KMK KASS, MITEK & KASS, PLLC

Newsletter

A newsletter on general legal matters

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AIRBNB AND CONDOMINIUMS

By: Benny L. Kass, Esq.

The Pope was here in September. Millions of people came to see and hear him. Where did they stay? Back in 2009, in anticipation of the large crowds wanting to be part of history for Barack Obama's inauguration, the District government relaxed all residential requirements so homeowners could do a daily or weekly rental. Today, there is a new game in town called Airbnb. According to its website, "Airbnb began in 2008 when two designers who had space to share hosted three travelers looking for a place to stay. Now, millions of hosts and travelers choose to create a free Airbnb account so they can list their space and book unique accommodations anywhere in the world." The hotel industry has already complained that they lost lots of revenue during the Pope's stay due to Airbnbs.

Currently, there are over 1000 possible rentals in the Washington metropolitan area. They range from a private room, a shared room, or even the entire apartment or house.

But if you own a condominium apartment, you will most likely be in violation of the association legal documents. The bylaws of condominiums typically contain restrictions on leasing units. In some associations, the bylaws prohibit any leasing whatsoever. However, the majority of associations

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TENANT OPPORTUNITY TO PURCHASE ACT

By: Brian L. Kass, Esq.

Established as part of the District of Columbia's Rental Housing Conversion and Sale Act of 1980, the District's Tenant Opportunity to Purchase Act (TOPA) continues to cause confusion and headaches for many property owners and agents of residential property in D.C.

Although created in an effort to preserve affordable housing and avoid displacement of tenants in D.C., many question whether those goals are still being met or whether the Act is creating unnecessary and expensive litigation as well as significant hurdles in the path of home sales.

TOPA notices are divided into three categories: single family homes (including condo and coop units); properties containing 2-4 units; and properties containing 5 or more units. All notices must be in the form established by the District's Department of Housing and Community Development form, which are

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do allow leasing, but with either a six month or one year minimum term.

Kyle Piers, a unit owner in Boston, learned his lesson the hard way. He was renting his one bedroom condo unit for $200-300 per night, but his neighbors in the 31 unit complex were not pleased. The heavy traffic of daily visitors was a concern to the board of directors, and Mr. Piers was hit with a $9,700 fine for violation of the association's leasing restrictions.

Housing advocates are complaining that landlords are depleting the housing stock because the short term rentals are more lucrative than long term leases. San Francisco recently enacted legislation which legalized such rentals, on the condition that the host must be a full time resident, and they cannot rent for more than 90 days a year. Any such renter must register with the city.

In addition to being subject to fines, a short term rental can trigger FHA sanctions. Stephen Marcus, a Massachusetts attorney whose law firm represents thousands of community associations in New England, asked FHA for comment. According to Marcus, "A condo currently on the FHA approved site could conceivably find their approval in jeopardy. HUD is clear. Any short term rental, even one out of 100, could cause a problem with project eligibility and approval status."

But Marcus conceded that FHA would probably not take such drastic action if the short term rentals were limited to just the pope's visit.

What should association boards do? On the one hand, the board – and it's manager – might want to take the position that we just do not want short term rentals, period. That is the decision of the board, and the courts will most likely support the board. The "business judgment rule" is in effect throughout the metropolitan area. Oversimplified, the courts take the position that unless the board is doing something seriously wrong, it will not second guess the board's decision.

The board could also have decided to temporarily waive the leasing restriction for a one or two day visit by the Pope. It would be prudent, however, to run that decision by the owners. Many owners just do not like strangers roaming all over the building, day and night. And as is occurring in San Francisco, owners may not want a precedent to be set. Will the board take the same action for the next inauguration? What about when the Nationals go to the World Series in the distant future?

These are difficult and complex decisions facing boards of directors. It not only involves losing FHA status, but relates also to the peace and quiet enjoyment of your home.

"Courts," added Marcus, "have upheld the desire for predominately owner-occupied condominium units. Airbnb has upset this goal by creating a hotel-type use with real issues including constant move in and move out, transient and security issues. Renters, many believe, tend not to take care of a property as well as owners residing in that property."

If you do decide to use this service, here are a few suggestions. First, contact your insurance company to make sure you are fully covered. Next, you should personally contact your potential guests. If you have any hesitation, don't rent to them. You have the right to take a security deposit to protect you from any damage created by your guests. And finally, while this may be obvious, put all of your valuables in safekeeping, preferably away from the premises.

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available on their website in both English and Spanish. Further, all notices must be sent by certified mail to the tenant(s) and either hand-delivered or sent by certified mail, *on the same day*, to the District of Columbia.

For single family homes and condo or coop units, there are two different TOPA notices depending on whether the owner has already ratified a contract with a third-party purchaser. Under both, the tenant has 30 days following receipt of the TOPA notice to express an interest, in writing, to both the owner and the District. If such notice of interest is timely delivered, the owner must afford the tenant a minimum of 60 days to negotiate and ratify a contract. This time frame may be extended if the owner fails to provide the tenant with certain requested information regarding the property.

In addition to the negotiation period, the tenant has a separate 15-day right of first refusal to match any third-party contract. If there is a ratified contract at the time the TOPA notice is issued, the 15-day right of first refusal is tacked onto the end of the 60-day negotiation period. If the TOPA notice is sent before the owner ratifies a contract with a third party, the owner must send a follow-up notice to the tenant if and when a third-party contract is ratified, thus triggering the tenant's 15-day right of first refusal.

If the owner and tenant agree to terms and ratify a contract, the tenant has a minimum of 60 days to go to settlement, subject to extension if the tenant's lender requires additional time.

If the owner does not sell or contract to sell the property within 180 days of the initial TOPA notice, or if a new contract is entered into at a price that is less than 90% of the price stated in the TOPA notice, the owner must start the process over from the beginning.

For properties containing 2-4 rental units, the process is similar; however, the time frames are longer, and the tenants are offered an opportunity to respond collectively before they may do so individually.

For properties containing 5 or more units, the tenants must respond with interest through a properly established tenant organization. Often, the rights of the tenant organization are assigned to a developer.

As noted above, the tenants – individually or as an organization, when applicable – have the absolute right to assign their rights to anyone they choose for any consideration they see fit. Assuming all deadlines are met, the owner must then negotiate in good faith with the party to whom the rights are assigned.

Regardless of any language in the lease, the tenant's right to receive a TOPA notice may not be waived. However, once the notice is properly served, the tenant may waive his or her right to exercise any rights afforded by the Act, thus allowing the owner to proceed to settlement more quickly.

As for settlement, all reputable title insurance underwriters will require not only evidence that the Act has been fully complied with, but also affidavits from Tenant(s) certifying his or her receipt of the applicable TOPA notice and that he/she has elected not to exercise or assign those rights. As one can imagine, obtaining the affidavit from a tenant is often a tricky, if not impossible, task; however, title underwriters have faced so many costly TOPA-related claims over the years that they are often unwilling to relax this requirement.

It should be noted that, in addition to the obligation of negotiating in good faith, the owner may not require the tenant(s) or their assignee(s) to place a (fully refundable) deposit greater than

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5% of the purchase price or to prove their financial ability to go to settlement.

Finally, it is important to note that there are several transfers of title that do not trigger TOPA rights, such as inter-vivos transfers between spouses, parents and children, siblings, grandparents and grandchildren and domestic partners, as well as certain transfers of legal title into a revocable trust.

As you can see, navigating through TOPA can be rather tricky and full of opportunities to go off track. Failure to properly follow the Act can land everyone in an expensive legal battle and tie up the property for years. As a seller, it is important that you and your agent understand the process from start to finish. The attorneys at Kass, Mitek & Kass, PLLC are well-versed and able to assist.

UNDERSTANDING PARKING OWNERSHIP A MISSION: POSSIBLE

By: Mark M. Mitek, Esq.

You are about to buy your first home, and the real estate broker, named Flannery, informs you that the three homes that she is going to show you today, all include parking spaces with the home. We all know, parking in the DC Metropolitan area is very important. Thus, the key is to be able to know for sure whether you are going to own (or have the exclusive right to use) a parking space.

To determine parking rights, you need to know whether your new home is part of a Condominium, a Cooperative or a homeowners association.

CONDOMINIUM PARKING SPACES

At the first community association you visit, you are told by your agent that it is a condominium. However, the homes are actually townhouses. She says: don't let what you see fool you. One usually thinks of a condominium as being one building with condominium units in it. But that is not always the case.

Your agent explains that there can be three kinds of parking spaces in connection with condominiums. A Condominium (the building and land) consists of the "units", any "limited common elements" and "general common elements." Thus, a parking space is either a parking space unit, a limited common element or a general common element parking space. In order to determine what they are, you need to review the condominium declaration and the condominium plat and plans.

HOW TO DETERMINE OWNERSHIP

1. PARKING SPACE UNITS

The declaration of a condominium association defines "units," "limited common elements," and "general common elements." The specific definitions of these items are usually found on page three or four. The definition of "residential" units will give the legal boundaries of the units, for example, dry wall to dry wall and concrete floor to interior surface of the ceiling. As for parking space units, there will also be a legal definition. The definition should include reference to the condominium plat and plans, which should identify the parking spaces as units, limited common elements, or general common elements.

Parking space "units" are owned just like residential or commercial condominium units. That is, the owner has a fee simple interest in the parking space unit. There is a deed recorded in the Land Records where the property is located, showing who owns the parking space. The owner receives a tax bill from the government agency and pays taxes on the value of the parking space unit – just like a residential unit. If the owner

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wishes to sell the parking space unit, it is handled just like the sale of a residential unit: contract of sale, settlement, and the recording of a new deed, showing the new ownership. (Often – but not always – the parking space is sold with the unit.)

Since you own the parking space, an exhibit to the declaration, called the percentage interest table, will show what interest the parking space has in the condominium. For example, if you own a residential unit and a parking space unit, you may have a 2.5 and a .5 interest respectively in the condominium. You have the right to vote these interests at association meetings. You are also required to pay the common expenses of the association based on these interests.

2. LIMITED COMMON ELEMENT PARKING SPACES

In the condominium declaration, after the definition of unit, there should be a definition of limited common elements which lists them, i.e., balconies, patios, decks, storage spaces, and maybe, parking spaces. That definition should also reference the plats and plans, saying "limited common elements are more particularly described on the plats and plans."

A limited common element parking space, like other limited common elements, allows the unit owner the exclusive right to use the limited common element assigned to his or her unit. Thus, the owner does not "own" the parking space but has the exclusive right to use it.

The developer initially assigns the limited common element parking spaces in a condominium project. You buy a residential unit, and pay more, and the developer will assign a space to your unit. This is also done with storage spaces. In some cases, however, the spaces are already assigned in the declaration. In that case, you can not pick which one you want. For example, if you purchase unit 1, the declaration and plats may already show that parking space 9 is assigned to that unit.

If a parking space is a limited common element appurtenant (assigned) to a unit, that owner in the future may assign (sell) the parking space along with his or her unit. Also, a unit owner may sell his or her assigned parking space separately to another unit owner. In either case, this is done by recording an amendment in the Land Records, showing the assignment of the parking space from one unit to another.

NOTE, if you sell your residential unit, the assigned parking space conveys automatically with it. Therefore, if you want to sell your space separately, you must sell it before you sell your residential unit, and make sure the amendment to the declaration is recorded before you convey your residential unit. The condominium declaration and/or the condominium laws will provide information and procedures to assign limited common elements parking spaces. With limited common elements as well as general common elements, unit owners will not have separate tax bills for such parking spaces.

3. GENERAL COMMON ELEMENT

As for general common element parking spaces, the condominium declaration should also define and describe general common elements, which may include parking spaces. If the parking spaces are not "units" or "limited common elements", they are "general common elements." And in some cases, the Condominium Board of Directors can assign spaces to units.

Such parking spaces are for the "general" use of all unit owners. You know the saying concerning parking: "if you see a space, you better take it, or someone else will." In some cases, however, the legal documents of a condominium allow for "reserve" general

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common elements. In that case, a parking space is reserved for your use by the Board of Directors, but you do not own it, and cannot assign it.

MAINTENANCE AND REPAIR OF PARKING SPACES

Depending on whether a parking space is a unit, limited common element or general common element, the responsibility for maintenance and repair may be different. Who is responsible (unit owner or association) is addressed in the condominium bylaws. With parking space units, the owner is usually responsible to maintain and repair the parking space. In some cases, however, the association is responsible to do the work, and the expense is assessed (passed on) to the unit owner.

Limited common element parking spaces are usually the responsibility of the association, but again, you need to review the Bylaws. General common element parking spaces are maintained and repaired by the condominium association as a common expense.

COOPERATIVE PARKING SPACES

Driving to your next possible home, your agent tells you it's a Cooperative. And your agent states: now is a good time to give you a summary of cooperative parking spaces. But first, you need to know how Cooperatives work in general.

Simply put, an entity – a corporation – owns the cooperative building and the land. The cooperative association leases residential apartments and parking spaces. There are no individual deeds recorded in Land Records showing ownership of apartments and parking spaces. The only deed recorded in Land Records is the deed showing that the Cooperative Corporation owns the land, building, etc. Instead of a deed showing ownership of an apartment, you have an interest in the Cooperative as shown by a Certificate, similar to a stock certificate.

Under the cooperative form of ownership, each member of the Cooperative is, by a virtue of his or her ownership in the corporation, entitled to enter into an occupancy agreement. This permits the member to occupy the apartment referenced in the occupancy agreement. In some cases, the occupancy agreement only references a residential apartment. In other cases, the occupancy agreement includes the member's right to use and occupy not just the residential apartment but to use a specific parking space.

Thus, you need to determine whether the Cooperative has parking spaces that members have the exclusive right to use or if the Cooperative parking is for general use, i.e., first come, first served.

Cooperative documents include: (1) certificate of incorporation; (2) bylaws; and (3) occupancy agreement (also called "proprietary lease") etc. The certificate of incorporation is the document that establishes the corporation. The bylaws, similar to other community association bylaws, govern the Cooperative.

The occupancy agreement is a contract between the Cooperative and the member as to the obligations and responsibilities of each. Thus, the occupancy agreement and bylaws need to be reviewed as to who is responsible to maintain and repair parking spaces. Most of the time, the parking spaces are maintained and repaired by the association, and the expenses are assessed to members. Cooperatives, just like other community associations, may have other governing documents, including Rules and Regulations.

Now, only one more home to see.

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SINGLE FAMILY HOMES AND TOWNHOMES IN A HOMEOWNERS ASSOCIATION

You turn your vehicle into the homeowners association, Ashley Manor. It is beautiful. The first road in the community goes for several blocks.

As you drive further into the community you see single family homes on the left and several townhouses on the right.

Flannery, your agent, explains:

(1) Homeowner associations have three important documents concerning parking space ownership. The first document is the master deed or declaration. The second document is the subdivision plat. A third document is the homeowners association's bylaws.

(2) Simply stated, first find the home that is for sale on the subdivision plat. If the driveway and the parking area are within the lot boundaries, there are usually no problems. If you own the lot, you can park there. As the owner of the lot, you are generally responsible for its maintenance and repair, including the exterior of your home, as well as the driveway.

(3) As for parking on the street in front of the house, in general, you can do so as long as there is no sign prohibiting it. However, parking in the street does lead to the question of who owns the street, the county or the homeowners association. Look at the subdivision plat. If it shows that the street has been dedicated to the county, then, the county owns it and is responsible for the repair and maintenance, including snow removal.

(4) In connection with parking and homeowner associations, you often will see a driveway that is shared by many owners. Simply put, a red flag should go up and you have more issues to look into and address.

As for townhomes in a homeowners association, you need to look at the subdivision plat and declaration. The subdivision plat will show the lot lines for each townhome. And they may include sidewalks in front of the townhome as well as the first several feet of each parking space. Thus, you need to review the declaration and make sure there are cross easement provisions in it. If the sidewalk and part of the parking spaces are within your lot, you are the owner of the sidewalk and the parking spaces within the boundary of your lot. The homeowners declaration should state that there are easements for other owners, invitees and guests to walk on the sidewalk and drive into the parking spaces that are within each lot. Again, it all depends on the documents.

In some cases, parking spaces are common areas, which are defined and described in the declaration. The developer of the project conveyed by deed the common areas to the homeowners association. Accordingly, the Association, via the Board, controls parking, including the possible authority to assign parking to lot owners.

Parking rights can be very beneficial. But, before you buy your home, look at and understand it’s parking.

This article should not be considered legal advice. You should consult with one of our lawyers in connection with your specific issue and matter.

DEATH AND TAXES: PLANNING FOR THE INEVITABLE

By: Laurie Pyne O'Reilly, Esq.

It's a well known saying: the only things certain in life are death and taxes. Paying taxes during one's lifetime, though dreaded, is fully expected. What can come as a surprise are the several kinds of taxes owed after death. Knowing about these taxes ahead of time and planning for them can soften the blow.

Post-death taxes fall into several categories.

The first category consists of the decedent's personal income taxes. The decedent's final state and federal income tax returns for the year of death – and any prior year returns the decedent failed to file – must be filed by the appointed personal representative of the decedent's estate. If the decedent's assets were in a revocable trust and no personal representative is appointed, then the successor Trustee will file the final returns. If the decedent was married, the surviving spouse may be responsible for filing the final returns even if no estate is opened.

The question comes up occasionally when a family member dies with no probate assets: are the surviving family members responsible for filing the returns and paying the tax? As with every rule there are exceptions, but generally speaking, surviving family members are not liable for paying the decedent's tax debt.

So, for example, if Dad dies owing income taxes, but owning no assets, his son is not responsible for filing Dad's final return or paying the tax out of his own assets.

The second category of post-death taxes consists of fiduciary income taxes that need to be paid either by the decedent's personal representative or successor trustee on income received by the decedent's estate or trust. Once the decedent dies, his estate or revocable living trust becomes a new taxable entity with a separate tax i.d. that the personal representative or trustee must apply for. (The decedent's revocable living trust becomes irrevocable and a new tax entity upon death.) Any income to the estate or trust in excess of $600 per year must be reported to federal and state governments. Reportable fiduciary income includes interest, dividend, rental and other income paid on estate assets, as well as "income in respect of decedent" which is income to which the decedent was entitled at the time of death that was not reported on the final individual income tax returns. This is done on IRS form 1041, and similar forms for state returns. So, for example, if the decedent dies owning rental property that generates rental income during the time the estate is open, that income must be reported on the fiduciary returns. The same would apply for any interest income paid on bank accounts or investments and capital gains realized on the sale of stocks or real property. (Note that capital gain income is usually minimal because of the "step up" in basis that capital assets receive when the owner dies.) Fiduciary income (or loss) is usually passed on to beneficiaries of the estate or trust to be reported by them on their individual returns at their individual tax rates. Fiduciary income taxes must be paid for each year the estate remains open or until the trust is terminated.

The third category consists of federal and state estate taxes. Estate tax is a tax imposed on all assets transferred on account of a decedent's death, including probate and non-probate assets. That means that not only is property titled in the decedent's name included in the calculation of any estate tax, but also assets held in revocable trusts, retirement accounts, proceeds of life insurance policies, etc. Excluded are assets in irrevocable trusts such as life insurance policies which the decedent no longer had the right to change or cancel during lifetime. Even non-probate assets such as those titled jointly with another person are included or partially

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Death and Taxes: Planning for Inevitable

included in the decedent's estate for estate tax purposes. For example, if the decedent owned his residence jointly with his wife, then one-half the value of the residence would be included in his estate. If a decedent owns a bank account jointly with his child, the entire account is included in the decedent's estate, except for any deposits that can be proven to have been made by the child.

Although the maximum federal estate tax is currently 40%, few estates – only about 0.2% nationwide – are subject to the tax. That is because the current estate tax exemption is $5.43 million, or $10.86 million for married couples. (Note that in order for spouses to claim the combined exemption, a return must be filed by the estate of the first spouse to die even if that estate is below the filing threshold.)

State and District of Columbia estate tax exemptions may not be so generous. While Virginia has no estate tax, Maryland and the District of Columbia do. In 2015, the estate tax exemption for Maryland residents is $1.5 million, but will increase to $2 million in 2016, $3 million in 2017, $4 million in 2018 and then will equal the federal exemption. Currently, estates in the District of Columbia worth more than $1,000,000 are taxed. Recent legislation increases the exemption amount to $2 million in 2016, and provides for additional increases to match the Federal estate tax exemption in 2018.

However, the District conditioned implementation of the increases on whether certain revenue conditions are met.

Significantly lower than the maximum federal estate tax rate, both the District and Maryland cap their rates at 16%. This can still be a substantial tax hit worth planning for. One of several ways of avoiding the tax is to gift property rather than allowing it to pass at death. This strategy needs to be employed carefully, however, since gifting the "wrong" assets, while saving estate tax, may result in a higher capital gains tax to the recipient. So careful planning is a must.

Inheritance tax is another type of tax that can be imposed on post-death transfers. While neither the District of Columbia nor Virginia impose an inheritance tax, Maryland does for certain transfers. Maryland charges a 10% inheritance tax on post-death transfers to persons other than close family members, which may include the closely held corporations of certain family. While inheritance tax is owed by the recipient of the property, typically the decedent's will provides for payment of the tax.

A smaller but not insignificant tax that can arise upon a decedent's death is the real property tax imposed on the decedent's residence. Once the owner dies, tax exemptions the owner may have been entitled to will no longer be available, which can sometimes result in large tax increases. For example, in the District, a homeowner entitled the senior citizen tax exemption receives a 50% reduction in real property taxes. Upon death, the tax break is no longer available, and unless another family member who is qualified for the exemption receives the property and applies to the District, the amount of the tax owed by the decedent's estate will double. Knowing this in advance, survivors can move more quickly to sell or distribute the property to avoid the increased property tax burden.

So while there's no escaping one of the certainties in life, with some awareness of the tax consequences when it happens, the other "certainty" can be softened or avoided.

CONDOMINIUM COLLECTIONS 101

By: Anthony R. Champ, Esq.

The lifeblood of a Condominium Association is, without question, its assessments. Without the necessary funds, the Association cannot provide for the upkeep of common areas and provide the necessary services to the community. Unfortunately, often unit owners shirk their obligation to pay the monthly assessment, and the Association is left with no other choice but to instruct legal counsel to pursue them. Toward that end, this article summarizes the collection process.

Step 1: To begin the collection process, a letter is sent to the delinquent unit owner that outlines the amount owed by the unit owner and demands payment. This "Demand Letter" also makes the unit owner aware of their basic rights under the Fair Debt Practices Act, including, but not limited to, their right to dispute the debt and request validation of the debt from the Association.

Step 2: After the initial Demand Letter expires, the Association may next file a lien with D.C. Land Records. Additionally, provided that the Association's governing instruments allow it, after notice (usually ten days), the Association may accelerate the monthly assessments for the fiscal year, rendering them immediately due and payable.

Step 3: Should a delinquent unit owner still fail to cure his or her delinquency at this point, the Association may file a lawsuit and/or institute foreclosure proceedings.

Step 4: Depending on the total amount owed, a collection lawsuit will be brought in one of two branches of the Superior Court for the District of Columbia. If the amount owed is less than Five Thousand Dollars ($5,000), the lawsuit will be brought in the Small Claims Branch of the Superior Court. If it is more than Five Thousand Dollars ($5,000), it will be brought in the Civil Actions Branch of the Superior Court for the District of Columbia. Traditionally, cases brought in the Small Claims Branch proceed faster than cases brought in the Civil Actions Branch. However, pursuant to the Court Rules for the Small Claims Branch, only fifteen percent (15%) of the attorney's fees incurred in connection with the case are recoverable by the Association (excluding very rare circumstances). The Civil Actions Branch is not beholden to such a rule, and thus, a larger portion, if not all, of the attorney's fees incurred by the Association may be recoverable.

Step 4a: As an alternative, or in addition to, filing suit, the Association may choose to foreclose on the delinquent owner's condominium unit. Once the Board authorizes a foreclosure, a Notice of Foreclosure is drafted and sent to the delinquent unit owner, via certified mail return receipt requested, and recorded in the District of Columbia Land Records. In addition to notice, there must also be publication of the foreclosure prior to the sale. If there is a buyer at the foreclosure sale, the buyer becomes the new owner of the condominium unit.

Step 5: Once a judgment is obtained from the Court against the delinquent unit owner, the Board may pursue post-judgment action. Post-judgment action may include garnishing the owner's wages, if nonexempt, and attaching the owner's other assets, such as his bank accounts.

As you can see, there are a variety of mechanisms in place to bring a defaulting unit owner into compliance. As such, Associations should take prompt action to ensure that uncollected assessments do not get out of hand.

Buying a new home or refinancing your existing mortgage?

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