NEAGLE LAW LLC
76 Orchard Road, Cumberland, ME 04021 • (207) 805-4211

Chris Neagle, attorney • *chris@neaglelaw.com*

**MAINE CONDOMINIUM LAW AND PRACTICE**
**Maine Condominium Act Projects**
February 2022



This outline is intended to assist unit owners, condominium association boards and their property managers better understand the laws and best practices of Maine condominium project management. **No one should rely on this outline to make legal decisions.** Always consult with an experienced lawyer as every situation is unique.

## A. Maine Laws

1. Maine Condominium Act ("MCA"), 33 M.R.S. §1601-101 et seq. This Maine law regulates all condominium projects created *after January 1, 1983*[1]. It has four sections:

a. Section 1601: Definitions and general rules of construction, requirements for the assessment of real estate taxes, and a prohibition against municipalities passing ordinances prohibiting condominium projects.

b. Section 1602: Requirements for creating, altering, and terminating condominium projects.

c. Section 1603: Rules for managing condominium projects, including assessment and collection of dues.

d. Section 1604: Protection of unit purchasers, including requirements for public offering statements when a unit is first sold by a developer and for resale certificates for unit sales between unit owners.

2. Maine Nonprofit Corporation Act: 13-B M.R.S. §§101 et seq is the law that establishes rules for all Maine nonprofit corporations, including all condominium associations. It describes the standards that the directors and officers must meet in making decisions, including the standard of good faith.

## B. Condominium Parties

1. Developer (called the "declarant" in the MCA): The party who owns the project real estate creates the condominium project by recording a declaration of condominium, including plans, in the Registry of Deeds and usually makes initial unit sales. MCA §1601-103(9).

2. Unit Owners: Individuals and legal organizations like limited liability companies and trusts that own the units. MCA §1601-103(27).

3. Condominium Association: A Maine nonprofit corporation whose members are the owners of all the units created in the project. MCA §1601-103(3) and MCA §1603-101. The association manages the common elements of the condominium project and has the power to make assessments on unit owners for that purpose. It is operated by a board of directors elected by the unit owners and by officers elected by the board members.

[1] Projects created between 1965 and 1982 are governed by the Unit Ownership Act (33 M.R.S. §560-568) and many sections of the MCA.

## C. Condominium Ownership Elements

1. Unit: A real estate interest owned in "fee simple" by the unit owner, usually bounded by the floors, ceilings, and walls of the unit. Some townhouse style units have no upper and lower boundaries. MCA §1601-103(26).

2. Common Elements: All portions of the condominium project which are not units, such as the driveways, parking areas, grounds and the buildings surrounding units. MCA §1601-103(4). The common elements are owned by all the unit owners as tenants in common, with each unit owner owning an undivided percentage interest equal to their allocated interest described in the declaration. The common elements are not owned by the association. The undivided percentage interest held by each unit owner cannot be separated from their unit.

3. Limited Common Elements: *Portions of the common elements* which are exclusively occupied by one or more unit owners and also cannot be separated from a unit. MCA §1601-103(16). Parking spaces, adjacent decks and patios, and storage areas are common examples.

## D. Condominium Project Documents

1. Declaration of Condominium: The document created by the developer which is recorded in the Registry of Deeds to create the condominium project. MCA §1602-105 has specific requirements for its contents. The declaration establishes the boundaries of the project, the unit boundaries, the common elements, the limited common elements and the allocation of ownership interests, the liability for expenses and the voting rights. The declaration often sets forth important restrictions on the use of units and common elements.

The developer sometimes reserves rights to remove or add other land or units to the project or to make other changes after the project is first created. The declaration also includes one or more plats and plans recorded in the Registry of Deeds as described in MCA §1602-109:

a. Project Plat: The site plan showing the overall layout of the project and locations of driveways, parking areas, buildings and other improvements.

b. Unit Plans: Floor plans and elevations showing the locations and boundaries of each unit.

*Note: Because the site plan and unit plans do not need to be attached to a resale certificate, many purchasers buy units without ever seeing them. A good buyer's lawyer will make sure their client has reviewed these plans.*

*Amendments*: The declaration can only be amended by a vote of the unit owners at a properly noticed association meeting (see MCA §1603-108) called according to the project documents and MCA §1602-117. Changes must be approved by at least 67% of all unit owners or any higher percentage described in the declaration. Some amendments require approval of 100% of the unit owners, such as amendments to change unit boundaries or unit use restrictions. MCA §1602-117(c). All amendments must be recorded in the Registry of Deeds to be effective.

*Unit Restrictions*: It is important to note that any restrictions on the use (what can be done in the unit), occupancy (who can reside in the unit) and alienation (unit sales and leases) of units must be in the declaration per §1602-105(a).

*Warning: Always work from signed copies of the declaration and plans which show Registry of Deeds recording information! Any other copies may not be accurate!!*

2. Association Bylaws: The document usually created by the developer which establishes the process by which the condominium association conducts its business, and sometimes contains use restrictions and other rules affecting the project. MCA §1603-106. Bylaws contain important rule for electing board members and officers, holding meetings, adopting budgets, collecting dues, and other management issues. The bylaws for MCA projects do not have to be recorded in the Registry of Deeds, but some bylaws are recorded there anyway.

*Note: Some poorly drafted bylaws have other terms such as project restrictions. Bylaws cannot affect the use, occupancy, lease, or sale of units so any such restrictions on unit should be moved to the declaration or deleted to avoid confusion.*

Bylaws can only be amended by a vote of the unit owners at an association meeting with proper notice. See MCA §1603-108. The bylaws will describe how many votes are needed. MCA §1603-106(a)(6).

3. Rules and Regulations of Association: The Board has the power to adopt and amend "rules and regulations" regulating the use of common elements and imposing late fees for late payments and fines for violations of the project documents unless *the declaration states otherwise*. MCA §1603-102(a)(1) and MCA §1603-103(a). They usually deal with issues such as use of common facilities (guest parking, swimming pools, tennis courts), trash collection, and common element pet control. They can also supplement the administrative matters described in the bylaws.

*Note: Again, the rules and regulations adopted by the Board cannot affect the use or occupancy of the units or the ability to sell or lease units. MCA §1602-105(12). Any such rules should be stricken from the rules and regulations adopted by the Board.*

*Warning: Many board members focus exclusively on their rules and regulations and forget all about the restrictions on the units and common elements found in the declaration. The best practice is to reference the declaration restrictions at the beginning of the rules and regulations and attach a copy of them. None of the rules and regulations adopted by the Board can be inconsistent with the restrictions found in the declaration.*

*Political Signs:* MCA 1603-106(c) prohibits the declaration, bylaws or rules and regulations from preventing a unit owner from placing a sign on their unit to support or oppose a political candidate of referendum question from 6 weeks before an election and one week after it.

4. Secretary of State Records:

a. Articles of Incorporation: A document created by the developer and filed with the Maine Secretary of State, which is how the association is lawfully created. It occasionally contains specific project information and/or any use or voting restrictions.

b. Annual Report: A report filed with the Secretary of State each year describing the current Board members and officers of the association. It needs to be filed by June 1st to maintain the good standing of the association.

5. Association Documents: Effective in September of 2011, all boards need to maintain files of 11 specific sets of documents, including all the project documents described above, an *alphabetized lists of unit owners*, meeting minutes, financial statements, and other important documents. MCA §1603-118(a). These association documents must be made available for inspection by all unit owners within 10 days of receipt of a written request for them. MCA §1603-118(b).

*Practice Tip:* Whether the board keeps paper copies in a file, pdf copies on their computers, or document images on the association website, it is important to *update these documents* whenever changes are made, such as document amendments, annual insurance policy renewals and unit sales that will change the list of unit owners.

## E. Organization of Condominium Association

1. Board of Directors/Executive Board ("board"): When projects are first created, the declaration may describe a time period when the declarant has the power to appoint and remove the members of the Board. MCA §1603-102(d). This declarant control period must end: (a) five years from when the first unit was sold; (b) 7 years after the first unit was sold if the declarant has reserved development rights; or (c) 60 days after 75% of the units have been sold. A declarant may surrender this right at any time.

The unit owners then elect the board members at a transition meeting of the association and then at each the annual meeting. A majority of board members must be unit owners, spouses of unit owners, or representatives of owners which are organizations. MCA §1603-103(e). The bylaws often describe other qualifications and terms for board members that must be complied with. The recommended structure is for the term for each director to last 2-3 years, and for the terms to be staggered so that some new directors but not all board members are elected each year, if allowed by the declaration.

*Decisions*: Boards can make lawful decisions at properly called board meetings. Boards may vote to delegate authority for a specific task to one or more board members and/or officers. If the members of a board communicate between board meetings to make time sensitive decisions, those decisions should all be ratified at the next board meeting. Board can also made decisions with the written consent of all board members, but that process is not recommended as it may discourage discussion of the issue.

*Precedents*: Some board members are afraid to make controversial decisions because they incorrectly think the board's decision will become a precedent that is binding on future boards. *Board decisions are not precedents.* Boards can and do make different decisions on the same issue at different times because board members have changed their minds or there are new board members.[2] Boards are encouraged to be consistent as much as possible but are not bound by prior board decisions.

2. Officers: A president, secretary, and treasurer are the most common officers and the bylaws should describe these positions. The officers are elected by the board members, which is best done each year after the annual meeting when board members are elected. MCA §1603-106(2). The bylaws should establish the qualifications and duties of each officer the powers of each officer and the method of electing and replacing officers.

*Decisions:* Unlike officers of many for-profit corporations, *association officers have no power to take any action without a vote authorizing the action taken at a board meeting*. The only special power held by an officer is the president's power to preside at meetings.

*Responses from board members and officers*: Many individuals in these positions report being overwhelmed responding to inquiries from unit owners. Other than providing readily available information, board members have no authority to take any action or even give meaningful feedback. The best response is to let the unit owner know that the board will discuss the inquiry at its next board meeting and that someone will then respond.

[2] Boards cannot make different decisions if those decisions violate the Maine Human Rights Act or similar laws.

3. Registered Agent: Appointed by the board, the individual must be a Maine resident and is the formal contact person with the Maine Secretary of State's office. Registered agents can be served with process in any lawsuits filed against an association. The association's attorney often fills this position.

4. Meetings: There are two kinds of meetings in any association.

a. An "*association meeting*" is a meeting of all unit owners which must occur at least once a year, typically at an annual meeting. Unit owners elect directors at the annual meeting. All budgets adopted by the board must be ratified at an association meeting. Special meetings may be called as necessary, such as meetings to consider amending the project documents. MCA §1603-108 requires that notices of meetings to be mailed or delivered between 10 and 60 days of the meeting. The declaration and/or bylaws may have other requirements for notices, quorums, and voting rights and procedures that should be carefully followed.

Proxies: Unit owners can give written *proxies* to others to attend meetings for the unit owners and to cast votes for the unit owners. MCA §1603-110(b). Proxies can be general where the proxy holder can decide how to vote on some or all issues or specific where the proxy holder is directed to vote in a certain way on some or all issues. Some project documents require proxies to be filed with the secretary *before* the meeting begins.

b. A "*board meeting*" is a meeting of the board members, which often occur several times each year. Again, the project documents notice and quorum requirements for board meetings should be carefully followed. Effective in September of 2011, all boards need to give "timely notice" to unit owners of the "date, time and place" of the meeting and the "topics proposed to be discussed" at all board meetings, and all unit owners are allowed to attend all board meetings subject to reasonable rules established by the board. MCA §1603-118.

Boards may only go into *executive sessions* (no other unit owners allowed) for the five specific reasons described in MCA §1603-108. The board cannot make any decisions in an executive session.

## F. Common Elements

Common elements are everything in the project except the units. MCA §1601-103(4). Limited common elements are part of the common elements. MCA §1601-103(16).

1. Use of Common Elements: Rules for the use of the common elements are initially established by the terms of the recorded declaration. Within those limits, boards have the authority to adopt additional rules on how the common elements may be used.

2. Unit Owner Alterations: Boards often have to deal with unit owner requests to the board to alter the common elements, such as a request to enclose a deck with a sunroom, add a dormer to a roof or adding a generator behind a unit. Boards are encouraged to have *written policies* in its rules and regulations for considering these requests *before* any request is considered. At least two options exist for documenting the unit owner's right to use the common elements. One, the declaration can be amended to change the unit boundaries, but that change requires approval of 100% of the unit owners. A more practical method is having the board give the unit owner a permanent easement to use and maintain the affected area of the common elements. MCA §1603-102(9). Whatever agreement is reached, it should be put in writing and recorded in the Registry of Deeds to alert future owners of the affected unit.

*Warning*: Boards should never allow unit owners to do maintenance work on any common elements, including limited common elements, even if the unit owners are responsible for the costs. Boards should require that the association be a party to any contract for changes or improvements to the common elements, including limited common elements. The Board needs to be sure that all contractors who work on common elements are qualified to do the work and are properly insured and that the work is done properly and meets or exceeds existing quality standards. The Board needs to be able to pursue warranty claims directly against any contractor who does faulty work on common elements.

3. Sale of Common Elements: Some associations have surplus land that they want to sell to raise funds. Current zoning requirements, including planning board approvals, must be considered carefully before any sale is considered. A minimum of 80% of unit owners must approve a sale of common elements in writing. MCA §1603-112. Some condominium documents impose a requirement that 100% of all unit owners approve any sale of common elements.

4. Maintenance of Common Elements: MCA §1603-107 states that the association must maintain the common elements, including the common elements, unless *the declaration states otherwise*.

MCA §1603-115(c) also states that to the extent *required* by the declaration, the cost of maintaining *limited common elements* shall be assessed against the benefitted units.

Some declarations give the unit owners the authority to maintain their own limited common elements. The board should still manage proposed alterations as described above.

Warning: Some boards have allowed unit owners to maintain the landscaping outside of their units, especially with townhouse style units. In these cases, the board should still approve any changes to landscaping. Problems with the project appearance have developed when different unit owners maintain landscaping to different standards.

## G. Insurance

MCA §1603-113 describes the insurance that the association is required to maintain:

Property Damage: MCA §1603-113(a)(1) requires the association to ensure the common elements, including the limited common elements, at 80% of actual cash value when the insurance is purchased. If units have horizontal boundaries between them (multi-story projects), then the association must insure the units, too. The declaration can require the association to insure all units. MCA §1603-113(b).

Liability Coverage: MCA §1603-113(a)(2) requires liability insurance, including medical payments, for claims arising out of the use, ownership, or maintenance of the common elements.

MCA §1603-113(c) allows the association to obtain other insurance. Common insurance purchased includes:

Director and Officer Coverage: Personal insurance coverage for claims against individual board members and officers in managing the project is also available.

Errors and Omissions Coverage: Insurance coverage for negligence committed by officers and directors' coverage for loss of funds due to dishonest board members and officers is recommended.

Unit Insurance: Unit owners must provide insurance for the improvements and personal property in their own units and liability for events happening in the unit unless the association provides that insurance.

4. Damage Claims: The first step is to determine whether the damage is to a unit or the common elements.

a. Common element damages: insurance claims need to be filed and adjusted by the board with the association's insurance company. MCA §1603-113(e). The insurance proceeds are payable to the association for the benefit of the unit owners when units are damaged.

b. Unit damages: Sometimes the association insures units. If so, see (a) above. Sometimes the unit owners insure units. If so, then the unit owner needs to file

insurance claims with their insurance company. Sometimes both the association and the unit owner insure the units. If so, then both parties need to file separate claims with their insurance companies.

*Warning:* Sorting out responsibility for damages can be trickier than it appears. Some insurance companies give out inaccurate information.

*Common Misunderstanding: The roof leaks and a unit is damaged by water. Many assume that the association is responsible for all damage caused by the roof leak. However, unless the roof leak was caused by the negligence of the association, the association must repair the roof leak promptly, but the unit owner is responsible for repairing the damage to the unit. There is no strict liability for damage to a unit caused by the failure of the building common elements surrounding the unit.*

## H. Annual Budgets/Assessments/Interest/Late Fees/Costs/Fines

1. Annual Budget: The board must adopt a budget prior to each fiscal year and send out a summary of it to unit owners within 30 days of being adopted, with the date of a ratification meeting to be held not less than 10 days or more than 30 days after the summary is sent by the board. The budget adopted by the board will be deemed ratified *unless it is rejected by a majority of all unit owners* at the ratification meeting. MCA §1603-103(c). The properly adopted budgets become the basis of assessments (dues) on unit owners.

2. Assessments ("dues"): Dues must be assessed according to the MCA §1602-107 *allocations* for units created by the declaration, which must be based on a formula that cannot favor units still owned by the developer. The board can decide how the dues are paid by unit owners, and the most common method is monthly payments. Dues accrue when a unit is lawfully created, not when it is physically constructed, and dues on "unbuilt units" can be a surprise to unwary developers. Any unpaid dues create *personal liability* for the owners of the unit.

3. Special Assessments: Boards that want to make special assessments outside of the normal budget need to comply with MCA §1603-103(g). Unit owners must ratify the special assessments just like budgets. Boards may make special assessments of up to two months of dues without ratification in the case of an emergency.

4. Late Fees: Late fees can be added to an account as authorized by the declaration bylaws and/or rules and regulations. Late fees imposed by the board must be reasonable. MCA §1603-102(a)(11) describes the power to impose charges for the late payment of assessments. *The board should adopt a late fee policy in its rules and regulations before assessing late fees.*

5. Interest: MCA §1603-116(a) describes the association's lien on units for unpaid assessments. See section I below. It also states that unless the declaration says otherwise, the association can impose interest as a "charge for the late payment of assessments". Having the right to charge interest set forth in the project documents is preferable.

*Note*: While the board can assess interest on unpaid dues, special assessments, and out-of-pocket collection costs and fines, it cannot charge interest on previously assessed interest and late fees. Treasurers and property managers need to be sure that their accounting programs compute interest properly.

6. Costs and Legal Fees: MCA §1603-116(g) states that a judgment entered in a lawsuit for the collection of lawful dues must award costs and reasonable legal fees to the prevailing party. *It is better for the right to collect legal fees and costs for all collection work, whether a lawsuit is filed or not, to be specifically described in the declaration or bylaws.*

Note that the Maine Supreme Court has approved *imposing defendants' legal fees on condominium associations* when the associations have not been the prevailing party. Therefore, before bringing a collection action, the board should be certain that it can prove that the budgets that led to the dues being collected were properly adopted and that the assessments were properly made. See *Stage Neck Owners Association v. Poboisk*, 1999 ME 52, *Villas by the Sea Owners Association v. Garrity*, 2001 ME 93, and *Seacoast Hanger Condominium II Association v. Martel*, 2001 ME 112.

7. Fines: In addition to whatever rights are described in the declaration and/or bylaws, the Board may impose fines for violations of the declaration, bylaws and rules and regulations. It is recommended that all boards adopt a uniform schedule of fines and add them to the rules and regulations. Before the board can impose any fines on unit owners, it must provide notice of a meeting giving the offending unit owner the opportunity to be heard. MCA §1604-103(a)(7)

8. No Two Month Assessments for New Owners: The project documents cannot create an assessment of two months of dues on units which have been sold from one owner to a new owner. MCA §1602-107(a) states that dues must be assessed according to the allocated interests described in declaration. Those assessments are only authorized for initial sales from the declarant to the first unit owners, and then only if the charges are described in the public offering statement. MCA §1603-102(a)(11)

9. 2009 Escrow Law: For units that are purchased after October 1, 2009, the board can require that a new unit owner pay up to six months of assessments to the association at the time of the closing on the purchase of the unit. The board needs to place the funds in an escrow account, with the interest payable to the unit owner. The escrow account must

be returned to the unit owner when the unit is sold, less any amount deducted for unpaid dues. MCA §1603-115-A. I have yet to see a board impose this assessment.

## I. Association Liens for Unpaid Assessments:

1. Association Lien: **The Maine Condominium Act gives an association an automatic lien on a unit the moment dues are not paid when due.** MCA 1603-116(a). No action is necessary by the Board to create a lien on the unit. **Recording a "lien certificate" or "notice of lien" document in the Registry of Deeds is *not recommended.***

*An enforcement action must be brought within 6 years from the date the assessment was due, or the lien will expire. MCA 1603-116(e).*

2. Priority of Association Lien: The automatic lien held by an association has a higher priority over all other liens on a unit *except*: (a) the lien of the first mortgage deed and (b) the lien of the town or city for unpaid real estate taxes. Having a priority over a second mortgage give the board leverage of that mortgage lender.

3. Paper Registry of Deeds Liens*:* Some boards, officers and property managers file a piece of paper in the Registry of Deeds called something like a "lien certificate" or "notice of lien" when dues are unpaid. That practice is a *waste of time and money,* because when a unit is sold or refinanced, a resale certificate will be produced by the board showing what the seller owes in dues. It is also a very passive collection method that puts no immediate pressure on the unit owner. Furthermore, once the dues are paid, the board must spend time and money preparing a lien discharge and recording it in the Registry of Deeds, too.

Significantly, *the practice of recording lien certificates in the Registry will sometimes lead to a considerable loss to the association.* Unit owners who are unable to pay their dues are often unable to pay their first mortgage loans either. When the first mortgage holder files a foreclosure action, it must name the holder of all subordinate liens to eliminate their liens, which includes the condominium association. If an association has recorded a lien document in the Registry of Deeds, then it will assure itself that it will be named as a party-in-interest in the foreclosure action and will face having its lien on a unit extinguished with no funds collected.

However, when an association relies only on the automatic unrecorded lien on a unit, sometimes the association is not named in the first mortgage foreclosure action because of errors made by bank "foreclosure factories" which are not always careful in their work. When that happens, once the foreclosure action and public sale are completed, the association will still have its lien on the unit for all of its unpaid dues etc., and it can demand full payment of its account from whoever purchased the unit at the foreclosure

sale, which is usually the bank. In 2018, I had an association client with a very large unpaid unit account due to extended bankruptcy and foreclosure proceedings. It was not named in the foreclosure action and it collected more than $30,000 in dues, interest and legal fees from the foreclosing mortgage lender when it tried to sell its unit. If this association had put a paper lien document in the Registry of Deeds, then it would have received nothing.

J. Collection Options:

1. Lien Foreclosure Actions: *If there is equity in a unit after considering the value of the unit and amount of the first mortgage and unpaid real estate taxes,* the best method of collecting unpaid dues is to bring a collection/lien foreclosure lawsuit against the owners of the unit, seeking an order declaring the amount due to the association and allowing the public sale of the unit for unpaid dues if the amount is not paid in 90 days.

If there is value in the unit above the amount of the outstanding first mortgage debt and real estate tax liability, I have always been able to collect all dues etc. on a delinquent account. Holders of second mortgages and other secured liens need to be named in the action to have their liens removed from the unit.

Once a lien foreclosure action has been commenced in court, then the *board can no longer accept partial payments* on the account (unless it has a written repayment agreement), or the lien foreclosure action will be waived. The board only has 10 days to return a payment received during a lien foreclosure action. 14 M.R.S. §6321.

After a lien foreclosure action has been started, if the unit owner wants to enter into a repayment plan, the lien foreclosure action can be stayed instead of dismissed. If the unit owner defaults on the repayment plan, the lien foreclosure action can be resumed. 14 M.R.S. §6321.

The legal fees and costs reasonably necessary for such an action can usually be added to the account. Any lien foreclosure action should include a separate cause of action against the unit owners for their personal liability for the dues etc.

2. Collection Actions: If there is no equity in a unit and the unit owners have other assets, then the better option may be to file a collection action on the unit owners' personal liability for assessments, etc.

a. The association can appear in Small Claims Court without an attorney if an officer or employee of the association attends the hearing. Property managers and collection agents usually are not employees.

b. If the claim is for more than $6,000[3], then the action must be filed in District Court or Superior Court, and an attorney will be required.

3. Disclosure Hearings: Once a money judgment is obtained from any court in a collection action, the board can bring a disclosure action in District Court, where the Court will make the unit owner disclosure income and asset information and may order monthly payments to be made. If the unit owner then fails to make the payments, the unit owner will face civil arrest and imprisonment.

4. Repayment Agreements: In some cases, the board may want to enter into a repayment agreement with the unit owner, which generally should require that the unit owner make all dues payments going forward ***plus*** an extra sum to apply to past amounts owed.

## K. My Proven Collection Method

1. Do Not Delay: Boards should never let a unit owner get more than two months behind in dues payments before starting a collection effort. I recommend that all boards adopt a policy on when and how its collection efforts will take place. No matter how sympathetic a unit owner's story may be, the *board has a fiduciary duty* to all unit owners to collect all dues.

2. First Attorney Letter: Once the association's own collection efforts have failed, I often get hired. The first step is to send a polite letter to the unit owner. The letter lets the unit owner know that I have been hired, that a relatively small amount of legal fees have been added to their account, and that I will be starting a collection proceeding soon, usually in about two weeks. That letter will often lead to a payment.

3. Second Attorney Letter: If the First Attorney Letter is ignored, I then take the time to check Registry of Deeds and municipal assessment records to determine the apparent equity in the unit and to discuss collection options with the board or its property manager. Once a collection strategy is in place, the unit owner gets a second more serious letter from me letting the unit owner know that a lawsuit is coming unless payment is made in the next week or so. This second letter usually gets most unit owners who ignored the first letter to pay up.

4. File an Action: If the Second Attorney Letter is ignored, too, then I get moving on one of the options described above.

*In 40+ years of representing condominium associations, this method has never failed to force unit owners to pay up when there is equity in a unit over the amount of the first mortgage and unpaid real estate taxes!*

[3] This limit is periodically reviewed and increased. 14 M.R.S. §7482. The last increase was in 2009.

## L. Mortgages on Units, Foreclosure Actions, and Bankruptcy Filings

1. Eligible Mortgage Holders: The holder of a first mortgage deed on a condominium unit can become an 'eligible mortgage holder' *by sending a specific written notice to the association.* Once that step is taken, the eligible mortgage holder has the right to receive notices of major decisions affecting the unit, and sometimes has the power to vote for the unit owner on certain issues. MCA §1602-119 and the terms of many declarations provide further details. At this time, I am not aware of any institutional mortgage lenders which routinely give this notice to associations, so EMHs are very rare.

2. Fannie Mae Regulations: The Federal National Mortgage Association (FNMA aka Fannie Mae) is a federal agency which insures many first mortgage loans on residential units, allowing for interest rates that are somewhat below market value, which can increase the value of a unit and therefore a project. It establishes other important requirements for condominium documents before it will insure mortgage loans for units, such as the fact that developer's retained rights cannot last more than 7 years, and management contracts with property manager must be able to be terminated for any reason by an association in 90 days. While many projects were created with these rules in mind, many others were not, requiring an amendment to the condominium documents by the unit owners if such financing is to be available for units in those projects.

3. Bank Foreclosure Actions: Holders of first mortgages should always name condominium associations in mortgage foreclosure actions on condominium units. The board should respond to any summons and complaint served on the association if there is equity in a unit, to be sure it gets any available funds from the public foreclosure sale of the unit. Only a licensed Maine attorney can file an answer with the Court. A completed foreclosure action in which the association was named and sale of a unit will extinguish its lien on the unit.

*Dues from foreclosing bank*: If an association loses its lien on a unit due to a first mortgage foreclosure, then it can begin charging the foreclosing lender dues *at the end of the 90-day redemption period* after a foreclosure judgment is entered, since the former owner no longer owns the unit and is no longer liable for assessments. An association can only pursue the former unit owner in a collection action for prior unpaid dues. Many foreclosing mortgage lenders incorrectly believe that they do not have to pay dues on the unit until after the public foreclosure sale, which can happen many months after the end of the 90-day redemption period. Those mortgage lenders often resist making those payments, but when they find a buyer for their unit, the association can list all unpaid dues etc. on its resale certificate for the closing.

The association cannot add its legal fees for protecting its lien to the unit owner's account unless the declaration and bylaws allow it. Many declarations do not.

4. Unit Owner Bankruptcies: While a bankruptcy filing by a unit owner may stop an association from pursuing claims that existed *prior to the filing*, it does not stop the association from charging new dues *after the filing* and initiating collection efforts if needed. The association *may need to file a proof of claim* with the bankruptcy court to recover past due amounts owed as of the date of the filing.

Again, the association cannot add its legal fees for protecting its lien to the unit from the unit owner's account unless the declaration and bylaws allow it. Many declarations do not.

## M. Unit Sales/Disclosures

1. Initial Developer Sales: Developers of most projects must produce a **public offering statement** in accordance with the MCA requirements. MCA §1604-102. Among other things, the public offering statement must include a written description of the condominium, the basic components of the project and a projected budget. MCA §1604-103. It also needs to include copies of the condominium project documents and financial information about the association. If the declarant has reserved development rights, then other disclosures are required by §1604-104. If a project is created in an existing building such as an apartment house, then MCA §1604-105 requires more disclosures.

For projects with 12 or fewer units with no reserved development rights and no power to make the project part of a larger project, the public offering statement can be just the declaration and bylaws. MCA §1604-103(b).

If a proper public offering statement is not delivered to a prospective purchaser *before* a contract for the sale of the unit is signed, a prospective purchaser can terminate a contract for sale at any time prior to closing. Once a buyer closes on the purchase of a unit, the right to cancel the contract for the lack of a proper public offering statement ends. MCA §1604-107.

*Warning*: Public offering statements are very helpful to unit owners when the developer is selling units, but the older they are, the less accurate they become. The public offering statement text describing the project becomes meaningless after a unit is sold. Many of them contain copies of the project documents that are not signed or have not been filed in the Registry of Deeds. Over time, the documents in them get amended and new budgets get adopted. *Boards should not rely on public offering statements for ongoing management of a project but rather should rely on the 11 sets of association records listed in MCA §1603-118 described above.*

2. Development Rights: Under the MCA, a developer can easily create "phased projects" and retain rights such as the right to add new units, add or remove land to/from the initial project, or add common elements with what are generally known as

"development rights". §1601-103(11). The development rights must be described in the declaration with a time limit on when they must be exercised. MCA §1602-105(8). The public offering statements for development rights projects must contain the additional disclosures described in MCA §1604-104.

3. Special Declarant Rights: A developer can also reserve special declarant rights, such as the right to use the project after units are sold to continue working on the project improvements and other units, the right to maintain a sales office, and the right to add the project to a larger project. §1601-103(25). Again, the special declarant rights must be described in the declaration with a time limit on when they must be exercised. MCA §1602-105(8).

4. Unit Resales: When units are resold between unit owners, no public offering statement is required. However, the seller must obtain a **resale certificate** from the association, and deliver it to the prospective purchaser. MCA §1604-108(a). The Board must produce a resale certificate for a unit owner within 10 days of a written request. MCA §1604-108(b). The board may charge a reasonable fee for preparing a resale certificate. MCA §1603-102(a)(12). The resale certificate must contain financial information about the association, the status of the dues account on the unit being sold, current copies of the condominium documents, and other important information.

A prospective purchaser has five days from the receipt of a complete resale certificate to terminate a contract for sale at any time prior to closing. Again, after the closing, this right to cancel a contract ends. MCA §1604-108(a). Many real estate brokers overlook this fact and do not seek resale certificates with purchase and sales contracts are signed, giving the buyer the option to terminate any sales agreement at any time.

*Warning: Many resale certificates produced by boards and their property managers fail to comply with MCA §1604-108(a), usually because they fail to include copies of the current declaration, bylaws and rules and regulations as required. Maintaining updated association records in accordance with MCA §1603-118 makes producing a valid resale certificate simple.*

*Warning: The MCA does not require the resale certificate to include the plats and plans showing the unit, the floor plans, the building elevation and the site plan showing driveways, parking areas and limited common elements. Purchasers should always see the documents prior to closing.*

## N. Warranties on Units

1. Common Law: The "common law" is the law established by decisions of the Maine Supreme Court and it generally favors sellers of real estate. *Stevens v. Bouchard*, 532 A.2d 1028 (Me. 1987) establishes that there are no implied warranties in the sale of real estate between parties as a general rule, as the buyer was unable to collect the cost of repairing a leaky roof even after proving that the seller knew about the leak. When a buyer purchases a unit from another unit owner, there are generally no warranties on the condition of the unit from the seller.

Parsons v. Beaulieu, 429 A.2d 214 (Me. 1981) describes the implied warranty imposed on builders of new homes (declarants) that the work be done in a reasonably skillful and workmanlike manner. *Dunelawn Owner's Association v. Gendreau*, 2000 Me. 94 discussed this common law warranty as it applied to the sale of a condominium unit, and the Court held that there is a six-year statute of limitations on bringing claims under this implied common law warranty.

2. Statutory Warranties: The MCA imposes specific warranties on the developer's sale of condominium units. The express warranties of quality (MCA §1604-112) and implied warranties of quality (MCA §1604-113) cannot be waived by a buyer of a residential unit, except for a specific defect which is disclosed to a buyer at the time an agreement is signed. These warranties can be transferred from one unit owner to subsequent owners of the unit. Note that the normal 6-year time period to bring claims under these warranties can be reduced to 2 years if the buyer signs a *separate agreement* at closing by which the buyer agrees to reduce the normal 6-year time period.

Chris Neagle, Esq.
Neagle Law LLC
76 Orchard Road
Cumberland, Maine 04021
(207) 850-4211
chris@neaglelaw.com