensure that they'll have access for the summer. Similarly, associations may be able to suspend an owner's right to park on the common area. Lastly, if a member's home is going to a sale, the association can include information on any outstanding assessments owed in the disclosure packet or resale certificate and those should be paid at closing.

Legal Remedies:

On the legal side, associations' governing documents and applicable law provide two main options to secure and collect delinquent assessments: (1) assessment liens to secure debt owed against the owner's *unit or lot*; and (2) lawsuits to secure the debt owed against the owner *personally*.

Assessment liens are recorded in a municipality's land records, attach to the owner's lot or unit, and are a cloud on title until paid or otherwise satisfied and released. Liens can be a relatively cheap and effective way to secure assessment debt owed against a property and protect the association's interests (often a lien will be voluntarily paid by the owner or through the proceeds of the sale of a property so that the owner can convey clean title to a purchaser). If traditional efforts to collect funds are unsuccessful and the circumstances are right an assessment lien may also form the basis for the association to foreclose on an owner's property (whether or not foreclosure on the lien is recommended, however, would be a fact specific inquiry and depend on many factors; foreclosure is discussed in more detail below).

Lawsuits are filed in the applicable court against the property owner personally and can result in judgments that are actively collectible through writs and garnishments. Under Virginia and D.C. law, an association that has a judgment against a current or former property owner for amounts owed can file a garnishment to collect the amounts awarded by the court to the association. The two types of garnishments with which associations typically have the most success are bank garnishments and wage garnishments. ***Bank garnishments*** involve the association (or its legal counsel) finding a bank account for the owner and then asking the court to issue an order that the bank hold all of the owner's funds so that they can be applied to the judgment. Similarly, for a ***wage garnishment***, pursuant to a request by the association, the court can order the owner's employer to hold part of the owner's paycheck and apply those wages towards the judgment. Additionally, if the owner is receiving rental income from the property, the association can file a ***rent garnishment*** and request the court order a tenant to pay rent to the court instead of the owner, with the court then paying those funds over to the association to be applied towards paying the judgment.

Of course, without information regarding where the owner banks or is employed and whether the debtor rents or resides in the property, the ability to successfully garnish a judgment is limited. In such cases, the remedy of debtor's interrogatories is available. For ***debtor's interrogatories***, the court will order the debtor to appear before the court and answer under oath questions related to the debtor's finances. Using the information found in those responses, the

association may be able to locate viable assets of the debtor, such as bank accounts and real or personal property, that provide options for collection on a judgment through garnishments or levies.

Writ of Fieri Facias ("Attachment" or Sheriff's Levy) is a document filed with the court that requests authorization for the sheriff to "seize" and auction off the debtor's personal property to satisfy a judgment. This method of collection requires some personal knowledge of the debtor and his possessions – e.g., does the debtor own a nice car? Does the debtor have expensive electronic equipment in his house? It can be effective in obtaining payment from a debtor under certain circumstances and, at a minimum, may convince a debtor to find the money to pay the debt rather than deal with the sheriff's office (or marshals' office) and the potential sale of personal property.

Foreclosure on a timely perfected assessment lien(s) *may* be advisable for an association when the circumstances are right. Given the potential costs associated with a foreclosure and the likely possibility of the association not being made whole at the end if the property either does not sell at foreclosure or sells for less than the cost of the association's secured interests, plus those of lienholders standing in higher priority than the association, and the costs of the foreclosure action. In many cases foreclosure may not be a cost-effective option. Some notable concerns are that foreclosure candidates may lack sufficient equity to make the foreclosure process worthwhile, may have title problems, or may not be in good enough condition (or otherwise sufficiently desirable) to attract worthwhile bids from prospective purchasers. In addition, recent changes made to applicable law during the pandemic have made foreclosure of properties more difficult for creditors.

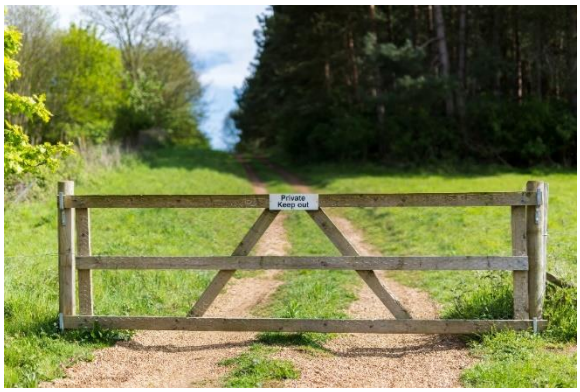
We typically recommend taking a two-pronged approach to collections involving both timely filing assessment liens and seeking judgments via lawsuits. Assuming that the debt is high enough to make it cost-effective, such an approach best protects the association from an owner's bankruptcy and from foreclosures by any other lienholders. This is because liens will typically give an association secured status in bankruptcy – which will prioritize payment on their claim – but can be susceptible to being wiped out in a mortgage foreclosure. On the other hand, judgments obtained via a lawsuit may be discharged by an owner's personal bankruptcy, but if not discharged in bankruptcy, the judgment will survive mortgage foreclosure, meaning that the association can pursue the former owner for any amounts that weren't paid from foreclosure proceeds. Unfortunately, in the rare instance where an owner goes through both foreclosure (and its interests are not fully or partially paid) and bankruptcy in quick succession, the association may be out of luck in collecting amounts owed and be best served by writing off the former owner's account.

While collection of delinquent assessments may not be what the Board wants to focus on or put at the top of its meeting agenda, ensuring that sufficient funds are coming in to cover anticipated expenses is vital and important to ensuring the smooth and efficient functioning of the association. It is also important to remember that, in regards to recouping the costs of liens and lawsuits, an association's recorded governing documents as well as applicable law may provide sufficient authority for the court to award an association the costs, including attorneys' fees, associated with collection action and those with authority who request stand a good chance of recovering some or all of the costs incurred.

We hope you find this information helpful and, should you have any questions or be interested in hearing more about our firm's approach to collections, please contact us.

Hey You! Get Off My Common Area!

By Lesley A.Z. Rigney



While association members generally possess easement rights to use and access common area properties and facilities of the association, may members store, alter, build or grow items on the association's common area? The answer…

Generally, No!

Unless permitted by the association's governing documents or rules adopted by the association's board of directors, owners cannot, without permission from the board, add items to or alter the appearance or condition of the associations' common area property or exclude others from all or part of the common areas. Such use may be considered unlawful encroachment onto association property and can present concerns regarding maintenance, liability, and ownership[1] of the property in question.

How does this happen? Owners may, without authorization, build a fence, plant a garden, add landscaping, or install structures (ex. solar panels, satellite dishes) onto or into the common area beyond their property lines. Sometimes the encroachment onto the common area is minor and the area encroached upon not regularly used or accessed. On occasion the owner in good faith believes that the installation or alteration made is within the boundaries of the owner's property. Some changes to common area property may not even detract from the aesthetics of the community or otherwise run afoul of the community's covenants or design guidelines, and thus not be immediately noticed.

When is encroachment permissible? In situations such as those described above, when the encroachment and its impact are *de minimus* or beneficial, there may be utility in allowing the change to remain, but only if the association's governing documents allow and the concerns noted above regarding maintenance, liability, and ownership can be adequately addressed. Specifically, in its recorded covenants an association may possess authority to grant easements or licenses to use the common area to third parties. If the alteration made by an owner to the common area is not prohibited by the association's governing documents or rules and the board is agreeable to allowing it remain, the board may want to consider permitting the alteration conditioned on the owner agreeing to certain terms, such as that the owner will maintain and insure the alteration at its expense and indemnify the association against any liability resulting from the alteration or its installation, maintenance, repair, replacement or removal. Any terms agreed to by the parties should be memorialized in a writing signed by both parties and, ideally, recorded in land records so that the terms thereof are enforceable not just against the current owner but future owners of the property. The board, however, must also consider whether the encroachment is being used by the owner (or is perceived by neighbors) as simply a way for the owner to essentially enlarge the owner's yard at the expense of the community's open space.

What to do if we want the encroachment removed? In situations where the board is not amenable to the encroachment remaining and/or it is of a nature not permitted by the association's governing documents, the board should first check the governing documents to see what, if any, remedies the documents provide and what type of notice the association may be required to provide an owner before initiating those remedies. In most situations, demand by the board, in writing, that the owner remove the encroachment and restore the premises to its preexisting condition may be all that is needed to achieve compliance. If the owner refuses or fails to comply by the deadline provided by the board, however, then the board may need to turn to the remedies available pursuant to the governing documents or applicable law. Depending on the circumstances, these may include the levy of violation charges, suspension of owner membership privileges, removal of the encroachment and remediation of the areas disturbed (ideally, with the cost thereof charged back to the owner responsible), and/or filing a lawsuit with the court requesting injunctive relief. Before initiating any remedies, however, it is vital that the association be sure that the alteration at issue is actually encroaching on the association's property (or area of responsibility) and, if in doubt, that the boundary line between the owner's property and common area be determined.

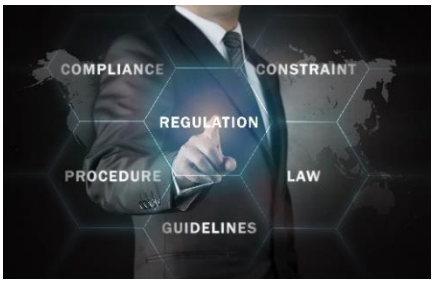
Do we need to disclose the encroachment? Covenant and rule violations existing on a Lot should be disclosed in a resale packet issued for the owner's property, but failure to disclose an encroachment or violation that exists on common area property not assigned for that owner's exclusive use should not impact enforcement because applicable statutes do not require them to be disclosed.

How do we prevent encroachments? Know the property lines of your common area and inspect! Get a survey of the property lines, if needed, and take prompt action to enforce unauthorized installations and alterations. If voluntary

[1] In Virginia and the District of Columbia, if the use has existed or continues for 15 or more years in a manner that is open, hostile, actual, exclusive and visible, these circumstances could be used by the owner to establish a claim of title by adverse possession to the portion of the common area property encroached upon.

compliance with a request to remove and remediate is not forthcoming, confer with the association's legal counsel regarding available options and recommended next steps.

Chadwick Washington Zoom Webinar Series



Chadwick, Washington, Moriarty, Elmore & Bunn, P.C., is pleased to host and invites you to attend its final educational Webinar in 2022 highlighting topics relating to community association law and governance. The Webinar is one hour, with two topics presented by CWMEB attorneys followed by Q&A Sessions in separate Zoom breakout rooms staffed by CWMEB attorneys. The waiting room for the Webinar will open about 15 minutes before the sessions begin at 7:00 p.m., with the Q&A Breakout Rooms opening at approximately 7:40 p.m.

Topics this season included Amending Governing Documents; EV Charging Stations and Solar Panels; Understanding the Fiduciary Duty; Association Insurance Coverages; Emotional Support Animals; Drafting Rules and Regulations; Key Provisions in Vendor Contracts; a Virginia legislative update (June sessions); and many more.

The firm's final 2022 educational Zoom Webinar will be held on **Monday, September 26, 2022, at 7:00 p.m.** and will include presentations regarding the **ABC's of Rules Enforcement** and **Basics of the Fiduciary Duty.** If you are interested in registering, you may do so directly here. Additional information can be found on the Seminar Series page of our website at www.chadwickwashington.com.

We have enjoyed seeing our clients and guests during our 2022 Webinar Series and, for our final webinar, we encourage you to register early so you don't miss out.

Firm Happenings

Sara Ross will be a panelist at the upcoming *Women in Community Association Law: A Dialogue* live webinar hosted by The College of Community Association Lawyers (CCAL) to be held virtually on November 9, 2022 at 2PM. Additional information regarding the webinar and how to register can be found here.

Tiago Bezerra and **Lauren Ritter** recently presented at a program entitled *Striving for Architectural Compliance* at the 12th Annual Virginia Leadership Retreat in Hot Springs, Virginia, which is held by the Virginia chapters of the Community Associations Institute.

Chadwick, Washington, Moriarty, Elmore & Bunn, P.C.
3201 Jermantown Road, Suite 600
Fairfax, Virginia 22030
(703) 352-1900
www.chadwickwashington.com

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