

Winter, 2005

Community Association LawLetter

MARYLAND APPEALS COURT INVALIDATES CONDOMINIUM LIEN FORECLOSURE

A condominium foreclosure sale on an assessment lien was ruled invalid by the Maryland Court of Special Appeals in *Greenbriar Condominium, Phase I v. Brooks*, where a Prince George's County condominium refused to accept the condominium unit owner's good faith tender of payment prior to the sale.

Greenbriar Condominium, Phase I ("Condominium") initiated foreclosure proceedings against a condominium unit for the owner's failure to pay 1995 condominium assessments and homeowners association assessments collected through the Condominium. At the foreclosure sale in May, 1996, the unit was purchased for \$2,500 subject to a deed of trust in the amount of approximately \$16,700. The court auditor determined the assessment debt was \$3,411 at the time of the foreclosure.

The trial court ratified the sale and the owner appealed. After the appeals court reviewed the circumstances of the foreclosure sale, the trial court determined in 1998 that the purchase price was so far below fair market value that it "shocked the conscience of the court", and invalidated the sale.

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TAX FORECLOSURE SALE OF HOMEOWNERS ASSOCIATION COMMON AREA UPHeld BY MARYLAND APPEALS COURT

The Maryland Court of Special Appeals has upheld the tax foreclosure sale of common area intended for use by residents of a Prince George's County homeowners association.

In *Bonds v. Royal Plaza Community Association, Inc.*, a 4.4 acre parcel in the middle of the Royal Plaza subdivision was intended to be conveyed to the Royal Plaza Community Association by the developer of the community, but no conveyance occurred.

When the real estate taxes were not paid, the common area property was sold at tax sale. Following a tax sale, the tax sale purchaser must comply with the statutory procedure of notifying interested parties and obtain court approval to obtain legal title to the property. This includes service of a suit on the record owner of the property. If the property is the common area "owned by or legally dedicated to a homeowners association", notice must be sent to the homeowners association's last reasonably ascertainable address.

The purchaser at the tax sale of the Royal Plaza property sent notice to the

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CONDO LIEN FORECLOSURE

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The Condominium then started a new foreclosure sale. Prior to the sale, the owner tendered payment based on the auditor's report in the prior foreclosure by submitting a cashier's check for \$3,411 in full satisfaction of the assessment lien. The Condominium refused to accept the check and indicated that it would not accept any amount less than \$31,114. This amount included the assessment debt, late fees, accrued interest and attorneys' fees (including attorneys' fees for the first foreclosure sale which was invalidated). Since the owner did not pay the amount demanded by the Condominium, the condominium unit was sold at the second foreclosure sale for \$21,600 subject to a deed of trust in the amount of approximately \$13,100.

The owner contested the sale and in July, 1999 the trial court invalidated the second foreclosure sale based upon its determination that the Condominium improperly refused to accept the owner's tendered payment prior to the sale.

The trial court also ruled that the owner was entitled to an award of reasonable attorneys fees incurred in challenging the foreclosure sale, based on the court's view of the need for a "level playing field" and the "prevailing party" provision of the homeowners association declaration of covenants. The written trial court order inexplicably was not issued for over three years until September, 2002. The Condominium appealed the decision, contending that the second foreclosure was valid and the owner was not entitled to attorneys fees.

On appeal, the Maryland Court of Special Appeals in September, 2004 upheld the trial court's decision and ruled that **the sale was invalid because the Condominium impermissibly denied the owner the right to stop the foreclosure by requiring the owner to pay \$31,114.** The court agreed that the owner properly relied on the auditor's statement from the invalidated first sale that the amount due at the time of the 1996 foreclosure was \$3,411. The appeals court also concluded that the Condominium could not legally assert a right to

attorneys fees and costs from the first foreclosure sale proceeding which was never ratified by the court.

However, the appeals court reversed the trial court award of reasonable attorney's fees to the owner. It determined that the trial court incorrectly ruled that the owner was entitled to attorneys fees based upon principles of fairness to "level the playing field".

"Although the attempted foreclosure sale for unpaid assessments was twice invalidated by the court, the Court of Special Appeals concluded that the owner was not the 'prevailing party' in the foreclosure litigation because it was only during the foreclosure proceedings that the owner cured the default and satisfied the assessment lien".

The appeals court further determined that attorneys fees were not warranted on the basis of the "prevailing party" attorneys fees provision of the homeowner association covenants. Although the attempted foreclosure sale for unpaid assessments was twice invalidated by the court, the Court of Special Appeals concluded that the owner was not the "prevailing party" in the foreclosure litigation because it was only during the foreclosure proceedings that the owner cured the default and satisfied the assessment lien.

Lastly, even if the owner was the prevailing party in the foreclosure litigation, the appeals court ruled that **the owner, who was an attorney, could not recover attorneys fees for representing himself** in challenging the foreclosure action.

TAX FORECLOSURE SALE

(Cont'd from Page 1)

developer in care of its resident agent, but did not send a separate notice to the homeowners association in care of the association's resident agent (who was also the registered resident agent for the developer).

A year and a half after the court approved the conveyance to the tax sale purchaser, the homeowners association sought to set aside the conveyance. The trial court agreed that the conveyance should be set aside because the homeowners association did not receive actual notice of the post-sale suit to obtain legal title.

On appeal, the Court of Special Appeals reversed the trial court decision and ruled that the homeowners association was not required to be a party to the post-sale suit and could not challenge the sale one and a half years after the trial court approved conveyance of the tax sale purchaser.

The appeals court determined that failure to send post-sale notice of the sale may have been constructive fraud, but the time to challenge a sale based on constructive fraud expired after one year.

The appeals court further concluded that the trial court had jurisdiction to enter the tax sale foreclosure order because the **tax sale statute did not require that the homeowners association be made a party to the post-sale suit** since it was not the record owner of the property. Although it was the intended recipient of a deed to the common area, the property had not been conveyed by the developer which remained the legal record owner.

Therefore, the trial court had jurisdiction to approve the conveyance of the common area property to the tax sale purchaser despite failure to give notice to the non-party association.

NEW FEDERAL REGULATION OF COMMUNITY ASSOCIATIONS IS PROPOSED

Two federal proposals to regulate community associations are under consideration. One proposal is federal legislation regarding the display of the United States flag; the other proposal is a federal rule regarding lender collection and escrow of association assessments.

A bill (HR 42) has been introduced in the United States House of Representatives to **invalidate association covenants and rules which restrict or prevent the display of the United States flag**. Introduced by Maryland congressional representative Roscoe Bartlett, the bill is similar to -- but more expansive than -- a Maryland law enacted in 2004.

Unlike the Maryland flag law, the proposed federal legislation does not limit the number of flags which may be displayed and allows association regulation of the time, place, and manner of flag display only where "necessary to protect a substantial interest of the association".

Separately, the United States Department of Housing and Urban Development (HUD) has proposed a rule to require lenders who make loans insured by the Federal Housing Administration (FHA) to **collect and escrow condominium and homeowners association assessments**. The funds collected would then be paid to the association by the lender.

In proposing the assessment escrow rule, HUD stated that it "desires to protect the viability of homeowners and condominium associations by providing a method whereby there would be greater assurance of these associations collecting their fees". If adopted, the rule would apply to FHA-insured loans obtained after the effective date of the rule.

MECHANICS LIEN FOR RENOVATION EXPENSES MAY NOT BE IMPOSED ON ENTIRE CONDOMINIUM BUILDING

A construction contractor may establish a lien for unpaid construction expenses against

the property where the work was performed. Such liens, known as “mechanics liens”, may be imposed only after notice to the property owner and court approval.

When a contractor was not paid for renovation work performed on the common elements and individual condominium units of a Baltimore City condominium, it sought to establish a mechanics lien on the entire building. The trial court and intermediate appeals court agreed that a lien could be imposed against the entire Lexington Towers Condominium building.

In *Southern Management Corporation v. Kevin Willes Construction Company*, the Maryland Court of Appeals - the highest

appellate court -- reversed the lower courts and ruled that a mechanics lien for condominium renovations could not be imposed without notice to each affected unit owner and allocation of the

common element renovation expenses based on each owner’s percentage interest in the condominium common elements.

In a condominium, the allocation of liability among unit owners for construction expenses subject to a mechanics lien is established by the Maryland Condominium Act. A unit **owner is liable only for the proportionate share of expenses** based on the owner percentage interest in the common elements.

The appeals court, therefore, concluded that the owner of 7 of the 8 units in the Condominium could not be made responsible for all of the expense of the common element renovations or for the work done on the individual condominium unit it did not own. Accordingly, it was improper to impose a lien on the entire condominium building.

THOMAS SCHILD LAW GROUP represents condominiums, cooperatives, and homeowners associations in Maryland and Washington, D.C. Since 1985, the firm has advised community associations on all aspects of association operations including covenant enforcement, assessment collections, developer warranties, maintenance and management contracts, and association document interpretation. Thomas Schild Law Group also represents community associations in court litigation and administrative hearings.

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