



**AVOID "ANALYSIS
PARALYSIS"**

*By: Francis J. McGovern, Jr.,
Esq.*

Board decisions need not be unanimous. In fact, although consensus building is necessary, the occasional "no" vote can be a sign of a healthy diversity of opinion. As long as due care has been taken in considering the decision, the board should move forward. Too often, a failure to garner unanimous support results in the decision stalling and reappearing on the agenda month after month. Not only does this unnecessarily delay the association's business, it presents the board as ineffective. The board must move forward with its decisions with or without unanimity.

**New Foreclosure Law in New Jersey and the
Effect on Associations**

By: Deanna Criscione, Esq.

The most recent statistics on foreclosures in New Jersey are bleak. According to a recent article on NewJerseyNewsroom.com, almost 3,500 N.J. properties had foreclosure filings in January 2013, and from January 2012 to January 2013 foreclosure filings have doubled in the state. In New Jersey, 1 in every 1,024 households is in some stage of the foreclosure process, compared with 1 in every 869 nationwide. The Federal and State Government have taken two significant steps in stopping the rise of foreclosures. In 2010, the Federal Government provided \$302 million dollars in aid for the state to fund the Homekeeper program. The Homekeeper program provides up to \$48,000 in forgivable mortgage assistance. However, it is expected that the Homekeeper program will run out of money by the end of 2013.

On December 6, 2012, Governor Chris Christie signed into law an act that is anticipated to speed up the foreclosure process for abandoned properties. Under this new law, the foreclosing mortgage company must file a foreclosure complaint that complies with the Fair Foreclosure Act. Then the foreclosing mortgage company can file an application with the court to proceed in a summary manner by proving that the property is abandoned or vacant. If the Court determines that the property is not vacant or abandoned, then the foreclosure will proceed on a normal schedule. If the Court determines that the property is vacant or abandoned, then the sheriff must sell the property within sixty (60) days of obtaining a writ of execution.

This new law does not take effect until April 1, 2013, so we will have to see how the mortgage companies take advantage of this new law. However, it should be kept in mind that the mortgage company has to choose to take advantage of this new law. The mortgage company does not have to file the application to proceed in a summary manner if the mortgage company does not want to proceed in an expedited fashion. Thus, although the legislature hopes that this new law will help ease the growing number of

abandoned properties in the state, there is no guarantee the mortgage companies will want to take advantage of this faster process.

For New Jersey condominium and homeowner associations, we should keep an eye on this law and how it gets applied. However, we still recommend that the associations identify the abandoned units in their community and take aggressive steps to either obtain legal title or possession of these properties. Unfortunately, the story we hear almost every day is one of a unit owner receiving communications from their mortgage company regarding foreclosure, and the unit owner, believing that the foreclosure will take place soon, abandoning their unit. This places a burden on the association and the other paying unit owners.

When we contact the delinquent unit owner regarding their arrearages, the unit owners claim that because they have abandoned their property and the mortgagee is foreclosing, they are no longer liable. However, until the mortgagee sells the unit at sheriff's sale the debtor's name is still on the deed, and, therefore, is still liable for the monthly maintenance fees. The best way for the association to recoup these arrearages, is to take either legal title or possession of the unit, place a tenant in the Unit, and collect the rental income to pay the on-going maintenance fees and reduce the arrearages. This requires the association to either accept a quitclaim deed to the Unit or apply to the court and obtain a rent receivership.

The hope is that the association recoups enough money from the rental income to be made whole before the association is divested of title or possession by the mortgage company selling the Unit at sheriff's sale. As it stands right now, mortgage foreclosures filed in 2008-2011 are stuck in the court system, and the foreclosures that do make it to sheriff's sale are being adjourned by the mortgagee for months, if not years. Thus, generally, the association can be guaranteed to recoup some money. However, we will have to watch this new law carefully to determine if the mortgage companies are taking advantage of the expedited process and its effect on foreclosures in New Jersey.

**Contributing
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**Spoliation of Evidence –
Penalties for Destruction of
Evidence**

By: Patricia Hart McGlone, Esq.

There may be serious penalties to pay in court if evidence is misplaced, damaged or destroyed. This comes into play if there is an accident on community property resulting in a lawsuit or if the common property is damaged or destroyed and there is an insurance claim or lawsuit as a result. The association must also be mindful of this doctrine and preserve evidence if invasive testing or remediation or repair work is done during the transition process.

New Jersey courts have found that there is a legal duty to preserve evidence:

1. when there is pending or probable litigation between the parties
2. there is knowledge of the existence of probable litigation
3. foreseeability that there would be harm as a result of the missing or damaged evidence
4. the evidence is relevant to the litigation

In Pennsylvania, a legal duty to preserve evidence arises when a party knows that litigation is pending or likely and it is foreseeable that discarding evidence would prejudice the opposing party.

Simply put, if there is a possibility of future litigation or a claim, the best practice is to preserve all relevant evidence.

For example, if someone falls on the community property and is injured, a photograph of the area involved would be helpful. The association should notify its insurer and the injured person (or their attorney if they are represented by counsel) before any repairs or changes are made to the area.

If there has been property damage to the common elements, the association should preserve evidence. If a sprinkler head leaks or a pipe bursts, the insurer and any potentially liable parties should be given the opportunity to inspect. The defective part should be saved and not discarded.

The Spoliation of Evidence doctrine plays a major role in the handling of construction defect claims. The developer must be placed on notice of the association's construction defect claims as soon as practically possible and given the opportunity to inspect the conditions before remediation and repair work is undertaken. Then the association must preserve relevant evidence.

The New Jersey Supreme Court set forth the steps that should be taken to preserve evidence and avoid any claims for spoliation of evidence in Robertet Flavors, Inc. v. Tri Form Construction, Inc., 203 N.J. 252 (2010):

It is preferable, of course, to have an orderly procedure for identifying a defect, alerting the allegedly culpable party, conducting an investigation and testing that is observed and documented by representatives for all potentially responsible parties, identifying a cause, and achieving a solution.

The court exercises its discretion in determining the penalty imposed for spoliation of evidence and will take the surrounding circumstances into account. As one court put it, the court tries to "level the playing field" when deciding the penalty to be imposed for spoliation of evidence. The penalties imposed by the court range from a total dismissal of the complaint where plaintiff has destroyed evidence to barring the claims relating to that evidence. Courts have also barred expert testimony relating to the destroyed evidence, precluded the introduction of evidence or given an adverse inference charge or a limiting instruction to the jury.

New Associates:

Matthew S. Maisel, Esq.

In 2006, Matt earned a B.A. in Political Science from the University of Delaware. As a member of Pi Sigma Alpha, the national political science honor society, Matt was named to the Dean's List seven consecutive semesters.

In 2011, Matt graduated from Rutgers School of Law – Camden. Matt participated in Hunter Moot Court and, at the request of a faculty member, participated in the Academic Success Program, tutoring first-year law students on studying and exam-taking skills. In his final year of law school, Matt served as Editor-in-Chief of the Rutgers Journal of Law & Public Policy.

Matt is admitted to practice law in New Jersey, Pennsylvania, and the U.S. District Court for New Jersey. Matt is a member of the New Jersey State Bar Association and the American Bar Association.

Matt began his career with McGovern Legal Services in January 2013.

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Practical Tip: To Maximize Vendor Performance, Be Specific

By: Scott K. Penick, Esq.

Contributing Writers:



Scott K. Penick, Esq.

BE SPECIFIC. If you take nothing else away from this short piece, remember this mantra – be specific. This tip will help maximize the performance of every vendor from the association's porter to the landscaper to the attorney – yes, even the association's attorney.

Start with a specific contract. Hand-shakes and signing one-page proposals may seem like the fastest way to get an association's relationship with a vendor up and running, but these shortcuts are the enemies of long-term efficiency. Before soliciting proposals from vendors an association should know exactly what services it needs from a vendor. An experienced manager can help the board develop a specific list of services to be provided by nearly every vendor. The association may negotiate some of the terms it wants due to price considerations or vendor recommendations, but once the list of services is finalized, it should be integrated into the written contract with the vendor. This provides the vendor with a clear understanding of the association's expectations, and it provides the association with measurable requirements to which it can hold its vendors.

Set specific deadlines. The two biggest enemies of timely performance are failing to give a deadline and the over-used acronym – A.S.A.P. The A.S.A.P. acronym has become so overused that it has lost its efficacy. Instead of omitting a deadline or asking for performance A.S.A.P., associations can get more timely performance by giving vendors specific deadlines, whether that deadline is in two months, two weeks or even two hours.

Giving a specific deadline, and a reason behind the deadline, dramatically improves the likelihood that the association's project will be completed on time. Without a deadline, or with the nearly-as-bad A.S.A.P. deadline, the association's project risks being placed at the end of the vendor's to-do list.

Another deadline-setting strategy is asking the vendor how soon it can complete the project. This is especially effective when the association has no set deadline in mind, but the association still does not want to end up at the bottom of the to-do list. Vendors want to keep clients happy. So asking a vendor when a project can be completed lets that vendor know that the timing is important, but it also shows the vendor that the association respects the vendor's commitments to other clients. The end result is that the vendor is more motivated to keep the deadline it committed to the association and even to over-perform to keep a good client happy.

Benefits of Accepting a Quitclaim Deed

By: Michael R. Polulak, Esq.

If your association is aware that a delinquent unit has been abandoned, then accepting a quitclaim deed from the unit owner and renting out the unit may be the fastest and most cost effective way to recover the arrears owed by the debtor.

So, what is a quitclaim deed? A quitclaim deed is a real property conveyance instrument that transfers whatever title the grantor has in the premises but does not provide any representations as to the validity of such title. In other words, a quitclaim deed transfers ownership of the property but it is not a guarantee that the grantor has clear title to the property.

When an association learns that a unit is vacant and the association is interested

New Personnel:

*Kelly Kolakowski,
Paralegal*

Kelly graduated from Middlesex County College with honors in 1994 with an Associates Degree in Paralegal Studies. Kelly has worked with associations and co-ops for over 19 years focusing primarily on collections.

Kelly joined McGovern Legal Services in January 2013.

*Corinn Hickey,
Paralegal*

Corinn graduated from Middlesex County College in 2006 with an Associates Degree in Paralegal Studies. Later, she attended Rutgers University in Newark, New Jersey where she graduated in 2012 with a Bachelor of Science in Marketing.

Prior to joining McGovern Legal Services, Corinn functioned as the sole paralegal for the managing partner of a law firm in Old Bridge, New Jersey.



Michael R. Polulak, Esq.

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in obtaining title and renting it out, then the first step is to gain access into the unit to ensure that it is in relatively rentable condition. Governing documents typically provide authority for the association to gain access upon reasonable notice to the owner to ensure that the vacant unit does not present a hazard or a threat to the neighboring units.

If the unit is in rentable condition, then the association's attorney will prepare and forward a quitclaim deed to the owner. Once the association accepts the quitclaim deed, then the association will own the unit subject to all mortgages, liens, taxes, and other judgments on the unit. In other words, it is highly unlikely that there will be any equity in the unit; therefore, the association will not be able to 'flip' the property for a profit. Rather, the association will only be able to rent out the unit until the mortgage company completes its foreclosure and becomes the new owner. The mortgage company's foreclosure process oftentimes takes years to complete.

Prior to renting out the unit, the association should to notify its insurance carrier that it owns the unit. Next, the association should consider hiring a local realtor to manage the unit and its tenant. The realtor will charge a percentage of the rental income (typically 10%) as a fee for finding a tenant and then managing the unit and tenant.

There is little risk to a tenant who rents out the unit subject to the mortgage company's foreclosure. The foreclosing mortgage company cannot disturb a residential tenant as long as the tenant has a bona fide lease. Therefore, even after the mortgage company forecloses, the tenant may remain in the unit for the remainder of the lease. While extremely rare, the one caveat is that a purchaser who intends to personally occupy the unit may dispossess the residential tenant upon 90 days notice. The tenant is otherwise unaffected by the foreclosure and sheriff's sale. Regardless, it is prudent for the association to notify any prospective tenants about the pending foreclosure and to notify the tenant of their rights pursuant to the Helping Families Save Their Homes Act of 2009.

The association should keep all rental income generated from the unit, less any realtor fee. The rental income should be applied first towards the arrears owed by the prior unit owner and any excess may be deposited in the association's general operating account. The association has no obligation to pay the outstanding mortgage(s) because the association did not sign the mortgage promissory note (this was signed by the prior owner). As a result, the mortgage company's only recourse is to foreclose on the unit, which oftentimes takes years to complete. Additionally, the association has no obligation to pay the real estate taxes. The only recourse for nonpayment of real estate taxes is the potential of a tax lien foreclosure, which also takes years to complete. In the meantime, the association may collect its rental income.

This process of accepting a quitclaim deed and renting out an otherwise vacant unit is likely the most cost effective and expedient way to recover the arrears owed by the debtor.

Knock, Knock...Nobody's There: Turning Vacant Units Into Opportunities

By: Scott K. Penick, Esq.

As the downturn in the real estate market persists, more and more homes are worth less than the owner owes on the mortgage. The result has been that more and more homes are being abandoned, leaving associations with a growing problem of vacant units in their communities. Rather than being a roadblock to collections, associations should look at vacant units as potential opportunities to generate positive cash flow.

Quitclaim Deeds: Whether a unit is owned by an estate, or the owner has simply left the building, quitclaim deeds are a great option for proactive associations. A quitclaim deed is the simplest form of deed and provides a quick and easy way to transfer title to the association. Many owners who have physically abandoned their units are willing to give associations quitclaim deeds. Why? The reasons vary, but most abandoning owners have debt problems, and if they can get one more creditor out of their life, they

are happy to do it with a quitclaim deed.

Even if the unit owner is deceased, and the unit is held by an estate, the executor may be willing to give the association a quitclaim deed, especially when the estate is insolvent – as many are.

In either case, once the association has the quitclaim deed, it can rent the unit and turn a delinquency into a source of positive monthly cash flow. Eventually, the mortgagee will foreclose, but with the slow rate of many foreclosures, associations often find that they have enough time to recoup all of their unpaid assessments and collection expenses before the bank takes the unit.

Rent Receivers: When unit owners cannot be found or are not receptive to giving the association a quitclaim deed, another option is to seek a court-appointed rent receiver. In order to do this a foreclosure complaint must be filed. Once the complaint is filed, the association may apply to the court to appoint a rent receiver. The rent receiver may be the association or another entity that will manage the rental of the unit for the association. When the court appoints a rent receiver, that person or entity is given the authority to take possession of the unit and to rent it out to satisfy the owner's debt to the association.

Mortgagee in Possession: What about when the bank has changed the locks on a vacant unit? In 2007, the Appellate Division of the New Jersey Superior Court decided a little-known, but hugely important case for associations: *Woodview Condominium Association, Inc. v. Shanahan*¹. The *Woodview* court held that a mortgagee that takes possession of a unit becomes responsible for the assessments that come due during the mortgagee's time of possession. In the *Woodview* case, the unit was not vacant, but subsequent courts have held that the same legal principle still applies to vacant units. Therefore, even when the bank has taken possession of the unit, there are still positive opportunities for vacant units.

¹ 391 N.J. Super.170, (App. Div. 2007)

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