

Fall 2009

Community Association LawLetter

2010 FINANCIAL FORECAST – MORE FORECLOSURES AHEAD!

With continued economic uncertainty likely to continue in 2010, most associations will face another year with many owners who are behind in paying assessments.

Lender Foreclosures To Increase

After a lull in lender foreclosures in 2008 to mid-2009 due to changes in Maryland foreclosure laws and government efforts to encourage loan modification by lenders, the number of foreclosures in Maryland started rising significantly by summer 2009.

The pace of foreclosures is likely to continue to increase well into 2010 and 2011. The expected rise in lender foreclosures is due to the backlog of deferred foreclosures; home values less than loan balances; job losses; and upcoming interest increases on five-year adjustable rate mortgages obtained in 2005 and 2006.

More Owner Bankruptcies

Some owners will file a Chapter 13 bankruptcy to stop a lender foreclosure. In a

Chapter 13, the owner agrees to pay some or all of the debt over 3 to 5 years.

When a lender forecloses, the association's lien is extinguished. Some owners will avoid personal liability for the unpaid assessments by filing a Chapter 7 bankruptcy after a lender foreclosure. Others simply move out and are unable to be located, making it more difficult and costly to bring a court suit to collect the unpaid assessments.

Collect Assessments after Foreclosure

The purchaser at a foreclosure sale is responsible for payment of assessments from the date of the sale. However, payment is usually not made until the court ratifies the sale several months later.

Where a lender acquires a property through foreclosure and does not pay post-foreclosure assessments, the board should follow the same collection procedures which apply to other owners. After a lender forecloses, the association board of directors should take the following actions to collect assessments due from the foreclosure sale date:

(Cont'd on Page 2)

2010 FINANCIAL FORECAST
(Cont'd from Page 1)

- Contact the foreclosure attorney to obtain the name and address of the lender or other person who purchased the property.
- Notify the purchaser of the amount of future monthly assessments and the procedures for payment.
- File new liens on the property for assessments due since the foreclosure sale date.

The expected rise in lender foreclosures is due to the backlog of deferred foreclosures; home values less than loan balances; job losses; and upcoming interest increases on five-year adjustable rate mortgages obtained in 2005 and 2006.

Assessments also may still be collectible from the prior owner. The board should take the following action to collect assessments due before the foreclosure sale date:

- If the amount due before foreclosure is substantial, determine if the former owner still resides at the foreclosed property or attempt to locate a new address.
- If the amount due is substantial, the former owner is located and no bankruptcy has been filed, file suit to obtain a court judgment -- which can be collected by attaching wages, bank accounts, or other property.
- Consult the association's attorney and accountant as to when and how to write off uncollectible assessments and related charges.

Although associations cannot prevent lender foreclosures, every board should plan now to monitor and respond to the expected increase in lender foreclosures and owner bankruptcies in 2010.

NEW MARYLAND LAWS TAKE EFFECT

Several changes in Maryland laws regarding the governance of community associations are effective October 1, 2009:

Fidelity Insurance. All Maryland condominiums, cooperatives, and homeowner associations must have fidelity insurance to protect the association against fraud or theft of funds by association officers, directors and managers. Theft of funds is typically not covered by directors and officers insurance or general liability insurance.

Closed Board Meetings. Condominium and homeowner association boards of directors no longer may hold closed meetings based on a reason it believes is "so compelling as to override the general public policy in favor of public meetings". That catch-all provision is eliminated from the Maryland Condominium Act and Maryland Homeowners Association Act. However, those laws were amended to include new provisions to specifically allow meetings to be closed for discussion of all legal matters and individual owner assessment accounts.

Books and Records. Association meeting minutes and financial statements prepared within the past 3 years must be provided to a homeowner within 21 days of an owner's written request. These records must be provided by mail, electronic transmission, or personal delivery. As in the past, other records must be available for inspection and copying during normal business hours on reasonable notice.

(Cont'd on Page 3)

NEW MARYLAND LAWS
(Cont'd from Page 2)

Developer to Homeowner Control.

Developers must comply with new procedures for transition of control of a condominium or homeowner association. This includes a meeting for the election of the board of directors and providing the financial records, contracts, owner records and other documents to the owner-controlled board.



Condominium Insurance. Changes in the Condominium Act regarding payment of the insurance deductible were effective June 1, 2009. A unit owner is now responsible for payment of up to \$5,000.00 of the insurance deductible under the condominium master insurance policy when the cause of the damage originates in the owner's unit.

A condominium board of directors must provide notice annually to all owners regarding an owner's responsibility for the property insurance deductible up to \$5,000.00 and the amount of the deductible. A similar notice must be included in resale certificates issued by the condominium.

To obtain copies of these new laws, visit the Law and Legislation Section of the Thomas Schild Law Group, LLC website at www.schildlaw.com.

**MARYLAND COURT BARS
HOMEOWNER'S ABUSIVE
EMAIL AND DISRUPTIVE CONDUCT**

A homeowner who repeatedly sends abusive, harassing and vulgar emails and letters, and disrupts meetings of the homeowners association, may be prohibited from sending such communications and engaging in disruptive conduct, according to a recent ruling of the Maryland Court of Special Appeals.

First Amendment Claim Rejected

In *Davidson v. Seneca Crossing Section II Homeowners Association, Inc.*, the Maryland appeals court rejected a homeowner's contention that a trial court injunction interfered with a claimed constitutional right to communicate with the homeowners association manager and board members.

The court concluded that the abusive and threatening language by the homeowner were "fighting words" which tend to incite a breach of peace or invoke a physical or violent response. Applying the "fighting words" doctrine, long recognized by the United States Supreme Court as speech not protected by the First Amendment, the Maryland appeals court ruled that an injunction was appropriate to prohibit a homeowner from engaging in abusive and threatening communications regarding association matters. The injunction did not bar all communication by the homeowner or prohibit attendance at association meetings, so long as the homeowner was not abusive or threatening.

The court's ruling leaves unclear the extent to which the United States Constitution First Amendment right of free speech applies in the context of homeowner associations.

(Cont'd on Page 4)

**MARYLAND COURT BARS
ABUSIVE EMAIL
(Cont'd from Page 3)**

The decision repeatedly refers to the homeowner's "free speech rights". Implicit in the court's analysis is that, if the words are not "fighting words" which are afforded no constitutional protection, then the First Amendment would apply to the homeowner's communications.

Implicit in the court's analysis is that, if the words are not "fighting words" which are afforded no constitutional protection, then the First Amendment would apply to the homeowner's communications.

However, the appeals court specifically stated that the association is not a public entity and its board members are not

public officials and, therefore, are not subject to the constitutional limitations placed on public entities and public officials.

Derogatory Statements Allowed

The Court of Special Appeals also ruled that derogatory statements made by residents at a meeting of homeowners and recorded in the meeting minutes did not support a legal claim of defamation.

Several residents expressed concern that a homeowner nominated to serve on the board had "physically assaulted someone" and "threatened residents and other Board members". The court concluded that such statements were subject to a "qualified privilege" because there was a valid societal interest in candid communication about who should serve on the board and the statements were not made with malice.

THOMAS SCHILD LAW GROUP, LLC represents condominiums, cooperatives, and homeowner associations in Maryland and Washington, D.C. The firm advises 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.

*** Copyright 2009 Thomas Schild Law Group, LLC***

The Thomas Schild Law Group Community Association LawLetter includes general legal information and should not be relied on with respect to any specific facts and circumstances. Readers are encouraged to consult an attorney as to the current law applicable to particular situations.