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Housing Counsel: Notifying lenders when homeowners association bylaws change

By Benny L. Kass, Published: May 20

I am the vice president of a community association of 55 homes in Loudoun County. Our homeowners recently approved changes to our legal documents, but they have a clause that states: "Any other provision of this Declaration to the contrary notwithstanding, neither the Members, the Board of Directors, nor the Association shall, by act or omission, take any of the following actions without the prior written consent and approval of the institutional holders of all First Mortgages of record on the Lots . . . [including] Modify or amend any material or substantive provision of this Declaration or the Bylaws of the Association."

This provision appears to be a show-stopper for several reasons. The board of directors does not have a list of all lenders, there are a couple of foreclosed properties for which we have no information, and there are a few residents who will not provide any personal information, including the name of their lender. Is there a public source where we can get lender data, or can you suggest other ways to overcome this problem?

It may not be a consolation to you, but this is not unique to your association. Almost every community association (including condominiums and homeowner associations) has similar language in its legal documents.

Even without lender approval, amending your legal documents requires a supermajority vote of the owners, based on their percentage ownership in the association. When legislatures enacted association laws, they did not want a small minority of owners to be able to dramatically change the way the association is governed and controlled.

The Virginia Condominium Act, for example, requires that a minimum of two-thirds of the unit owners (by their percentage of ownership) approve any amendments to the legal documents. The D.C. Condominium Act contains a similar requirement. And although Maryland does not have any such requirement, from my experience most, if not all, Maryland association legal documents contain similar supermajority requirements, demanding two-thirds or even 75 percent approval.

The problem is compounded because most association documents, in order to comply with Fannie Mae and Freddie Mac guidelines, contain requirements such as those in your legal documents. In fact, Virginia law states that "no provision of this chapter shall be construed in derogation of any requirement of the condominium instruments that all or a specified number of the beneficiaries of mortgages or deeds of trust encumbering the condominium units approve specified actions contemplated by the unit owner's association."

You say you are having difficulty obtaining the names of the current mortgage holders. Your board should enact a rule requiring all homeowners to provide, on an annual basis, the name of their mortgage lender. This is not a difficult task, nor is it an invasion of privacy. All mortgages (deeds of trust) are public information since they are recorded among the land records in the jurisdiction where your property is located. And many jurisdictions have online access to the local recorder of deeds. For example, you should be able to find out who holds the mortgage loans on all of your properties by searching the Web for "Loudoun County real estate tax."

But, as you suggest, with foreclosures and short-sales, this information may not be current.

Association lawyers around the country have used what I call the "book of the month" option. Send the proposed amendment to as many lenders as you can find, advising them that if you do not hear from them within a set period of days, you will assume their consent. Fannie Mae, for example, allows such a procedure, which it calls "implied approval." The most current Fannie "Selling Guide" states that the documents "must provide that amendments of a material adverse nature to mortgagees (lenders) be agreed to by mortgagees that represent at least 51 percent of the votes of unit estates that are subject to mortgages."

However, Fannie recognizes that lenders may not always respond. Accordingly, if the documents were recorded before Aug. 23, 2007, then implied approval can be assumed if the lenders do not respond within 30 days after they receive proper notice of the proposal. The notice must be sent by certified or registered mail, with a return receipt requested.

If the project was recorded after that date, then implied approval can be assumed after 60 days' advance notice.

But this relates to amendments "of a material adverse nature to" mortgage lenders. You and your association attorney should make a business judgment as to whether your proposed amendment falls into this category. For example, an amendment changing the date of the annual meeting is, in my opinion, not adverse to any lender, so lenders do not even have to be notified. However, if you are changing the percentage interests in the association, that is material and would require notification.

What risks does your association face if it just ignores the requirement of notifying and obtaining consent — implied or actual — from the lenders? That's a very good question, and to my knowledge it has never been litigated in any court in the United States. From my experience, and from conversations with a number of association attorneys throughout the country, quite often the requirement is ignored, with no consequences.

As a practical matter, the lender's lien was recorded on the land records before any amendments were enacted. If the lender wants to foreclose on a unit, the lender is usually in first place position, subject only to any law that gives the association a priority on assessments.



In the District, when a lender forecloses, it has to pay the association up to six months of prior unpaid assessments. In Maryland, based on a law that just was signed by the governor on May 10, banks that foreclose on association homes after Oct. 1 must pay the association up to \$1,200 of any unpaid assessments. No such priority exists in Virginia.

I cannot recommend ignoring the law. If you believe your proposed amendment has material consequences against your lenders, do your best to track down all the mortgage lenders and send them notice by certified mail, return receipt requested. Wait the 30 days, and then proceed to record the amendment on the land records where your association is located.

Benny L. Kass is a Washington lawyer. This column is not legal advice and should not be acted upon without obtaining your own legal counsel. For a free copy of the booklet "A Guide to Settlement on Your New Home," send a self-addressed stamped envelope to Benny L. Kass, 1050 17th St. NW, Suite 1100, Washington, D.C. 20036.

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