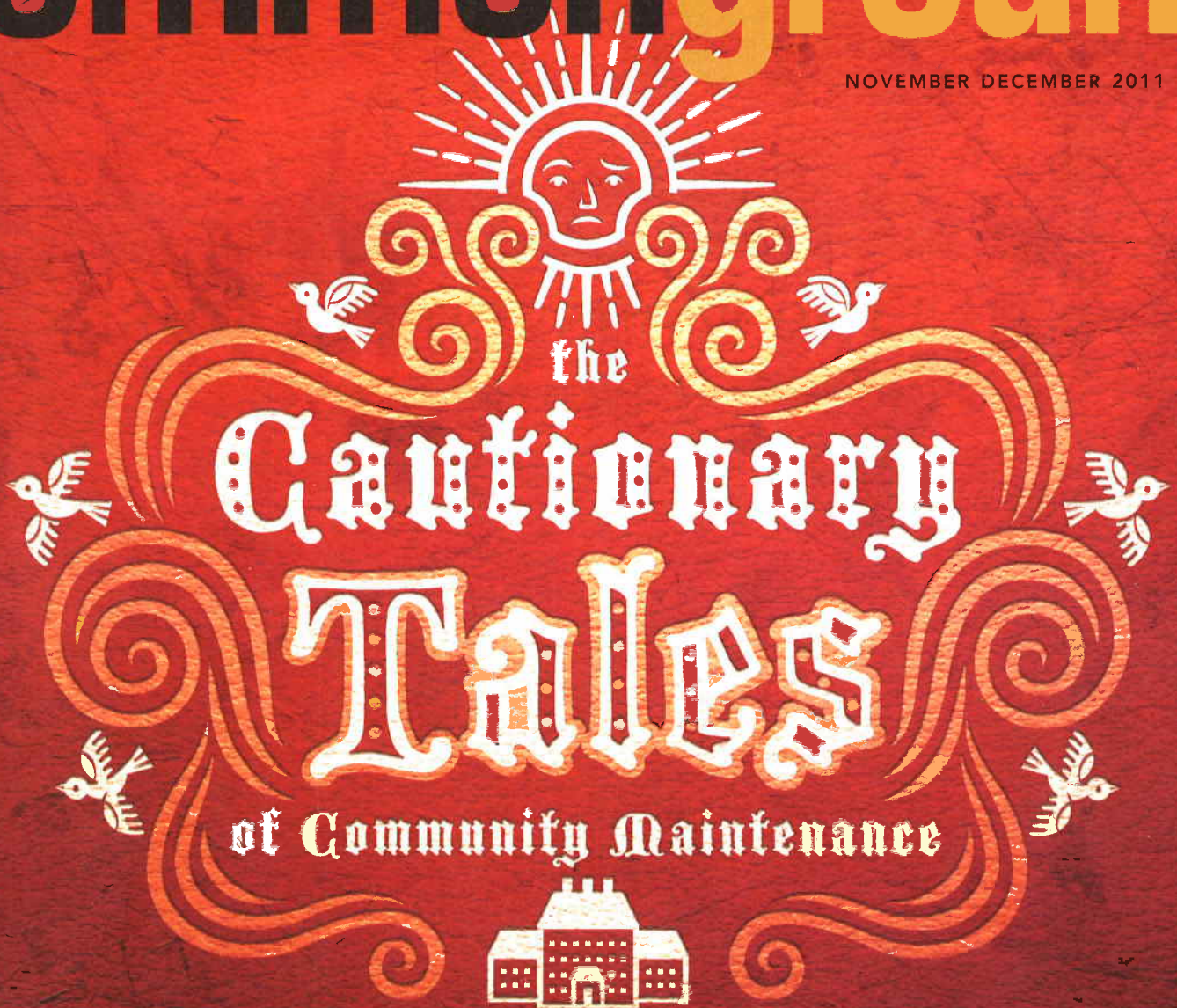


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J&R 11

» jim slaughter, ESQ.
beth a. grimm, ESQ.
ursula burgess, ESQ.

Master Roads

Our master association charges each owner \$10 a month to use its roads. The subassociation rules state that we are responsible for master association assessments, but many of us don't even use those roads. What does North Carolina law say about the roles of master associations? — *Southport, N.C.*

A To charge an owner in North Carolina any amount, a master association or subassociation must have such authority in the governing documents. They must state what amounts can be charged and for what purpose.

The North Carolina Planned Community Act gives little guidance on master associations. The relevant provisions don't apply unless the association was created on or after Jan. 1, 1999. As a result, whether your association can legally demand such money is likely based on the documents' wording. The declaration, after all, is a contract among all association members.

If the declaration permits such charges, it doesn't matter whether an owner uses the roads. Association members generally can't avoid assessments by not using the pool or other common elements. Legitimate defenses to such charges might be that the documents don't authorize such assessments, that the documents aren't binding on a specific property, that the charges were not properly approved or that the board was not authorized to enact the charges.

Although it's too late for your situation, the North Carolina General Assembly enacted greater association disclosure laws in 2011 that require owners to disclose all assessments and services paid for by such assessments to potential purchasers.

Your options for resolving the dis-

pute depend on when your association was created. If it was formed before 1999, you may only have such authority over the master association as given in the declaration. If it is newer, you may have additional statutory remedies. The Planned Community Act has provisions for homeowners to ratify budgets, to elect members of the executive board and to remove members of the executive board with or without cause, which would apply to the master association as well.

Issues involving assessments and master associations are very fact specific. Small wording changes in documents or when the association was created can drastically change the situation.

» Jim Slaughter is a member of the College of Community Association Lawyers (CCAL) and partner in the North Carolina law firm of Forman Rossabi Black, PA.

Exclusive Yard

Q Our condominium has an exclusive use, adjoining backyard. The real estate agent suggested we could use the space as our own. We placed some patio furnishings there, but the association asked us to remove all of the decorations and anything in view of our fellow condominium owners. What rights do we have in our exclusive use area? — *Carlsbad, Calif.*

A The best advice that I can give you and any other potential purchaser is do not get advice about what you can do with your property in a common-interest development from a real estate agent. They're generally capable of handling their part of the transaction, but are not usually well versed with CC&Rs. Exclusive use

areas are so confusing anyway.

Property with this characterization is part of the common area property owned in shares by owners. However, sometimes it is owned by the association, which might be the case where separate lots consist of only a footprint.

Unless the governing documents say otherwise, the association has control over what can be done in exclusive use areas even though unit owners have exclusive rights. Use is not controlled by what the real estate agent says or even what neighbors are doing; it is regulated by the governing documents and any rules adopted by the board. Don't be fooled if you see something going on in such areas that you would like to do; it may only be a matter of time or resources that has kept a board from acting on a neighbor's violation.

Consult the documents and look for what authority is granted to the board. It is usually pretty broad. The board may be able to regulate use, conduct and construction on a separate-interest lot.

» Beth A. Grimm is a CCAL member and founder of Beth A. Grimm, PLC, in Pleasant Hill, Calif.

Foreclosure Case

Q Can you provide an update on the *Watergate at Landmark v. Story* case? Why was it withdrawn by the appellant? What does this mean for nonjudicial foreclosures? — *Warrenton, Va.*

A On June 7, 2011, Watergate at Landmark Condominium Unit Owners Association withdrew its appeal to the Supreme Court of Virginia because the parties reached a settlement. Once the appeal was withdrawn, the

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order entered in the City of Alexandria Circuit Court in 2010 became the final order in the case.

The case began when Watergate filed a judicial foreclosure action on a condominium assessment lien, sold the unit at auction and filed a motion for the court to approve the sale. That motion indicated that the proceeds from the sale would be used to pay taxes and the special commissioner's fees; the remaining funds would be applied to the balance due on the first trust. Watergate further requested that the remaining balance due under the first trust be extinguished. Watergate argued that the court had the right under principals of equity to order this disbursement and wipe out the remaining balance. The judge disagreed.

Virginia Code Section 55-79.84(A) (iii) states that first mortgage deeds of trust recorded prior to the perfection of a condominium assessment lien have

priority over the condominium lien. In *Board of Directors of Colchester Towne Condominium Council of Co-Owners v. Wachovia Bank*, the Supreme Court of Virginia ruled that in a nonjudicial foreclosure conducted pursuant to Virginia Code Section 55-79.84, if the sale resulted in proceeds less than the balance due on the first trust, then the purchaser of the unit at the auction took ownership of the unit "subject to" the remaining balance due on the first deed of trust.

This meant that the purchaser would have to pay the outstanding balance due to the first trust or possibly be subject to a foreclosure action by the lender. The judge in the Watergate case cited that opinion in the ruling and relied on the clear language in the statute regarding priority of first mortgage deeds of trust. As such, the judge denied the motion to approve the sale of the unit and held that because the sale resulted in proceeds less than the balance due on the


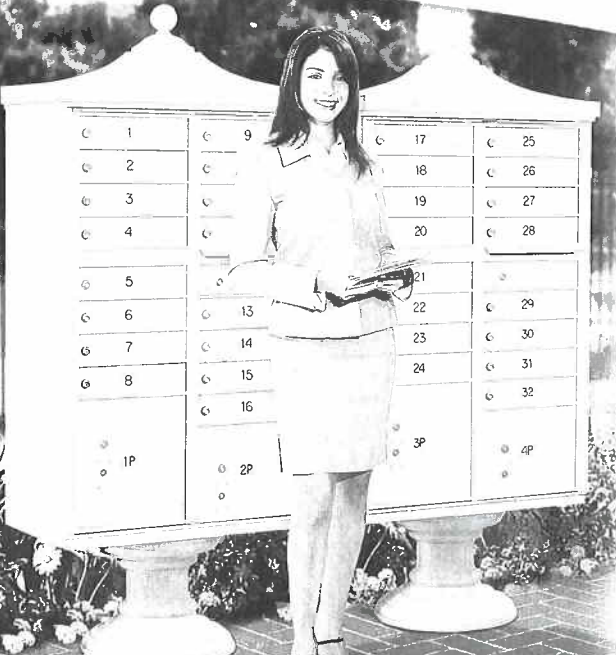
first trust, then the purchaser of the unit would have to take the unit "subject to" the remaining balance due on the first deed of trust. The purchaser was allowed to walk away from the sale as a result.

The judge's opinion makes it clear that in any condominium lien foreclosure action—judicial or nonjudicial—if the auction does not net proceeds adequate to pay the balance due on the first trust, the purchaser is responsible for the remaining balance. This opinion from the City of Alexandria Circuit Court is not binding in other Virginia courts, but it will be used in other jurisdictions if the issue arises.

» Ursula Burgess is an associate at Rees Broome, PC, in Bethesda, Md.

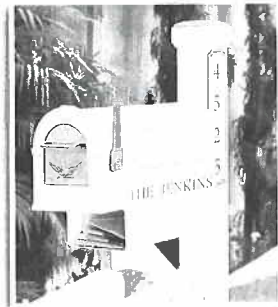

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