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Montana Condominium Act – Liens and Legalities
As Applies to Bay Point on the Lake
October 2006

Montana condominiums are governed by the Unit Ownership Act, ' ' 70-23-101, *et seq.*, MCA. Section 70-23-308(6), MCA, provides that condominium bylaws must provide for the manner of collecting from unit owners their respective share of the common expenses as that term is defined by ' 70-23-102(4), MCA. Section 70-23-504, MCA, states:

Maintenance and improvement of common elements.

- (1) The necessary work of maintenance, repair, and replacement of the common elements and additions or improvements to the common elements shall be carried out only as provided in the bylaws.
- (2) The association of unit owners shall have the right, to be exercised by the manager, to have access to each unit as may be necessary for the maintenance, repair, or replacement of the common elements or to make emergency repairs therein necessary for the public safety or to prevent damage to the common elements or to another unit.

The term Acommon elements@ includes both general common elements and limited common elements pursuant to ' 70-23-102(3), MCA.

The Unit Ownership Act specifically provides that the association shall have a lien upon an individual condominium unit and the undivided interest in the common elements appertaining to such unit for the reasonable value of common expenses subject only to liens for taxes and assessments and a first mortgage or trust indenture lien. Section 70-23-607(1), MCA. That statute also provides that the association, to claim a lien, shall record with the Flathead County Clerk & Recorder a claim containing:

- (a) a true statement of the account due for such common expenses after deducting all just credits and offsets;
- (b) the name of the owner of the unit or reputed owner, if known;
- (c) a description of the property where the common expenses were furnished and the designation of the unit, sufficient for identification.

Subsection (3) of the same statute provides that the claim of lien must be verified by the oath of a person having knowledge of the facts and shall be filed with and recorded by the Flathead County Clerk & Recorder in the same manner as the filing of other liens under Title 71, Chapter 3, Part 5.

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Section 70-23-608, MCA, provides that legal proceedings to foreclose a lien created by ' 70-23-607, MCA, shall conform as nearly as possible to the proceedings to foreclose liens generally in Montana as set forth in Title 71, Chapter 3, Part 5, MCA. Therefore, the lien shall not only be for the amount of the unpaid assessment, but also for attorney fees. The lien may be enforced by the manager acting on behalf of the association pursuant to ' 70-23-608, MCA.

It is noteworthy that ' 70-23-609, MCA, provides that if a foreclosure suit is filed against a condominium unit, the unit owner is required to pay a reasonable rental for the unit if so provided in the bylaws (and a such a provision is included in the Bay Point Bylaws) and the association in the foreclosure proceeding is entitled to have a receiver appointed to collect the rent. Thus, even during the pendency of the foreclosure proceeding, the non-paying owner of the unit in Building 14 must pay a fair rental value if he occupies the unit during the foreclosure proceeding.

The various documents recorded with the Flathead County Clerk & Recorder relative to formation of Bay Point Estates indicates that all such documents appear to be consistent with applicable Montana law. Building 14 is governed by the Declaration of Unit Ownership of Bay Point Estates No. 14 recorded in Book 562, Pages 1-45, records of Flathead County, Montana. All of the then existing Declarations were merged into one Amended Declaration and Statement of Covenants, Conditions and Restrictions by means of that document recorded in Book 737, Page 417, records of Flathead County, Montana. Under the merger, the stated desire of the owners was:

. . . so that they may use and enjoy their property as a single integrated entity with one association of owners, one set of bylaws, and one set of covenants, conditions and restrictions.

The merger document defined the term Acommon elements@ as consisting of both common elements and limited common elements, with reference to the applicable Montana statute. The term Alimited common elements@ was defined as including decks and provided that the costs of maintaining, repairing and replacing limited common elements are the responsibility of the unit owners to which such limited common elements are appurtenant.

Each owner of a condominium unit in Bay Point Estates is clearly subject to the recorded Declaration and Statement of Covenants, Conditions and Restrictions. Sections 4 and 5 of the merger documents state:

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4. Units subject to Declaration, Bylaws, Rules and Regulations, and Restrictive Covenants. All present and future owners of Units shall be subject to and shall comply with the provisions of this Amended Declaration, the restated Articles of Incorporation of the Association, the Bylaws, and any rules and regulations which may be adopted by the Association, as these documents may be amended from time by time by the Association. Amendments to the Bylaws shall be filed of record with the Flathead County Clerk & Recorder.

5. Binding Effect. All provisions of this document shall be covenants running with the land and shall bind any person having any interest in a Unit as though the provisions were recited and fully stipulated in each deed or conveyance thereof.

The Declaration of Unit Ownership of Bay Point Estates No. 14 stated, in ' 2(e) that:

All decks, either ground level or second floor, immediately adjacent to each unit shall be a limited common element for the use of each respective unit to which said decks adjoin. The expense of maintenance and repair of such decks shall be common expenses of all unit owners.

The CCRs applicable to each condominium include Section 11 titled ADefault in Payment of Assessments.@ Subsection (b) of that section states:

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At any time within ninety (90) days after the occurrence of any such default, the Board (acting upon the authorization of the majority thereof at any regular or special meeting) may give a notice to the defaulting owner, which said notice shall state the date of delinquency, the amount of the delinquency, and make a demand for payment thereof. If such delinquency is not paid within ten (10) days after delivery of such notice, the Board may elect to file a claim of lien against the unit ownership of such delinquent owner. Such claim of lien shall state: (1) the name of the delinquent owner or reputed owner, (2) a description of the unit ownership against which claim of lien is made, (3) the amount claimed to be due and owing (with any proper offset allowed), (4) that the claim of lien is made by the association pursuant to the terms of the Act, and (5) that a lien is claimed against said described unit ownership in an amount equal to the amount of the stated delinquency. Any such claim of lien shall be signed and acknowledged by any two or more members of the Board and shall be dated as of the date of the execution of the last such Board member to execute said claim of lien.

Upon recordation of a duly executed original or copy of such claim of lien in the office of the Clerk & Recorder, Flathead County, Kalispell, Montana, the lien claimed therein shall immediately attach and become effective, subject only to the limitations hereinafter set forth. Each default shall constitute a separate basis for a claim of lien or a lien. Any such lien may be foreclosed by appropriate action in court or in the manner provided by law. In the event of foreclosure of the lien, reasonable attorneys' fees and expenses shall be allowed to the extent permitted by law. In the event any claims of liens have been recorded as herein provided, and thereafter the Board shall receive payment in full of the amount claimed to be due and owing, then upon demand of the owner or his successor, and payment of a reasonable fee, the Board, acting by any two (2) members, shall execute and acknowledge a good and sufficient release of lien, such release of lien to be delivered to the owner or his successor upon payment of the fee.

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The Amended Bylaws of Bay Point Owners Association, Inc., a Montana nonprofit corporation, were recorded April 13, 1982 in Book 737, Page 512, records of Flathead County, Montana. Article 6 of the Amended Bylaws specifies certain powers and duties of the Board of Directors. Section 6.1.2 provides that the Board has the power and duty to enforce the Declaration, Articles, the Bylaws and other instruments relating to the ownership, management and control of Bay Point Estates. Section 6.1.6 provides that the Board has the power and duty to cause any common area to be maintained and to contract for goods and/or services for any common area. Section 6.1.12 specifies that the Board of Directors has the power and duty:

To fix and collect regular and special assessments according to the Declaration and these Bylaws, and, if necessary, to record a notice of assessment and foreclose the lien against any unit for which an assessment is not paid within thirty (30) days after the due date, or bring an action at law against the owner personally obligated to pay such assessment.

Article 8 of the Amended Bylaws deals with maintenance and assessments. Sections 8.2 and 8.3 provide:

.2 In the event of default by any unit owner in paying the Board of Directors the monthly assessed common expenses, the Board of Directors shall have the right to declare the entire annual assessment due and owing. The Board shall also have the right to assess a late penalty amounting to Ten Dollars (\$10.00) per month for monthly fees unpaid after the tenth day of any month. Furthermore, when a unit owner is declared to be in default, such unit owner shall be obligated to pay interest at the highest legal rate permitted on such common expenses from the due date thereof together with all expenses including a reasonable attorney=s fee incurred by the Board of Directors in any proceeding brought to collect such unpaid common expenses. The Board of Directors shall have the right and duty to attempt to recover such common expenses together with interest thereon and the expenses of the proceeding including attorney=s fees in an action brought against such unit owner or by foreclosure of the lien on such suit granted by Section 70-23-608, Montana Code Annotated, 1978;

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provided, however, that the purchaser at a foreclosure sale resulting from default under a first mortgage or trust indenture or a contract vendor reclaiming under applicable default provisions shall, consistent with Section 70-23-610, Montana Code Annotated, 1978, be responsible for no more than that unit=s proportionate share of the accrued common expenses in arrears on his or her unit. That proportionate share shall be the same as the percentage interest in the common elements appertaining to that unit. Liens for common expenses shall be subordinate to a mortgage or trust indenture previously given on any unit interest, and it shall be unnecessary for the holder of such mortgage or trust indenture to participate in any action resulting from liens for common expenses.

8.3 In any action brought by the Board of Directors to foreclose a lien on a unit or units because of unpaid common expenses, the unit owner shall be required to pay a reasonable rental for the use of his unit or units from the date the action is commenced and the plaintiff in such action shall be entitled to the appointment of a receiver to collect such rental. The Board of Directors, or the manager acting on behalf of the unit owners, shall have the power to purchase such unit or units at the foreclosure sale and to acquire, hold, lease, mortgage, vote the votes appurtenant to, convey or otherwise deal with the same. A suit to recover the money judgment for unpaid common expenses shall be maintainable without foreclosing or waiving the lien securing the same; provided, however, that no such suit or judgment shall be brought against a purchaser who obtains title as a result of foreclosure of the first mortgage or trust indenture for costs not incurred by him as an owner.

The Board clearly has the power and in fact the duty to proceed with the filing of a lien and, if necessary, the filing of litigation to enforce and foreclose such a lien. The Board should act in a timely manner to file a lien and then to foreclose against the owner, who would then be required to pay a reasonable rental during the pendency of the foreclosure proceedings if the owner occupies the unit during the foreclosure proceeding. If the particular condominium unit is in the Bay Point Rental Partnership, LLP, then the net rents otherwise payable to the owner should

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be applied by the court-appointed receiver to the amount sought in and expenses of the foreclosure litigation.