BECKER & POLIAKOFF

WWW.BECKER-POLIAKOFF.COM
BP@BECKER-POLIAKOFF.COM

PROPERTY TAXES SUPERIOR TO ASSOCIATION'S CLAIM

Unpaid assessments may be extinguished at deed sale

Fort Myers The News-Press, April 10, 2008

By Joe Adams
jadams@becker-poliakoff.com
TEL (239) 433-7707
FAX (239) 433-5933

Q: Please explain how property taxes impact an association's ability to collect unpaid assessments. We live in a condominium and our building has a unit owner who has failed to pay property taxes for a year. C.M. (via e-mail)

A: The short answer is that property taxes are superior to the association's claim of lien, which means that the association's claim of lien for unpaid assessments may be extinguished at a tax deed sale.

When an individual fails to pay their property taxes, the Clerk of Courts will sell a tax certificate in the amount of taxes owed for any given year. The purchaser of the tax certificate holds the certificate for two years, during which time the amount on the certificate accrues interest, usually at a high rate. After two years, the purchaser of the tax certificate has the right to apply to the Clerk of Courts to set a date for a tax deed sale. A tax deed sale functions similarly to a foreclosure sale in that the tax deed is sold to the highest bidder, who then takes title to the property. The recipient of the tax deed takes title free of all encumbrances including all mortgages and the association's claim of lien. The association's claim of lien is extinguished in the process, thereby preventing the association from foreclosing the claim of lien.

Pursuant to Florida Statutes, a person may redeem a tax certificate at any time after the certificate is issued and before a tax deed sale is held. Obviously, if an owner redeems the tax certificate encumbering his unit then the association can move forward with the normal process of foreclosing the claim of lien. Even if an association's claim of lien is extinguished at a tax deed sale, the association can still seek to file a lawsuit against the delinquent owner for money damages for the delinquent assessments.

If a tax deed sale occurs (which extinguishes the association's claim of lien) and there is equity in the property at the time of the sale, the association may be able to recover some or all of its money from the excess proceeds, depending on how much equity is left in the property, and who "stands in line" ahead of the association, if anyone at all.

It is also worth noting that the Florida Condominium Act provides that all provisions of a declaration relating to a condominium parcel which has been sold for taxes survive and are enforceable after the issuance of a tax deed to the

same extent that they would be enforceable against a voluntary grantee of the title immediately prior to the delivery of the tax deed. There are similar provisions in the Florida Homeowners' Association Act.

Q. In a previous column you stated that in HOA elections general proxies can be used, unless prohibited by the governing documents. Can limited proxies be used unless prohibited by the governing documents? If limited proxies are used, how would the proxy holder be able to vote for nominees from the floor? L.V. (via e-mail)

A. The Florida Homeowners' Association Act provides that elections of directors must be conducted in accordance with the procedures set forth in the governing documents of the association, and that the members have the right, unless otherwise provided by statute or in the governing documents, to vote in person or by proxy. If a homeowners' association's governing documents do not prohibit members to vote in elections by proxy, limited proxies would be allowed.

Absent a prohibition in the governing documents, general proxies in a homeowners' association setting can be used, and would allow the holder of the proxy to use his or her discretion while voting on agenda items, such as elections. A limited proxy can be used where the member designates on the proxy form the way he or she wishes to vote and the proxy holder is simply the person designated to cast that member's vote in the manner predetermined by that member.

For a proxy to be valid it must be dated, must state the date, time, and place of the meeting, and must be signed by the authorized person who executed the proxy. The proxy should also indicate who the proxy holder is. A proxy is only good for the meeting for which it was originally given, or legal adjournment thereof, and automatically expires 90 days after the date of the meeting for which it was originally given. Furthermore, a proxy is revocable at any time at the pleasure of the person who executes it.

Since a limited proxy prevents the proxy holder from utilizing their discretion when voting the proxy, the proxy holder would not be able to change the vote to a candidate nominated from the floor. That vote would be for whomever the member cast his or her vote for on the limited proxy. If the member who submitted the proxy is able to attend the meeting, the member could revoke their previous proxy and vote at the meeting for any of the candidates, including any who nominated themselves from the floor. A definite answer would require reviewing the language within the proxy and the governing documents.

Q: My homeowners' association owns a community clubhouse with a pool and tennis courts. The facilities are getting run down and the new board has announced its main goal is to rehabilitate the facilities. At a recent meeting, the board committed to seek input from the members and proceed only with a widely accepted plan. During the discussion, a board member stated that legally the board has unlimited authority to repair, or even tear down and rebuild, the clubhouse and to assess the members whatever is needed to accomplish this. I find that very hard to believe as I understood that members must approve all capital improvements. Can you clarify the law on this point? R.W. (via e-mail)

A: Your misunderstanding may come from your familiarity with the Condominium Act, which requires that capital improvements that are "material alterations", as that term has been defined in the law, must be approved as required in the declaration or, if not addressed in the declaration, then by 75 percent of the members. However, no such provision exists in the Homeowners' Associations Act. To determine the limitations on a homeowners' association board's authority both as to improvements and to spending and assessment authority, you need to read the governing documents and locate any such limitations. In the absence of express limitations, the board's authority in this regard is essentially unlimited. In my experience, homeowners'

association documents often do not contain "material alteration" limitations, but do limit assessment authority so that the members' control of the funds can effectively limit the boards' authority.

One legal limitation that always exists is that the board has a fiduciary duty to act in the best interest of the association. Therefore, a plan to build facilities that are clearly not appropriate for a given community, or to spend money on a project that is not needed, may violate that duty. Establishing a breach of fiduciary duty is often difficult as there is usually a range of reasonable choices and the board has some discretion within that range. Those are the types of decisions a board is elected to make. Of course, a practical limitation on the boards' authority is the ever-present ability of the members of the association to recall the board.

Finally, the Homeowners' Associations Act does require a board to obtain competitive bids for an improvement project that exceeds 10% of the annual budget, and I expect the cost of your association's project will exceed that amount. While this provision is not in any way a limitation (the board may accept the higher bid), it does allow the members to monitor the board's project and decision-making process.

Mr. Adams concentrates his practice on the law of community association law, primarily representing condominium, co-operative, and homeowners' associations and country clubs. Mr. Adams has represented more than 600 community associations and serves as managing shareholder of the Firm's Naples and Ft. Myers offices.

Send questions to Joe Adams by e-mail to jadams@becker-poliakoff.com This column is not a substitute for consultation with legal counsel. Past editions of this column may be viewed at www.becker-poliakoff.com.