



COMMUNITY MATTERS

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News and Trends in Community Association Law

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Tax Redemption: Capitalizing on Your Lien Rights

by | **Stephen A. Finamore, Esq.**

Some property owners are required to pay community association assessments, but every property owner in the State of Georgia must pay property taxes (and then eventually die).

Even though Georgia's property tax collection process can operate to extinguish an association's lien for assessments, an association may still collect the amounts due by virtue of its lien rights.

Georgia law provides that a city or county may sell a property to recover unpaid taxes, however; those with an interest in the property may restore or "redeem" that interest through the redemption process. If property taxes are not paid, a property can be sold at a public auction to the highest bidder. The highest bidding purchaser at a tax sale will obtain a deed to the property subject to all other encumbrances. During the one (1) year period following the tax sale, any lien holder or other interested party may "redeem" the property by paying the tax sale amount plus an additional percentage to the tax sale purchaser. If a lien holder or other interested party redeems the property, it will acquire a "super lien" in its favor and have priority over all other interests, including the owner and the first mortgagee. However, if the property is not redeemed from tax sale, the purchaser may foreclose the right of any lien holder to do so by sending legal notice to each such lien holder. The tax sale purchaser may then secure clear title to the property.

Assume that a given property is part of a community association with covenants requiring payment of assessments. Assume further that assessments are owed to the association and that taxes are owed to the city or county. After the tax sale, the association may redeem the property from tax sale as a lien holder. In doing so, the association would receive a priority "super lien" enabling foreclosure of all other liens and interests encumbering the property. While this may be a great idea if the redemption amount is relatively small, the reality is that many

properties sell for much more than the amount of taxes actually owed. Although the association may have a claim to these excess funds, a sale amount exceeding a few thousand dollars will often place the possibility of redemption beyond the association's ability to pay.

So why should an association explore the possibility of redeeming property at tax sale? In one word: investors.

While redemption may require funds beyond a typical community association's ability to pay, the amount is often not beyond the means of a savvy and well-funded investor. What the investor will usually lack, however, is the legal interest or lien against the property required to obtain a super lien. Fortunately, an investor can purchase the requisite legal interest from a party possessing it and receive an assignment of the interest in exchange for money. Investors are interested in association liens because there are statutes and well-established Georgia law providing that assessments constitute a valid lien against real property. Investors also know that associations are nonprofit entities that may not be able to afford the significant disbursement of cash necessary to redeem a tax sale. This creates a mutually beneficial circumstance where an investor can acquire the rights needed to perfect a super lien and title to a property, and an association can recover the amounts owed on its lien.

Albert Einstein once said, "The hardest thing in the world to understand is the income tax." But Dr. Einstein probably never studied Georgia property tax law and



the tax sale process. Despite the rather convoluted nature of the tax sale process, an association that is due assessments should explore the possibility of utilizing the tax sale process to collect what is owed. An association should consult with its attorney upon receiving notice of a pending tax sale. ❖

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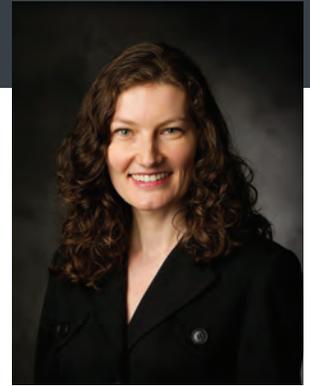
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Hope for the Best and Prepare for the Worst:

A Legal Perspective on How an Association Can Prepare a Good Contract

by | **Elina V. Brim, Esq.**



If there is a way to summarize how to prepare a good contract, “Hope for the best and prepare for the worst” would be a very fitting phrase. Community association boards have to enter into contracts for many services, from management contracts to simple handyman projects.

Understanding how to negotiate a good contract has tremendous financial and legal implications for community associations. The purpose of this article is to provide an overview of the items that need to be addressed to prepare your association for the worst possible scenario.

The simplest things are frequently the most overlooked things. That holds true for contracts. We frequently see contracts where the parties’ names are not correct or where there is no start date, end date, and/or total price for labor and materials. It is important that the parties’ correct legal names are included in the contract. Board members signing on behalf of your association should make sure to sign as representatives of the association. Failure to do so may expose the signing directors and/or officers to personal liability.

One of the most common pitfalls of contracts is a poorly defined scope of work. Although the contractor may explain in detail what the contractor intends to do, that specific description is generally left out of the contract. Therefore, the scope of work should be specifically defined to include all services

that will be rendered (a step-by-step process, if possible); specify the type and brand of materials that will be used; list all items which need to be uninstalled, reinstalled, or removed for disposal; and explain all applicable labor and product warranties.

The Association should also require the contractor to provide the contractor’s license as part of the contract. Additionally, the Association should contractually require its vendors to execute lien waivers, which are documents which release the Association from liability for costs of materials and labor used in performance of the contract.

To avoid liability for the contractor’s negligence, the Association should always ask the contractor to indemnify the Association for damages or claims resulting from the contractor’s or his or her employees’ negligence or willful misconduct. The Association should also require the contractor to provide proof of worker’s compensation insurance and general liability insurance as part of the contract.

Finally, when the vendor is not performing up to the requirements of the contract, the Association should protect itself by including

a termination clause which clearly outlines the Association’s remedies in case of a breach. That termination provision should specify what constitutes breach (such as untimely performance), what the Association can do to terminate the contract without liability, and how the notice of termination is communicated to the breaching vendor.

In dealing with contractors, it is tempting to rely on verbal promises and statements. Unfortunately, when a disagreement arises, verbal statements and promises can be easily disputed. We recommend that you communicate with vendors in writing. Although most contracts do not need to be in writing to be enforceable, it is very important to have a written agreement that clearly defines the terms of the contract between the parties.

This article is an overview of the most essential terms for service contracts; however, by following these recommendations, you are taking active steps to prepare for the worst. When dealing with substantial construction contracts, it is always advisable to have them reviewed by your association’s attorney. ❖



Community Association Case Update:

Georgia Law Does Not Always Require a Board of Directors to Undertake Enforcement

by | **John T. Lueder, Esq.**

Many of us over the years have come across owners who threaten to sue an association because the association’s board of directors has not taken enforcement action against a violation in the community. In one of the cases that our firm

has been defending, a homeowner carried through with that threat and argued, in part, that the association had a duty under Georgia law to enforce the covenants against all violations and that the association should be liable for not enforcing. Specifically, the homeowner argued that if Homeowner “A” has a covenant violation against which the association does not enforce, then Homeowner “B” may sue the association for

continued..

not enforcing against Homeowner "A." As our firm predicted, the Georgia Court of Appeals in the case of *Rymer v. Polo Golf and Country Club Homeowners Association, Inc.* soundly rejected that argument and agreed with our client's

position that a community association's board of directors has the sole discretion under

Georgia law to decide when it will take enforcement action. As a result, should a homeowner believe that an association is not enforcing against another homeowner, a cause of action against the association does not automatically arise under Georgia law.

There are, however, two important takeaways from this decision. First, although Georgia law

does not require an association to enforce, a board deciding not to enforce could open the door to various other defenses, such as selective enforcement. Second, if the covenants themselves require an association to enforce, then the association would be required to follow the covenants. ❖



Condominium Benefits of FHA Approval

by | **Tim Guilmette, Esq.**

From time to time our clients ask us about the Federal Housing Administration (FHA) program approval process for condominiums. Generally, they want to know what benefits come with approval. Usually, these inquiries stem from owners in the community who want to sell their units or from owners who are thinking about applying for a federally-insured reverse mortgage. Unfortunately, many of these owners, who are often in the midst of selling their units or searching for a reverse mortgage, are unable to receive the benefits that accompany FHA approval because their condominium approval has expired or their condominium was never FHA approved. Like most government programs, approval can take some time to achieve, and the U.S. Department of Housing and Urban Development (HUD) has mandated that condominium approvals must be renewed every two years, so condominiums should take a proactive approach to prevent an expiration of their approvals, and the loss of benefits to unit owners.

There are several benefits to obtaining FHA approval. One such benefit is that approval allows prospective buyers to utilize FHA federally-insured mortgages to purchase units within the condominium. This provides a huge incentive for condominiums to obtain approval because it significantly

expands the pool of prospective buyers. FHA loans have become more popular in recent years because they require a lower down payment of 3.5 percent, as opposed to anywhere between 5 to 20 percent with traditional loans. Individuals utilizing an FHA federally-insured mortgage are also required to live in the unit as their primary residence, effectively reducing the amount of investor owned properties in a condominium. Condominiums with fewer investor-owned units often experience higher property values than those with a greater number of investor-owned units.

Another benefit pertains to those owners looking to advantage of the FHA federally-insured Home Equity Conversion Mortgage (HECM) program, the federal government's reverse mortgage program. This program allows qualified owners to withdraw some of the equity in their units, up to the lesser of the appraised value of the home or the HECM FHA mortgage limit of \$625,000. Only owners residing in FHA approved condominiums are eligible for this program, which provides certain benefits that other reverse mortgage programs may not. For instance, private reverse mortgages are backed by the financial strength of the companies providing those loans, whereas HECM loans are backed by the federal government. Some private lenders also place restrictions on how the loan proceeds



can be used, but HECM proceeds can be used for any purpose. Generally, with a HECM reverse mortgage if owners or their heirs want to pay off the loan and keep the home rather than sell it, they would not have to pay more than the appraised value of the home.

It is important to note that not all condominiums are eligible for approval. HUD requires condominiums to meet strict financial and other requirements before it will grant approval. For instance, no greater than 15 percent of units can be delinquent in the payment of assessments, at least 10 percent of the annual budget must go toward funding reserves, and condominiums must have a Fidelity/Crime insurance policy with certain minimum coverage requirements.

Expanding the pool of potential buyers and providing unit owners with the ability to obtain an FHA federally-insured reverse mortgage are just two of the benefits that accompany FHA approval. Condominiums that are interested in obtaining more information regarding the approval process, or the specific requirements for approval, are encouraged to contact their attorneys. ❖



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