



It's Not Always Easy to Collect Assessments

Many condominium units have a fair market value that is less than the amount owed to the bank

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Q: My condominium association has developed a real problem with owners who are not paying their assessments. This situation is starting to affect our bank account and cash flow. Another problem is that several of the units are being foreclosed upon by their mortgage lender and I understand that a mortgage foreclosure will wipe out the association's claim, except for the past six months of assessments. Therefore, we have been advised by our property manager to move very quickly and beat the mortgage lender to court. We have been told that this is the only sure-fire way to collect all of the funds owing to the association. However, our condominium board continues to allow owners to be thirty days in arrears before sending a letter demanding payment, and even that letter gives an additional thirty days to pay. Shouldn't we be rushing into court to make certain we collect all that is owing to our association?

D.F. (via e-mail)

A: The current real estate market and economy in general is creating new challenges for many condominium associations such as yours. While I do agree that taking prompt, diligent action to collect assessments is most often in the best interest of the association, there are situations now in which racing to obtain a foreclosure judgment before the mortgage lender will not result in any

benefit to the association. In other words, in many situations, there is no absolute, certain method to making sure the association collects all that is due to it.

The main issue is that a first mortgage is a legally superior interest to an association's claim of lien for unpaid assessments. The new, complicating factor is that many condominium units have a fair market value that is less than the amount owed to the bank. Therefore, there is no equity in the unit which in better days was the security that the bank, the association, and the unit owner could rely upon to resolve this situation to the satisfaction of all parties. But where there is no equity in the unit, and the association obtains title through a foreclosure of its lien for unpaid assessments, the association takes title to the unit subject to any first mortgage. If this occurred in the past when units usually had equity, the association would contact the bank, advise the bank of the association's foreclosure, and the bank would quickly and eagerly commence foreclosure proceedings or take a deed in lieu of foreclosure from the association. By taking title to the unit, the first mortgagee then becomes liable for assessments going forward, and possibly up to six months of assessments that have accrued on the unit. However, many banks today are not eager to take title as they too have no viable

method of selling the unit and recovering their funds. Mortgage lenders do not want to take title to units because, in the current environment, that would result in them “throwing good money after bad.”

If an association holds title to a unit that is subject to a mortgage debt that exceeds the value of a unit and the mortgage lender will not take action, there is very little the association can do to resolve the issue. The association might be permitted to rent the unit out and collect rent, but any lease would need to clearly provide that the mortgage company may come in at any moment and take title and possession of the unit.

Still, it is advisable in most instances for a condominium association to take prompt action if it can determine that the unit owner is likely to be able to save the property from the association’s foreclosure action. In addition, not every bank will refuse to take title to the unit after the association commences a foreclosure action, and if the bank does take title at least the association has a paying owner going forward. That result is certainly better than doing nothing and allowing the unit owner to enjoy the services provided by the association, but not pay assessments indefinitely. The association’s alternative of doing nothing could result in no action and no collected assessments for years to come, depending upon the action, or inaction, of a first mortgagee. As you can see, there is certainly no guarantee that winning the race to foreclosure judgment will guarantee a full recovery for the association.

Q: Our condominium association established a committee to review our condominium documents and to recommend changes to the board. In doing so, the committee failed to provide notice and to keep minutes of such meetings. Is this a violation of the “sunshine laws”? **L.T. (via e-mail)**

A: The Florida Condominium Act defines “committee” as a group of board members, unit owners, or a combination thereof, appointed by the board or a member of the board to make recommendations to the board regarding the

proposed annual budget or to take action on behalf of the board. The board may establish other committees by authority granted through the association’s condominium documents or board resolution. A committee’s scope of authority to act depends on the task at hand, and how much authority is granted by the board.

Association committees are generally categorized as either “statutory committees” or “non-statutory committees”. In a condominium association setting, statutory committees are those committees that can take final action on behalf of the board, or make recommendations to the board regarding the association’s budget. The statutory committees in a condominium association are always subject to the so-called “sunshine laws”. The non-statutory committees are also subject to the sunshine laws unless they are specifically exempted from those requirements by the association’s bylaws.

For those readers who are interested in homeowners’ association law, there are some differences. In a homeowners’ association setting, the statutory committees are committees which make final decisions regarding the expenditure of association funds, or committees which are vested with the power to approve or disapprove architectural decisions with respect to parcels in the community. The sunshine laws always apply to statutory committees in a homeowners’ association. A homeowners’ association’s non-statutory committees, however, are not subject to the sunshine laws (although the governing documents should be reviewed to make sure there is no requirement in them to the contrary).

In your case, it does not appear that the committee was empowered to take final action on behalf of the board, nor is that committee’s purpose to make recommendations to the board regarding the association budget, and therefore it is a non-statutory committee. However, unless your association’s bylaws exempt non-statutory committees from the requirements of the sunshine laws, those requirements should have been followed.

As an added twist, there is another type of committee for condominium associations. At election meetings, the Florida Administrative Code requires a committee to verify the signature and unit identification on the outer ballot envelopes, and to handle the ballots and envelopes as further set forth in that Code. Although all of the actions to be performed by this committee can occur at the election meeting, the Florida Administrative Code allows the committee to verify the outer envelope information in advance of the election meeting. If this option is chosen, the committee meeting where this occurs must be noticed in the same manner required for noticing board meetings, and the meeting must be open to all unit owners and must also be held on the date of the election.

Free Courses Offered on Regulating Condos, Coop Associations

There are two free courses on Condominium and Cooperative Associations being held at the Seven Lakes Condominium Association located at 1965 Seven Lakes Boulevard, in Fort Myers. The first course will be held on Thursday, April 17, 2008 from 9:00 a.m. through 1:00 p.m., and deals with the regulation of residential condominium and cooperative associations in Florida. The second course will be held on Thursday, April 24, 2008 from 9:00 a.m. through 12:00 p.m. regarding condominium association operations.

Registration is required because space is limited. To reserve a space, please call Laura Hagan at 727-525-0962 or e-mail: fleducation@caionline.org/florida.

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.