

JUNE 2011

Community Associations Newsletter

2011 Maryland Legislative Update

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The Maryland General Assembly passed a number of bills that affect community associations and we have summarized the pertinent bills below.

Limited Lien Priority

The truly big story that came out of this year’s session is the lien priority for community associations. After many unsuccessful attempts over the past years, a law was finally enacted granting “lien priority” to homeowner and condominium liens. Unfortunately, while welcome, this highly anticipated law does not quite live up to its promise.

House Bill 1246 / Senate Bill 946 – Until now, when a first trust lender foreclosed against an owner, the foreclosure would (unless the sales price at auction was more than enough to satisfy the first trust lien, which was rare) almost always wipe out an association’s lien position. Lien priority is an effort to see that an association’s lien is protected in the event of a lender foreclosure, given that it is the association common assessments secured by such liens that go to pay for the upkeep, insurance and administration of the association property and which benefit the foreclosed property.

Unfortunately, as a result of negotiations with powerful lobbying groups that had opposed (and helped defeat) prior efforts to pass lien priority bills, the bill was diluted from the version that was introduced. First and foremost, the super priority over a first mortgage or first deed of trust provided by this statute was greatly curtailed. The priority is limited to the lesser of: four (4) months of unpaid regular assessments for common expenses or a maximum of \$1,200.00 in assessments. “Assessments” (for purposes of this priority law) will not include any associated late fees, interest, legal fees, or costs for filing the lien. The statute further excludes from the term “assessments” any fines, special assessments, or any other costs or sums due under a declaration, bylaws, or as provided under any contract, law, or court order.

The new law also provides the holder of a first mortgage or first deed of trust with the ability to pose an administrative challenge to the super priority assertion by making a request that an association provide written information about the portion of any lien that has priority under the statute, including information that is sufficient to allow the holder “to determine the basis for the portion of the lien” that has priority. Should an association fail to provide the requested information to the holder “within 30 days after the filing of the statement of lien,” the association automatically forfeits its super priority under the statute. Practically speaking, it is likely that most association liens will have already been recorded for more than 30 days before a first mortgage or first deed of trust holder has the opportunity to request written information regarding the priority portion of the lien. The statute seems to allow an association to preemptively fulfill this obligation by including language on the recorded statement of lien that provides the basis for the priority portion of the lien.

Another critical limitation to the new Maryland lien priority is the limited applicability of an asserted assessment priority. This priority only applies in the case of a lender-initiated foreclosure. An association that initiates its own lien foreclosure action cannot claim any lien priority against the prior Deed of Trust holder in that action.

Lastly, although the law will be effective on October 1, 2011, it will only apply to mortgages or deeds of trust that are recorded on or after this effective date. This means that associations will not benefit from this priority in our current lender-initiated foreclosure market. Because of these limits and restrictions, the law does not appear to be the solution sought to the loss of assessments when a lender initiates a current foreclosure, nor is it expected to have the huge impact hoped for, but it does represent progress (“a journey of a thousand miles starts with a single step...”) and perhaps some hope for more favorable changes in the near future.

AMENDMENTS THAT IMPACT THE OPERATIONS OF CONDOMINIUM OR HOMEOWNER ASSOCIATIONS

Condominium Owners Can Be Required to Maintain Insurance

House Bill 679 modifies Sections 11-104 and 11-114.2 of the Maryland Condominium Act to facilitate requiring owners to maintain condominium insurance. The changes authorize a condominium association to amend its bylaws by the affirmative vote of unit owners having at least 51% (even if a higher amendment approval percentage is set forth in the bylaws) of the votes in the council of unit owners when the purpose of the amendment is to require all unit owners to maintain condominium unit owner insurance policies for their units. As many know, the failure of owners to obtain individual insurance can sometimes leave the association’s master policy as the only source of insurance funds to deal with casualty losses (hurting both the association as a whole and owners who neglect such coverage). In addition, if your bylaws require each unit owner to maintain unit owner’s insurance, the Act will now require that each unit owner provide evidence of the insurance coverage on an annual basis. The law is effective October 1, 2011.

Election Challenges through the Division of Consumer Protection of the Office of the Attorney General

Senate Bill 532 amended the Maryland Homeowners Association Act to allow a lot owner who believes that the governing body failed to comply with the election procedures under the association's governing documents to submit his/her dispute to the Division of Consumer Protection of the Office of the Attorney General. Disputes must concern: (1) the notice about the date, time, and place of the election; (2) the manner in which a call for nominations for the board was made; (3) the format of the election ballot; (4) the format, provision, and use of proxies during the election process; or (5) the manner in which a quorum is determined for election purposes. These new rights will be effective as of October 1, 2011.

OTHER BILLS

Real Property - Recession of Sales Contract- Return of Deposits

House Bill 1109 added a clarification to the buyer's rights to rescind a sales contract after receiving disclosure documents, and when the real estate broker is required to refund the sales deposit.

General Mortgage Foreclosure Bills

Indicative of the ongoing issues with foreclosures, the Maryland General Assembly enacted several laws affecting foreclosure actions (including lien foreclosures initiated by community associations). Most foreclosure related bills become effective July 1, 2011 (as opposed to the typical October 1st effective date of most legislation).

House Bill 366 / Senate Bill 205 requires that a complaint to foreclose under § 7-105.1 must include an affidavit stating that at the time the notice of intent to foreclose was sent, the contents of the notice were accurate. Because of the many issues with "robo-signers" in the mortgage foreclosure news recently, this law will become effective July 1, 2011.

The Real Property Act was further amended to prohibit a court, in an action to foreclose a mortgage or deed of trust on residential property, from accepting a lost note affidavit in lieu of a copy of the debt instrument unless the affidavit: (1) identifies the secured party; (2) provides the basis for the secured party's right to enforce the debt instrument; (3) states why a copy of the debt instrument cannot be produced; and (4) describes the good faith efforts made to produce a copy of the debt instrument. This law is also effective July 1, 2011.

Other technical amendments to the Real Property Act require such things as a requirement that owners be provided with written notice of: the mortgage holder's determination that the property is not owner-occupied; a telephone number to call and contest that

determination; what documents are required to be served on the mortgagor or grantor in a foreclosure action; changes to the time period within which a mortgagor or grantor may file a request for foreclosure mediation; a prohibition on a foreclosure sale purchaser exercising any right to collect rent payments from a bona fide tenant in possession of a residential property unless the purchaser conducts a reasonable inquiry into the occupancy status of the residential property.

Finally, the Real Property Act was also amended to clarify the authority and powers of the Commissioner of Financial Regulation to enforce the provisions of the Protection of Homeowners in Foreclosure Act and the Maryland Mortgage Fraud Protection Act. Note that this law was enacted as an emergency measure and took effect on the date that it was signed into law, which was April 12, 2011.

If you have any questions regarding any of these new laws, please do not hesitate to contact our office. We will continue to provide updates as developments arise.