

August 2016

Community Associations Newsletter

A Foreclosure Primer

By: Winta Mengisteab, Esquire and Kelly C. Zook, Esquire

If your association is grappling with properties that have remained in a state of “limbo”, whether due to a banking institution that has been unwilling to take action, a chronically delinquent owner who has not paid assessments for years, or otherwise, we encourage boards to revisit their foreclosure options in order to deal with such properties. While the decision for an association to foreclose on a property varies greatly from case to case, we will review some of the basic considerations of the foreclosure processes in Virginia, Maryland, and the District of Columbia.

In Virginia, both the Condominium Act and the Property Owners’ Association Act provide for a non-judicial foreclosure action. The non-judicial foreclosure process is the same for both condominiums and homeowners’ associations. The statutes require associations to send written notice of the intent to foreclose, which must allow the owners of the properties being foreclosed 60-days to resolve the debt secured by valid statutory liens before the association can proceed with the foreclosure sale. The statutes also require associations to advertise the sale date, send another written notice of the sale date to the owner and certain lien holders, and file an accounting of the foreclosure sale with the commissioner’s office of the corresponding

jurisdiction. This non-judicial foreclosure process is relatively quick if all of statutory requirements of each step in the process are met without much resistance from the delinquent owner or their lenders.

In Maryland, assessment lien foreclosures are always judicial actions, and as such, tend to be more time consuming and expensive. The judicial foreclosure process is heavily regulated by court rules and residential foreclosure sale statutes. The process requires: a) several notices of the intent to foreclose at both the pre-filing and post-filing stages, b) compliance with stringent service requirements once the foreclosure petition has been filed, c) mandatory mediation, d) a foreclosure bond, e) detailed advertising requirements both prior to and after the sale, and f) a third party audit once the sale has been ratified. The Maryland Contract Lien Act, provides associations with statutory authority to foreclose on assessment liens. In addition to the demanding administrative process of a judicial foreclosure, recent legislative amendments to the Maryland Contract Lien Act, have limited such foreclosure actions to only those liens that consist of delinquent periodic assessments or special assessments. For example, amendments to the Maryland Contract Lien Act only allow

2 Rees Broome, PC

recovery of any interest, and reasonable costs and attorneys' fees directly related to the filing of the lien, provided they do not exceed the amount of the delinquent assessments.

Maryland, also has an alternative foreclosure action that can be less expensive and less risky for associations – the “sheriff sale”. A “sheriff sale” is formally called a Writ of Execution, and is an action by which a judgment creditor seeks to enforce its judgment by attaching and selling real property that is owned by the judgment debtor. Therefore, it too is a judicial foreclosure action; however, the property is attached and sold by the Sheriff's Office. Once the association has secured a judgment, it, as the judgment creditor, can simply request the Writ of Execution, submit the fees/costs associated with the action to the Sheriff's Office which then coordinates everything else including the notice, advertising, and public auction.

In the District of Columbia, the D.C. Condominium Act creates a power of sale and non-judicial foreclosure process that can be exercised by the president of the board of directors. The D.C. non-judicial foreclosure process requires only one notice to the delinquent owner at least 30 days before the sale date, which must also be recorded in land records, and a short advertising period prior to the sale date. The D.C. non-judicial foreclosure process, in our experience, is generally the fastest, and least expensive of the jurisdictions in the tri-state area.

D.C. condominiums also enjoy a super-priority lien for up to six months of unpaid assessments, which has been held by the D.C. Court of Appeals to extinguish a deed of trust if the banking institution does not take adequate action

to protect its junior lien interests. Because of this case law, many associations are deciding to pursue foreclosure actions more often and earlier in their delinquencies. [We note that while Maryland associations now also have the benefit of a 4-month priority lien over a first trust, it only applies to deeds of trust that were recorded **after** October 1, 2011, and there is no similar case law in Maryland.]

Despite the varying foreclosure options, there are other concerns that each board will have to review thoroughly before determining whether a foreclosure action will be effective in resolving a long-standing assessment delinquency problem. Some examples include:

- The possibility that the sale does not result in a third party bidder, which would mean that the sale does not go through and the association does not collect its debt. In such an instance, if the association's governing documents allow it, the association may elect to purchase the property itself in the hopes of renting or selling the property, or forcing a bank foreclosure.
- The risk that such an aggressive collection action may cause the owner to file for bankruptcy protection.
- The risk that the foreclosure action will prompt the owner to file a lawsuit to halt the foreclosure sale.
- Potential issues with Moderately Priced or Affordable Dwelling Units that are generally subject to resale restrictions.

1900 Gallows Road • Suite 700 • Tysons Corner, Virginia 22182 • (703) 790-1911 • Fax: (703) 848-2530
 7430 Heritage Village Plaza • Suite 202 • Gainesville, Virginia 20155 • (571) 261-1970 • Fax: (571) 261-5873
 7101 Wisconsin Avenue • Suite 1201 • Bethesda, Maryland 20814 • (301) 222-0152 • Fax: (240) 802-2109

3 Rees Broome, PC

If your board is considering or would like to review its foreclosure options, please feel free to contact our office for a legal opinion or formal foreclosure recommendation.