

HOMEOWNERS ASSOCIATION DELINQUENT ASSESSMENT LIENS AND SHORT SALES

by

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With many properties "under water" (no equity) some sellers are looking to avoid foreclosure by short selling their properties. A short sale is a sale in which the purchase price is less than the total of all liens against the property.

In a short sale, the owner lists the property for sale and then accepts an offer from a buyer in an amount that is less than all of the liens on the property. Then the terms of the purchase are submitted to the lien holders for their approval. This is where things get tricky.

The first mortgagee, usually the bank, will have to agree to take less than it is owed if the short sale is to close. But, California law requires that all of the other lien holders will have to agree as well! This is where the negotiations begin. The bank has the first lien with priority over all other liens (except property taxes). The bank can foreclose and wipe-out the junior liens (see the separate article entitled "SENIOR "WIPE-OUTS" OF HOA DELINQUENT ASSESSMENT LIENS" for more information).

But in a short sale, the idea is to avoid a foreclosure sale. Several parties benefit from avoiding a sale. The bank does not have to become the owner of the property and pay the association dues while it attempts to evict the prior owner, fix up the property and re-sell it. The seller avoids a foreclosure on his or her credit report and the buyer usually gets a good deal on the purchase price.

However, for the short sale to close, all of the other lien holders, as with the bank, will be asked to take less than they are owed and approve the sale. Since the bank holds the ace of a possible senior wipe-out, the junior lien holders may be asked to take a substantial cut in what they are owed. In the case of the most junior of lien holders, which likely includes the association, the offer may be as little as a few pennies on the dollar or even nothing.

Thus, the poker game begins. An association with a junior assessment lien must approve the short sale for the sale to close but, if it does not approve and the short sale falls through, the senior will foreclose and wipe-out the association's lien. Under these circumstances, it is not uncommon for the association to be offered \$500 or less on a \$10,000 lien. Should the board accept this offer as "better than nothing"?

The best advice is that the association should engage in negotiations with all of the other parties. If the bank is taking a 50% cut in what it is owed, it would seem fair for the association to do the same. Remember, pigs get fed but hogs get slaughtered. But what if the association is asked to take little or nothing?

In that case, the board will have to look at several factors and then make a business judgment as to how to proceed. Here are some of the factors that the board should consider: (1) the consequences of failing to reach an agreement (senior wipe-out of assessment lien); (2) the likelihood of collecting the amounts due from the owner on an unsecured basis once the lien is wiped out; (3) the advantage of getting a new owner to pay future dues as soon as the short sale closes; and, (4) the amount being offered.

As to the latter point, remember, there are five other parties that can chip in a little more money so that the association can realize a greater amount from its lien: (1) the bank could take a bit less; (2) the seller could throw in a few more dollars to avoid the foreclosure on his or her record; (3) the buyer could pay a bit more - after all they are probably getting a good deal; and, (4) and (5) there are two brokers involved who would really like to earn their commissions, even if they have to reduce them a bit.

So, in summary, the board should not allow the seller, buyer, bank or brokers to demand that the association release its lien for a pittance. The board should make a business judgment as to how much or little it will accept with the understanding that an excessive demand could cause the short sale to fall through and result in the association's lien being extinguished (wiped-out) by a senior lien sale.

The information contained in this article is of a general nature. For legal advice, contact your association's general counsel. Richard G. Witkin, Esq. can be reached at Witkin & Neal, Inc. at (818) 845-8808 or at rwitkin@charter.net.