

# October 2004

## Notice to Virginia Community Associations Execution of Liens/Voting to Implement Collection Decisions

By: Peter S. Philbin, Esquire

A recent Fairfax County Circuit Court decision involving the enforcement of condominium liens by non-judicial foreclosure has compelled a closer examination of some of the practices Virginia community associations may employ when collecting debts.

The case, Wilburn v. PWL Condominium, was decided in September 2004. The Wilburns challenged a non-judicial foreclosure of their condominium unit by their association on a number of grounds. Ultimately, the Court invalidated the sale on four (4) central grounds: 1) failure to provide the debtor with the "time" of the foreclosure sale; 2) lack of evidence that the Board voted to accelerate the owner's account per the association's collection policy; 3) lack of evidence that Board reconvened (after deliberating in executive session) in open session to vote on the foreclosure; 4) inappropriate delegation of lien signing authority to the association's legal counsel.

As to the first deficiency, failure to provide debtor with notice of the "time" of the sale, the Court, unfortunately, completely erred in reaching this decision. The Court overlooked evidence submitted from both the debtors and the association that clearly showed that the association properly noticed the debtor with the date, place and time of the sale. The association included a copy of the actual newspaper advertisement with the debtor's notice and the inclusion of the advertisement was expressly referenced in the foreclosure sale notice issued to the debtors.

As to the second deficiency, the debtors argued that the collection policy of the association mandated individual, case-by-case decisions by the Board to accelerate the account of a specific delinquent owner. This was, in large part, due to the use of the words "may accelerate" in the list of available collection actions. Despite testimony from the Board President that the Board had, indeed, voted to accelerate and

evidence that the Board clearly had ratified the acceleration decision by its subsequent votes concerning the ongoing foreclosure, the Court found the “acceleration” to be inappropriately documented.

As to the third deficiency, the Court found that the Board decision to foreclose (deliberated upon in executive session) was not properly reflected in the “open” Board meeting minutes as mandated by §55-79.75 of the Condominium Act. The Board could not produce proof that this particular decision was reflected in the “open” meeting minutes although it was standard practice. The Court took special notice of the fact that other foreclosure decisions made in other executive sessions had been noted in the open minutes. The Board again asked the Court to take notice and give effect/weight to the obvious ratification of the decision by subsequent actions and decisions of the Board, but the Court was not persuaded.

As to the final deficiency, the Court concluded that the delegation of the lien signing power to an “assistant secretary”, in this case the association’s legal counsel, was not proper under the association’s governing documents and Condominium Act. Although the Association had the express power to appoint assistant officers and to prescribe their duties, the Court found that the Condominium Act demanded express authority for lien signing be included in the Declaration or Bylaws of the Association.

While the foregoing case has limited reach as binding precedent (especially outside of Fairfax County), we believe that some of the decisions set forth therein are instructive and we are taking some action for our clients.

First, we are reviewing our client’s collection policies to help ensure that the language could not be construed to require some action by the Board to accelerate or otherwise take certain routine actions regarding collections. Where we find such language we will be contacting our clients with recommendations for revisions (e.g., making acceleration, interest, suspensions of rights automatic upon referral of the account for legal action).

Second, as to lien execution, we have a number of clients that have policies appointing our firm and others as assistant officers for the purpose of signing and releasing liens. The clients have enjoyed the convenience, speed and cost savings associated with such policies. Over the years, resolutions delegating lien-signing authority have been scrutinized by various judges without reservation.

However, given the well-publicized nature of the decision outlined above and the effect that an invalid lien could have on a foreclosure action by an association, we believe that it is better to be conservative and assume that the next judge may be as restrictive.

In some cases, the Association’s governing documents expressly provide

for the delegation of such lien execution rights so no change in approach will be taken. In other cases, where the authority is not as clear, we will (and have begun already) forwarding liens to the "principal" officer of the Association while recommending that the clients consider amendments to their covenants to expressly enable the delegation lien signing powers.

The statutory requirement that the principal officer sign liens is really unfortunate. Often, the principal officer has little or no first hand knowledge of the amount of the debt and simply trusts

that management and counsel have accurately represented the sums due. Given the requirement that liens be notarized, an additional duty and burden is placed on the President or other volunteer to ensure that the lien is signed before a notary public. In some cases, the principal officer's schedule may prevent timely execution of the liens resulting in delay and the additional expense of the preparation of a new lien.

As always, if you have any questions regarding these issues, please contact me or any one of our community association attorneys.

S:\Assoc. Monthly Memos\2004\October 2004 - Execution of Liens.doc