



by Frank A. Lombardi, Esq.



# On Death and Taxes

## Protecting the Association Lien



**A**s the saying goes, there are two things we cannot escape in life — death and taxes. In most cases, a unit owner can escape paying monthly assessments by moving out. The association could chase them on the personal obligation, but the unit owner could seek bankruptcy protection and most likely avoid paying. Or, morbid as it is, a unit owner could escape paying assessments by passing away. So, given that, let's examine briefly how the grim reaper and the tax man can affect the association's ability to collect on its lien for assessments.

First, what happens when a unit owner dies? Their assets and liabilities

are handled by an executor (if there is a will) or administrator (if there is no will). These legal representatives take control of the estate assets, including the unit, pay the last bills and distribute the remainder to the heirs or devisees. Where does the association fit into the estate administration process? And, what can it do to protect its lien for assessments?

When the association becomes aware of a unit owner's demise, the association should make an attempt to learn the identity of the legal representative as soon as possible. Check the probate court located in the city or town hall where the unit is located. For collection purposes,

the association should treat the estate's representative as the new owner, or at the very least, a substitute owner. As the association is a creditor of the estate, notice of claim should be sent to the estate's legal representative.

### Notice of Claim

When filing such a notice, be sure to let the probate court and the legal representative know, or at least "remind them," that the association is a secured creditor by and through its statutory assessment lien under RIGL 34-36.1-3.16, and that the association reserves its right to foreclose on its assessment lien.

In most cases, the probate court will not be able to prevent the association from foreclosing on its assessment lien. However, out of an abundance of caution, I would send a notice of claim, indicating that you intend to continue the collection process with the legal representative, who at this time may be in the process of gathering the assets and can pay the assessment under their administrative powers. Occasionally an executor may ask for time, so long as there is no competing interest (i.e. the bank, which could also foreclose and wipe out assessments representing more than six months; or as we shall see, taxes), then an agreement may be reached.

The association may treat this probate claim as a regular collection and just have the mortgage lender bank pay the assessment out of its negative escrow, as both the association and lender have an interest in maintaining and protecting the value of the unit. If neither the

lender nor estate administrator cooperates, the association may seek to foreclose on the lien and would not need probate court permission. There is no specific case law on this in Rhode Island, but when I raised the issue with two different probate judges, each said that their respective courts could not stop the foreclosure if push came to shove. Keep in mind though that the legal representative is, in effect, the unit owner, and I would submit is due any notices of foreclosure under the statute.

### Tax Sales

The Rhode Island Super Lien statute indicates that the association has a lien that is primary to the first mortgage on the unit, to the extent of six months' assessments, \$2,500 of attorney's fees and up to \$5,000 of collection costs. However, the assessment lien is also subordinate to tax liens by municipalities, such as property taxes. If assessments are not being paid, and the mortgage is not being paid, then chances are the taxes aren't being paid either. What remedy does the city or town have to ensure payment? The tax man cometh in the form of a tax sale, which is similar to a bank foreclosure in some respects — to the degree that a third party comes in to pay the amount owed and gets title to the property.

In the case of a bank foreclosure, the buyer gets title and there is little a unit owner may do. In the case of a tax sale, the buyer gets title to the unit by paying the amount of taxes owed. However, the buyer gets a tax sale deed from the city treasurer, in exchange for payment of the taxes. The unit owner will have one year in which to pay the taxes and get the unit back, which is called an automatic right of redemption.

After one year from the date of the sale, the buyer would be able to file a petition in superior court to foreclose the original unit owner's right to redeem the property by simply paying

the taxes back. If the taxpayer still does not pay it back, then the court will issue an order essentially giving the property to the tax sale buyer. Since the amount of taxes could be \$1,000 to \$10,000, you can see how this might be a very lucrative investment. Also, since the tax sale could wipe out the mortgage, very often the banks will pay the taxes on behalf of its mortgagor unit, but since that is not always the case, it makes sense to follow the proceedings closely to protect the association's interests.

Since, under the statute, the association lien for assessments is not prior to the city or town's lien, the tax sale could also affect the assessment lien. A successful argument could be made that the petition for foreclosure or right of redemption wipes out, not only the mortgage, but the association's lien as well.

What to do? Our office has taken the position that, from the date of the tax sale, the buyer, in effect,

becomes the owner (granted, subject to right of redemption, but still the owner). So then, I have sent notices to the tax sale buyer, owner and, of course, the bank. If there is no positive response, I then initiate foreclosure and have the third-party buyer at auction pay the assessments. The point is, do not wait the year and be competing with the third-party tax sale buyer to pay the assessments.

I would recommend taking steps to foreclose as soon as the association receives notice of a tax sale. Again, treat the tax sale purchaser as a new, albeit conditional, owner of the property for notice and association lien foreclosure purposes. CM

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