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CONDOMINIUM ASSOCIATIONS

What happens when financially stressed condominium owners fail to pay their association fees? The condo association picks up the tab, of course, depending on prevailing rules governing collection of such past-due fees. Also, in many jurisdictions, banks are motivated to delay foreclosure action in part because they would be liable for the unpaid assessments if they assumed ownership of a condo unit. In this article, the author provides an overview of the problem and summarizes how such issues are handled in some states.

Condo Associations Battle Deadbeat Owners, Balky Banks in Collecting Fees



BY MARSHALL L. JONES

The impact of the recent economic downturn has been far reaching. One group that has felt the severity of the downturn are condominium associations. News headlines provide a sampling of one of the

issues currently facing condominium associations: “Delinquencies at condos can cost neighbors”¹; “As Fore-

¹ Sacha Pheiffer, *Delinquencies at condos can cost neighbors*, BOSTON GLOBE, Oct. 16, 2007, available at <http://>

closures Mount, Condo Associations Battle with Lenders.”²

By their nature, the viability of condominiums is tied to the economic circumstances of unit owners. The condominium association is established to administer and maintain the common elements of the condominium, which could include items like landscaping, structural maintenance, lobby, and hallway cleaning and a litany of other tasks. The condominium association is primarily funded through assessments made against the unit owners, who are obligated to pay assessments based on their ownership of units. Without a steady flow of assessment income, the condominium association’s ability to maintain the common elements, pay for insurance policy premiums, and otherwise comply with its obligations under the governing condominium documents is severely impaired. In some cases, an association can obtain a loan to help cover the expenses. However, such loans can be difficult to obtain.

In the current economic environment, condominium associations are facing increasing levels of unit owner delinquency in assessment payments. The condominium laws enacted in the various states, as well as the governing condominium documents establishing condominium regimes, give condominium associations various tools to enforce the unit owners’ assessment obligations.

Suspension of Use of Facilities and Fines. The failure to pay assessments generally will give the association the right to suspend a unit owner’s right to use various services provided to the owners by the association. Condominium statutes generally prohibit any action that would impede a unit owner’s access to the unit. Some declarations and state statutes also provide for monetary fines that may be imposed.

Personal Obligation. In most instances, the obligation to pay assessments is a personal/contractual obligation of the unit owner. The association can enforce that obligation in the same manner as any other contract and obtain a judgment lien against the unit if it is not paid. This also makes available to the association various other means of collection, including garnishment. However, for the cash-strapped association, these additional collection steps will require further time and expense. Also, although the judgment lien will secure the judgment, the priority of that lien will likely be subordinate to the existing mortgage or deed of trust encumbering the unit to secure the unit owner’s purchase money financing of the unit.

Lien for Assessments. Under most state condominium statutes, the obligation to pay assessments constitutes a lien against the unit that may be perfected through the recording of a memorandum or notice of lien. Perfection of the lien gives the association the right to foreclose the lien in accordance with state law and the terms of the governing declaration. The power of the association’s lien for assessments, however, varies by state.

www.boston.com/business/personalfinance/articles/2007/10/16/delinquencies_at_condos_can_cost_neighbors/

² Paola Iuspa-Abbott, *As Foreclosures Mount, Condo Associations Battle with Lenders*, DAILY BUSINESS REVIEW, July 23, 2008, available at <http://www.law.com/jsp/article.jsp?id=1202423176300>

Most state condominium statutes are based on the Uniform Condominium Act³ and/or the Uniform Common Interest Ownership Act (the “Acts”).⁴ Under both acts, the lien for assessments is subordinate to the lien of the first mortgage or deed of trust, provided that, the assessment lien has priority over such first mortgages or deeds of trust “to the extent of the common expense assessments based on the periodic budget adopted by the association . . . which would have become due in the absence of acceleration during the 6 months immediately preceding institution of an action to enforce the lien.”⁵ Under the acts, the association’s assessment lien has a “super priority” over the lien of the first mortgage or deed of trust for six months worth of assessments. This “super priority” lien has been adopted in a number of jurisdictions, including Massachusetts, Florida, and the District of Columbia.⁶

In other states, however, the super priority assessment lien has not been adopted. For example, the Virginia Condominium Act provides that the assessment lien is subordinate to “sums unpaid on any first mortgages or deeds of trust recorded prior to the perfection of said lien for assessments and securing institutional lenders.”⁷ Accordingly, the foreclosure of a first deed of trust on a condominium unit in Virginia will extinguish the lien for assessments where the proceeds from the sale are not sufficient to pay off the foreclosed deed of trust. The statutes of Maryland and North Carolina similarly do not provide for super priority.⁸

In Virginia, however, the power of the association’s lien for assessments is even further weakened. Pursuant to Va. Code § 55-79.84, the association, after perfection of the lien, may sell the unit at public auction via a non-judicial foreclosure. The sale is to be made “subject to prior liens.”⁹ The Supreme Court of Virginia in *Board of Directors of the Colchester Towne Condominium Council v. Wachovia Bank, N.A.*, 266 Va. 46, 581 S.E.2d 201 (2003), interpreted “subject to prior liens” to mean that the proceeds of any foreclosure of the assessment lien must be used to satisfy the lien of the first deed of trust before being applied to the assessment lien.¹⁰ As the dissenting opinion noted, this interpretation “is inconsistent with that phrase’s well-understood and long accepted meaning.”¹¹ The long accepted meaning of “subject to prior liens” is that the foreclosure sale will not require application of the assessment lien foreclosure sale proceeds to the prior recorded first deed of trust, which would remain a lien against the condominium unit until entirely paid. Instead, the purchaser at an assessment lien foreclosure sale made “subject to” the lien of the prior deed of trust would purchase the condominium unit with the prior deed of trust in place.

³ UNIF. CONDOMINIUM ACT (1980)

⁴ UNIF. COMMON INTEREST OWNERSHIP ACT (1994)

⁵ UNIF. COMMON INTEREST OWNERSHIP ACT § 3-116 (1994)

⁶ See, e.g., MASS. GEN. LAWS ch. 183A, § 6; FLA. STAT. ch. 718.116; D.C. STAT. § 42-1903.13

⁷ VA. CODE ANN. § 55-79.84(A).

⁸ See, e.g., Md. Code Ann., Real Property § 11-110.; N.C. GEN. STAT. § 47C-3-116

⁹ VA. CODE ANN. § 55-79.84(I)

¹⁰ *Board of Directors of the Colchester Towne Condominium Council v. Wachovia Bank, N.A.*, 266 Va. 46, 52, 581 S.E.2d 201, 204 (2003).

¹¹ *Id.* at 54, 581 S.E.2d at 205 (Lacy, J., dissenting).

The effect of the *Colchester* case is to render the association's lien for assessments in Virginia very weak. The amount of the first deed of trust generally far exceeds the amount of the assessment lien and, as a distressed sale, the proceeds of an assessment lien foreclosure are often not sufficient to satisfy both the first deed of trust and the association's assessment lien. Furthermore, as a result of the *Colchester* case, the association does not have the flexibility to sell the unit subject to the existing deed of trust. Bills to remedy this situation have consistently failed to make any progress in the Virginia General Assembly.¹²

Interestingly, the Nevada Legislature has moved in the opposite direction. Nevada revised its condominium statute to provide that, effective as of Oct. 1, 2009, the association's lien for assessments will have a nine-month super priority status.¹³

In many cases, the failure of a unit owner to make assessment payments is a precursor to missed payments on the mortgage. As lenders institute foreclosure proceedings against defaulting condominium owners, some condominium associations are seeing lenders delay in completing the foreclosure process.¹⁴ In the cur-

rent environment, lenders are often concerned that they will be unable to sell the unit to a third party and the lender will be forced to acquire the unit and maintain it as "real estate owned." Taking title to the unit means assuming the obligation to pay assessments going forward. In Florida, a condominium association took action to attempt to force a mortgage trustee to complete the foreclosure process in a timely manner. The lower court imposed a sanction on the lender, requiring the lender to "diligently proceed with the pending foreclosure action . . . or pay monthly maintenance fees on the condominium unit in foreclosure."¹⁵ The victory for the association, however, was short-lived. On appeal, the court overturned the lower court's ruling, holding that the law in Florida only required a "first mortgagee . . . to pay condominium maintenance fees after it acquires title . . ." ¹⁶ The court noted that the lower court was attempting to do equity, but that "[s]ince equity follows the law, it cannot be utilized to impose this obligation without limitation before title is passed."¹⁷

Where does this leave condominium associations in their struggle to pay the bills? As noted above, associations have a variety of enforcement strategies to pursue. Importantly, the viability of the association's lien for assessments depends on the language of the statute in the state at issue. It is critical that the association and its counsel become familiar with the complexities of the assessment lien statute in a particular state when deciding the most effective course of action for collecting past due assessments.

¹² See most recently, S.B. 411, 2010 Session (Va. 2010) (stricken January 27, 2010).

¹³ NEV. REV. STAT. 116.3116(2)(c). The statute, however, provides an automatic carve out for mortgages purchased by Fannie Mae and Freddie Mac, limiting the super priority to six months, in line with the policies of those entities.

¹⁴ Ruger, Todd, *Lenders' latest foreclosure strategy: waiting*, SARASOTA HERALD TRIBUNE, July 12, 2009, available at: <http://www.heraldtribune.com/apps/pbcs.dll/article?AID=/20090712/ARTICLE/907121067/2055/NEWS&Title=Lenders-latest-foreclosure-strategy-waiting&template=printart>

¹⁵ *U.S. Bank Nat'l Ass'n v. Tadmor*, 23 So.3d 822 (Fl. Dist. Ct. App. 2009).

¹⁶ *Id.* at 823.

¹⁷ *Id.*