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residential and commercial  
condos and HOAs

2023 HOA Legal Issues

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# MLW HOA/Condo Resources

- [okhoa.blogs.com](http://okhoa.blogs.com)
- You Tube Channel: Search Winton Law HOA (subscribe to receive notifications of new videos)
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# Oklahoma Community Association Handbook

- Now in its Third Edition
- Oklahoma's only comprehensive resource for HOA and Condo law, operations, and forms
- Available in hardcopy \$29.95 by emailing [office@wintonlaw.net](mailto:office@wintonlaw.net)
- Ebook available \$19.99 go to [www.smashwords.com](http://www.smashwords.com) and search wintonlaw



# Law – Overview

## The law of HOAs

- The applicable law is published cases and statutes
  - 60 O.S. 501 et seq. – Condo Act
  - 60 O.S. 851 et seq. – HOA Act
  - 18 O.S. 865; 1001 – Corporation Act
  - Title 16 conveyances, title standards
- Where is it? Access the law at **[www.oscn.net](http://www.oscn.net)**
- **Handbook contains statutes and seminal cases**



# Assessments: Overview

- Four types: Annual, Special, and Specific/Individual, Reserve (See, CAIRF BPR for reserves)
- Procedure: Accounting system; Owner tracking; invoicing, title companies
- Collections: Communication; customer service; Liens; Judicial actions
- Costs and Attorneys Fees



# Assessments - Collections

- The correct account amount
- Consistent application of interest
- Late fees? The ubiquitous \$25 late fee
- Uniform invoicing and collections; title company contact
- Lien practice: Absent a Power of Attorney, your HOA manager does not have authority to sign liens.
- Make sure your manager, attorney, any third party collector understands and complies with FDCPA and Bankruptcy.



# Assessment Liens

- Uniform application
- NOT MMLs – do not have to foreclose within one year
- Filed with county clerk
- “continuing lien” language
- Title company contact
- Who signs?





# Small Claims Collections

- \$10,000 jurisdictional amount
- Affidavit; Alias Affidavit
- Service of Process
- Trial within 45 days approx.
- Default/Attorney's fees limited
- Service of judgment
- Collection of the judgment



# HOA/Condo Foreclosures

- Valid lien?
- Bankruptcy?
- Petition and Summons
- Entry of Appearance
- Answer/Cross-claims
- Timing
- Will the HOA see any \$? Does the board want to rely on a non-lawyer's legal advice?



# Bankruptcy

- Is owner re-affirming?
- Pre-petition dues
- Post-petition dues
- Automatic stay – Civil Penalties
- Collections during pendency
- Make sure your HOA, your manager, and attorney understand the U.S. Bankruptcy Code





Just waiting on bulk trash day...in OKC.





One morning...in Florida.



Your neighbor...in Houston.









# Some enforcement truths to think about

- Language on a page cannot guarantee behavior or results.
- Relationship is less expensive and more certain than litigation.
- Aesthetic harmony, much like beauty, lies in the eye...
- Sometimes enforcement is as simple as communication.



# Due Process & the HOA

- The right(s) of a member to receive notice of an alleged violation and opportunity to remedy before penalty
- Written notice of violation, clear path to remedy, potential penalties
- Hearing; “en banc”
- If the Gov Doc affords due process, then no fines, common area ban, or similar penalties including litigation without due process; note exceptions



# Dispute Resolution – Judicial Remedies

- Due process
- Demand letter
- Monetary Fines/Specific Assessments/Lien
- Small Claims Court
  - Collections of assessments and fines
  - Amounts under \$10,000.00
  - Attorney’s fees limited
- District Court
  - Collections under \$10,000 (CS court)
  - Collections over \$10,000 (CJ court)
  - Injunctions, damages
  - Declaratory actions (honest disagreement)



# The dangers of a one sided story



# Amendments – Reasons Why

9. No shooting from boats, except for cripples, and in no event shall a motor be ‘running’ in so doing. (The boat shall not be in forward motion.



# Amendments - Overview

- Why? Defective/obsolete language, grammatical errors, change in law and/or facts, remove defunct Declarant language.
- Follow amendment provision within document.
- 11 O.S. 42-106.1
- Absent special amendment provision, each Lot owner must execute a notarized ballot to be filed with the amendment
- Covenants – Regular and intentional oversight
  - Special amendments – 11 O.S. 42-106.1(D)
- Bylaws – Board and member amendments – 18 O.S. 1013



# Amendments: Mechanics

- Drafting Committee
- Testing the Waters
- Information meetings
- Notaries/Acknowledged signatures
- Voting Ballot – all in or line item?
- What percentage?
- Filing with county clerk



# Leasing Restrictions

- States have upheld when contained in recorded covenants; non-condo bylaws and rules insufficient for substantive restrictions such as leasing, fines, uses.
- Percentage limitations: pros v. cons
- Primary occupant requirements
- Absolutely NO tenant approvals





# Insurance - Overview

## Insurance Issues

- Insurance protects against casualties and liabilities
- Specialized insurance packages for community associations
- Director's & Officers Insurance
- Insurance must “fit” to Gov. Doc.
- Annual review of coverage
- Duty to defend certain claims



# Form 1120H isn't about taxes in OK

- Residential HOA/Condo
- Annual income tax filing
- Form 1120H
- 18 O.S. 865-867
  - Gross negligence
  - No joint and several liability
  - No breach of fiduciary duty claim, except for:
    - any breach of duty of loyalty
    - Lack of good faith or intentional
    - improper personal benefit.



# Operations - Board Duties

- Look for the “shall”
- Business judgment rule
- Duty of loyalty
- Duty against self-dealing
- Duty of inquiry: accounting
- Arbitrary and capricious
- Protect against embezzlement



# Operations – Board Statutory Immunities

- 18 O.S. 865-867 – IRS form 1120H
- 18 O.S. 1027(E): A member of the board of directors, or a member of any committee designated by the board of directors, in the performance of the member's duties, shall be fully protected in relying in good faith upon the records of the corporation and upon information, opinions, reports, or statements presented to the corporation by any of the corporation's officers or employees, or committees of the board of directors, or by any other person as to matters the member reasonably believes are within the officer's, employee's, committee's or other person's competence and who have been selected with reasonable care by or on behalf of the corporation.



# Operations - Common Mistakes in Common Interest Communities

- Over-eager/under-eager enforcement
- Failure to provide due process if required by the governing documents
- Failure to properly constitute the ARC
- Enforcing non-existent covenants
- Assuming court will be a panacea
- Failing to place a D&O insurance policy



# Operations – Myths

## Have you ever heard...

- “My neighbor’s fence doesn’t comply with the covenants, so I’ll sue the HOA.”
- “Plant more trees in the Common Area or else...”
- “The Board doesn’t enforce the covenants, so I’m not paying my assessments.”
- “I never received a copy of my covenants, so they don’t apply to me.”
- “You can file a lien, but you can’t foreclose.”

