



Issues To Consider for Foreclosure or Deed-in-Lieu of Foreclosure Involving Subdivision and Condominium Properties

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Lenders foreclosing on residential, commercial or mixed-use properties that involve covenants, deed restrictions, CCRs, declarations, easements, owners associations, and developer/declarant rights should be aware of issues that may arise during the course of the foreclosure action or a deed-in-lieu of foreclosure transaction that could have a significant impact on the overall acquisition costs, the lender's ability to market the property, and various operational issues that relate to distressed real estate projects. No two distressed projects are exactly alike and there are myriad issues and traps that can be avoided with careful and early planning. The following is a basic issue list for consideration before and during the pendency of the foreclosure or acquisition via a deed-in-lieu transaction.

1. Determine the type and status of property being foreclosed

- Residential, commercial, or mixed-use
- A group of lots or units
- A single lot or unit
- Developed, partially developed, or undeveloped
- Stand-alone property or part of an overall development

2. Obtain and review the foreclosure title commitment, a U.C.C. search, and a municipal lien search to determine applicability of the following issues:

- Homeowners' association declaration of covenants
- Declaration of condominium
- Declarations and deed restrictions pertaining to the overall community or development
- More than one owners' association (master and sub associations)
- Subdivision plat(s)
- Contractors' liens
- Owners' association liens
- Municipal liens, including super-priority municipal liens (may not appear in the real estate records)
- Whether the recorded mortgage pre-dates recordation of formation documents and certain changes to the condominium statutes
- Recorded joinder and consent of mortgagee to formation documents
- Ownership of property and personalty

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3. Analyze assessment/maintenance fee liability

Homeowners' association

Homeowners associations are generally governed by Chapter 720, Florida Statutes. Certain statutory provisions may take precedence over provisions in the subdivision declaration of restrictions, but that is not always the case (may depend upon the substance of the particular issue and the existence of statutes at the time the deed restrictions were recorded).

- Does the subdivision declaration reference Ch. 720, Florida Statutes?
 - If yes, was the subdivision declaration recorded prior to October 1, 2007? Review mortgage foreclosure provision to determine how the subdivision declaration addresses assessment liability for owners and mortgagees.
 - If no, review the mortgage foreclosure provision in the subdivision declaration in light of the statutory limitation on liability (the lesser of 12 months of common expense assessments or one percent of the original mortgage debt) per §720.3085(2)(c), Fla. Stat.

If the subdivision declaration provision is more limited than the statutory liability, plead for assessment liability pursuant to the declaration. Otherwise, plead for assessment liability pursuant to §720.3085(2)(c), Fla. Stat.
- Does the subdivision declaration contain provisions requiring payment of capital assessments or special charges upon conveyance of the property to a third party? Plead with specificity for the inapplicability of capital assessments and other identified assessments and charges.

Condominiums

Condominiums are governed by Chapter 718, Florida Statutes. Accordingly, the statute may be given more deference by courts than the declaration of condominium.

- Evaluate the Declaration of Condominium.
 - If recorded prior to July 2010, §718.116, Fla. Stat. provides that assessment liability was limited to the lesser of up to six months of unpaid common expense assessments or one percent of the original mortgage debt.
 - If recorded after July 2010, §718.116, Fla. Stat. provides a limitation on assessment liability to the lesser of up to 12 months of unpaid common expense assessments or one percent of the original mortgage debt.
 - Review Declaration of Condominium for a provision that automatically updates the requirements of § 718.116, Fla. Stat.

Generally

Does the declaration contain provisions requiring payment of capital assessments or special charges upon conveyance of the property to a third party? Plead with specificity for the inapplicability of capital assessments and other identified assessments and charges.

4. Is the property being foreclosed occupied by tenants? If yes:

- Are leases current?
- Are the tenants paying rent or in-kind?
- Are tenants current on rents and dues?
- Do commercial tenants have appropriate licenses (e.g., liquor licenses)?
- Are tenants complying with use restriction requirements (e.g., signage) ?



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- Are tenants complying with local government regulations (e.g., parking)?
- Are there empty units that need to be renovated or repaired?
- Are tenants making payments to an owners' association (because the landlord owner has failed to pay outstanding assessments)?

5. What developer/declarant rights need to be obtained?

- Even if a project is completed, a bulk purchaser/successor developer will likely need some developer/declarant rights in order to develop the property, operate a sales center, build model homes, erect sales signs, etc. It is important to evaluate which rights are needed and then consult regarding the best way to obtain such rights while limiting liability for predecessor acts.
- Developer/Declarant rights are found in a writing that is recorded and outlines the rights, duties and responsibilities given to a developer/declarant pursuant to statutes and deed restrictions/declarations.
- The assignment of developer rights also must be in recordable form, and will need to be recorded in conjunction with the transfer of title.

Homeowners' association developer rights

- There are no Florida statutes which govern a successor purchaser of subdivided lots in a manner similar to condominiums.
- A successor to the original developer/declarant will likely prefer a specific assignment of developer/declarant rights rather than relying on a general assignment.
- A lender with developer/declarant rights may be exempt from subdivision lot assessments (in lieu of assessments it may have to fund budget shortfalls), but that is dependent upon the timing of recording of the mortgage and the deed restrictions and the specific language contained in the subdivision declaration.

- The assignment of developer/declarant rights must be in recordable form, and will need to be recorded in conjunction with the transfer of title.

Condominium developer rights

- Determine whether it makes sense to acquire developer rights needed for sales and marketing while limiting liability for prior developer acts pursuant to the Florida Distressed Condominium Relief Act as a bulk assignee or bulk buyer (§718.703, Fla. Stat.).

Bulk assignee

A party taking title to condominium units upon foreclosure or via deed-in-lieu that has a proper assignment of developer/declarant rights and is categorized as a bulk assignee could:

- Control the condominium until such time as it sells the units to another purchaser
- Amend to correct existing deficiencies in the declaration of condominium (depending upon the language of the document)
- Control the books and records of the condominium association and make sure they are in order
- Appoint a property management company of its choice, depending upon any existing management contract
- Enhance the sales potential of the units by amending the governing documents (depending upon the language of the document)

Bulk buyer

A party taking title to condominium units upon foreclosure or via deed-in-lieu that has a proper limited assignment of developer/declarant rights and is categorized as a bulk buyer:

- Can market and sell or lease units, maintain model units, and have signs on the common elements



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- Is not responsible for turnover process or its expenses, since the conveyance triggers turnover of control of the association (if turnover has not previously occurred)
- Is not responsible for claims against the developer for breach of warranty, construction defects, or failure to properly operate the condominium association

6. What issues need to be considered for transfer of control of the owners' association?

- The assignment of developer/declarant rights may require resignation of old board of directors and appointment of a new board.
- The new board needs to meet to remove old officers and elect new ones.
- There may be association budget and assessment collection issues.
- Correction of inadequate or faulty documentation may be necessary.
- It is important to develop association transfer of control plan for turnover – review the applicable statutes for condominiums (§718.301, Fla. Stat.) and homeowners' associations (§720.307, Fla. Stat.).

7. Is a receiver needed?

- Evaluate whether a receiver is needed for the property. It is important that the receiver be appointed by the court to serve in the proper role (receiver for the collateral, the developer, the association, or some combination), so that the receiver does not exceed its authority (e.g., so that the receiver can take necessary actions for the protection of the collateral, to convey units or lots, or to operate the owners association).
- A receivership can limit exposure for the foreclosing lender by dealing with problem issues prior to the transfer of title, such as:
 - Environmental issues
 - Chinese drywall
 - Completion of initial construction

- Making major repairs
- Security/vandalism
- Marketing and sales
- Managing tenants
- Compliance with governmental regulations
- Compliance with developmental plan
- Other miscellaneous issues
- Operation of the owners' association during foreclosure is necessary
- Continue marketing of units for sale to avoid automatic turnover
- Funding the owners' association accounts so that bills can be paid
- Advance funding certificates (a form of secured lending to the owners' association so bank funding does not get included in the uncollectible deficiency)
- Receivership certificates
- Continuation of deficit funding (funding only association deficits as opposed to funding association based on a budget)
- Audit association's operating, working capital and reserve accounts.
- Maintain association official records
- Continuation of marketing and offering property for sale in the ordinary course of business
- Conduct regular functions of the owners' association

9. What issues need to be considered post-foreclosure?

- Monitor timelines for:
 - Assessments
 - Payment of assessments due as of date of conveyance
 - Payment of ongoing assessments
 - Insurance



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- Association control (turnover)
- Marketability
- Other maintenance
- Identify and plan for association control issues

with necessary rights for sales and operation of the property.

10. What other special development issues may need to be considered?

- Marina issues
- Submerged state land leases must be evaluated for purposes of transferring along with the property
- Partial termination of condominium
- Condo hotels
- Mixed use projects
- Community development districts or special taxing districts
- Mobile home parks
- Timeshares and fractional interests
- Infrastructure construction
- Livestock
- Mitigation and conservation areas
- Water management permits and obligations
- Reserved business interests in covenants. For example:
 - Right to sell parking spaces
 - Right to control cable television costs

This list of issues is general in nature and does not cover all possible issues with regard to the conveyance via foreclosure or deed-in-lieu of property in a distressed condominium or homeowners' association project. Careful analysis of your project with members of the Real Property Litigation and the Community, Condominium, and Resort Development Group of the Real Estate and Finance Practice Group will result in a smooth transition of the project

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