

Issues every real estate player should consider in condominium bulk sales

BY BENJAMIN E. WILSON

Esq., Shutts & Bowen LLP



Since the enactment of the Distressed Condominium Relief Act on July 1, 2010, more real estate investors have become interested in acquiring these condominium units in a bulk sale and

taking advantage of the protections provided under the Act. While many condominium bulk sales have occurred, opportunities remain, and more will likely arise in the future. This article is designed to highlight some, but certainly not all, of the unique issues that any potential bulk purchaser must consider.

STATUS OF CONSTRUCTION:

The quality of construction of the condominium project must be evaluated by a bulk purchaser prior to it being obligated to proceed with a bulk sale. While the Florida Condominium Act imposes implied construction warranties from condominium developers, contractors, subcontractors, and suppliers, those warranties may have expired or the party responsible for those warranties may be long gone or have little or no assets. If that is the case, the costs of repairs would be passed on to the bulk purchaser (to the extent the repairs are necessary to the condominium units being purchased) or the bulk purchaser and the other unit owners (to the extent the repairs are necessary to the common elements of the condominium), and this will certainly affect the amount a bulk purchaser is

willing to offer for the property.

TO BE A "BULK ASSIGNEE" OR "BULK BUYER:" THAT IS THE QUESTION:

Upon the enactment of the Distressed Condominium Relief Act, bulk purchasers were provided with the opportunity to qualify as either a "bulk buyer" or "bulk assignee" and receive certain statutory exemptions from liability imposed upon condominium developers if the bulk purchaser acquired more than seven units in the condominium. Presently, the Distressed Condominium Relief Act applies to bulk sales occurring on or after July 1, 2010, but before July 1, 2012; however, there are proposals to extend the term of this act for as much as five years.

There is a difference between being classified as a "bulk buyer" or a "bulk assignee." The decision of whether a bulk purchaser should be a "bulk assignee" or "bulk buyer" depends upon the facts of the particular deal and the goals of the bulk purchaser. To qualify as a "bulk buyer," a bulk purchaser must acquire more than seven condominium units in a condominium and receive an assignment of some or all of the following reserved "developer rights" under the condominium declaration: (i) the right to conduct sales, leasing, and marketing activities within the condominium; (ii) the right to be exempt from the payment of working capital contributions to the condominium association arising out of, or in connection with the bulk acquisition, to the extent applicable, and (iii) the right to be exempt from any rights of first refusal that the condominium association may have over future sales. *Unlike a "bulk assignee," a "bulk buyer" is not liable for any duties or responsibilities of the developer of the condominium unless*

the bulk buyer assumes those duties or responsibilities in writing.

To qualify as a "bulk assignee," a bulk purchaser must acquire more than seven condominium units in a condominium and receive an assignment of "developer rights" other than the three "developer rights" that a "bulk buyer" is entitled to receive. These additional developer rights may include (i) the right to be exempt from condominium association approval of condominium unit sales or alterations to a condominium unit, (ii) the right to amend the condominium declaration, and/or (iii) the right to assign limited common element parking spaces. *Unlike a "bulk buyer," a "bulk assignee" assumes all duties and responsibilities of the developer, but a "bulk assignee" is not responsible for (1) the implied construction warranties under the Florida Condominium Act (though the exemption does not apply to work subsequently performed by the "bulk assignee"), (2) the obligation to fund conversion reserves or warranties under Section 718.618 of the Florida Condominium Act, and (3) the obligation to fund any amounts due under an assessment guarantee of the developer that may remain in place, unless the "bulk assignee" elects to assume those obligations.* Further, a "bulk assignee" has the option to assume control of the condominium association's Board of Directors and assume no liability relating to the prior actions of the developer-appointed Board of Directors, *though that control period will be temporary.*

CONDOMINIUM ASSOCIATION ISSUES:

In addition to verifying if turnover of control of the condominium association

has occurred, there are many other matters related to the condominium association that must be verified by a bulk purchaser prior to its purchase.

Have all assessments been paid by the seller? Under the Florida Condominium Act, condominium unit owners are jointly and severally liable with prior owners for past-due assessments, with certain limitations applying to the liability of acquiring first mortgagees.

What is the status of delinquent assessments at the condominium as a whole? This is a very important issue because condominium unit owners may be subject to a special assessment to cover any budget shortfall. Further, a high delinquency rate in assessment payments may affect the ability of future purchasers of the bulk purchaser to obtain loans to purchase condominium units, or the ability to properly operate and maintain the project.

Are all required insurance policies, service contracts, and other association records in place?

Was the funding of reserves for capital expenditures (such as the roof and driveway) properly waived? If not, the seller should be required fund its share of the reserves prior to closing of the bulk sale.

As you can see, condominium bulk sales are complex and present many time-consuming issues, including issues not raised here (such as lien or land use/zoning issues), that a bulk purchaser and its advisors should address when contemplating a condominium bulk sale.

If you have any questions regarding this article or bulk sales in general, please feel free to contact me at Shutts & Bowen at 305-358-6300, or by email at bwilson@shutts.com.