

## CONDOMINIUM MORTGAGE FINANCING

### INTRODUCTION:

Condominium mortgage financing is generally in one of two forms. During development of the project, the owner/declarant will have blanket mortgage financing in place. This type of mortgage will cover the entire property and is not substantially different from any other multi-unit construction financing mortgage. For this reason blanket mortgages will not be dealt with any further in this paper.

The second form of mortgage affecting condominiums is the unit mortgage which is placed once the condominium has been registered. It is this unit mortgage which differs from the conventional mortgage and deserves discussion.

By virtue of Section 16(7) of the Condominium Act (the "Act"), the unit mortgage is not enforceable against the common elements. This is an obviously necessary consequence of the condominium concept. The Act further provides in Section 16(8) that the mortgage is enforceable against a unit owner's common interest in the Condominium Corporation, as opposed to the common elements themselves. Section 15(1) of the act provides that the common interest of an owner is real property for all purposes. Accordingly, common interest becomes the proper subject matter of the unit mortgage. It is this distinction which give rise to many of the differences between a condominium unit mortgage and more conventional forms of mortgage.

As the solicitor acting for the mortgagee, there are two general steps in the transaction which ought to be addressed under this topic. The first is advising the mortgagee as to matters which arise out of the instructions. Relatively few mortgage lenders provide much beyond their conventional set of mortgage instructions when asking the solicitor to place a

condominium unit mortgage. Some of the provisions of conventional instructions either do not apply to the condominium situation or cannot be complied with. These are matters which ought to be addressed at the outset of the transaction. The second step of the process is in preparing the mortgage document and what ought to be included in the mortgage in order to adequately protect the mortgagee.

MORTGAGE INSTRUCTIONS:

Instructions forwarded from the mortgage lender may be detailed as to the specific requirements for a condominium loan, but they are just as likely to be silent on the point. They will undoubtedly contain matters which must be addressed with the mortgagee.

1. Survey

Mortgage instructions are likely to contain a clause requesting that you provide the mortgagee with a Plan of Survey or a Surveyor's Certificate showing the boundaries of the lands being mortgaged and all buildings or structures on the lands. In the case of a condominium, this is a requirement which is difficult, if not impossible with which to comply. The mortgagee should be advised that there is a Plan of Survey for the entire condominium building which is filed at the Registry of Deeds and of which a copy could be provided. This Plan will not, in all likelihood, show the individual unit and in that regard will be a departure from the instructions.

In many instances, the mortgagee will waive all requirements of survey in the case of a condominium once it has been advised as above. Most others will be satisfied with receiving a copy of the Plan of Survey for the condominium project as a whole. I am not aware of any situations where the

mortgagee has insisted upon some other form of survey being provided.

2. Insurance

The mortgage instructions will require confirmation of fire and hazard insurance and will be specific as to the form of mortgage clause to be inserted. In this regard, the Declaration must be reviewed very carefully. Although not required by the Act, invariably the Declaration will contain some form of provision with respect to the type of insurance which must be carried by the corporation and the manner in which the proceeds under such insurance will be disbursed in the event of a loss. In all likelihood, the proceeds will be paid to an insurance trustee who will then be obligated to carry out repairs in accordance with the terms of the Declaration. This will undoubtedly interfere with the standard policy clause making the loss payable directly to the lender.

The Declaration must also be reviewed for reference for the type of coverage to be provided by the condominium corporation. The corporation may only be obligated to insure the condominium property excluding the units. The definition of the units in the Declaration will likely include some structural elements within the boundaries of the unit. Accordingly, the unit owner must place insurance on the unit which should comply with the mortgage instructions. There may very well be a provision in the Declaration requiring the mortgagee of a unit to waive any right to the proceeds under such an insurance policy so as to not interfere with the scheme of the Declaration with respect to the insurance trustee.

Section 21(2) of the Act gives the unit owner the capacity to obtain insurance on his unit in a sum equal to the amount of the mortgage on his unit. This would appear to be

notwithstanding the issue of whether the unit owner has any insurable interest in the unit. Section 21(3) allows payment under such policy to be made directly to the mortgagees in order of their priorities.

3. Easements

In addition to any easements which appear in the title search, the mortgagee should be advised that Section 17 of the Act provides certain statutory easements which may or may not have any effect on the unit in question.

THE MORTGAGE DOCUMENT:

One of the essential conditions on the marketability of condominiums is that mortgage financing be as readily available on such units as it would be on traditional single family dwellings. In order to provide such equivalent financing, the mortgage lender will want security which is the equivalent of its traditional form of mortgage. The fundamental differences between the condominium and other forms of ownership require certain departures from the standard form of mortgage document. It is through the operation of certain sections of the Act and the insertion of these clauses that the mortgage lender will have a more equivalent form of security.

VOTING RIGHTS:

The undivided interest held by all the unit owners in the common elements results in part of the mortgaged security (i.e., the common interest) being beyond the complete control of the individual mortgagor. The mortgagee is well advised to

obtain the right to vote on all condominium matters in the place of the mortgagor.

Such right is granted in Section 24(2) of the Act provided that the mortgage contains a provision to that effect. In the case where there is more than one mortgage, the subsection further provides that the right to vote shall be exercised by the mortgagee with priority.

The provision in the mortgage may take one of several forms. The mortgagee may feel that it is impractical to vote at all meetings for a condominium corporation and may therefore authorize the mortgagor to vote unless and until notice is given to the condominium corporation of the revocation of this authorization. If this scheme is chosen, the mortgagee ought to obtain a covenant from the mortgagor that the mortgagor will give the mortgagee notice of all meetings and the issues to be decided at such meetings. Another alternative is to obtain such notice directly from the condominium corporation.

It is important that the provision regarding voting rights stipulate that the right to vote and the exercise thereof does not make the mortgagee a mortgagee in possession. This will help avoid any problem created by the mortgagee becoming a "owner" of the property and thereby becoming financially responsible for any debts of the corporation.

COMMON EXPENSES:

The Act gives the condominium corporation the power to levy funds from the unit owners for matters relating to the common elements. Section 19 of the Act gives the corporation a right of lien against the unit of any owner who does not pay such levy. Section 19(3A) makes the lien a priority over all encumbrances except taxes and for unpaid power supply.

Section 19(3B) further provides that the encumbrancers are permitted to pay the lien out and add the cost of doing so to the principal under the mortgage. Accordingly, it may not be necessary to set this out in the mortgage document itself.

The mortgagee might be well advised to insert a clause in the mortgage providing that default of payment of such a lien is a default under the mortgage with the attendant consequences.

The condominium corporation lien for unpaid common expenses resembles the lien of the Municipality for unpaid property taxes. In that regard, the mortgagee is well advised to provide in the mortgage that at any time the mortgagee is entitled to call upon the mortgagor to make monthly payments to the mortgagee on account of common area expenses which will then be paid by the mortgagee directly to the condominium corporation. To take the matter one step further, the mortgagee might be advised that the mortgage commitment should set out that monthly payments will be made as is commonly the practice with property tax payments.

**DUTIES AND OBLIGATIONS OF UNIT OWNER:**

In addition to payment of common expenses, the unit owner may have certain duties and obligations imposed by the Act, the Declaration or the By-laws. The mortgage should provide a covenant by the mortgagor to faithfully observe and perform all such duties and observations and that failure to do so constitutes default under the mortgage. In such a case, Section 25(1) of the Act provides that a mortgagee may make application to the Supreme Court for an Order directing performance of such duties. It should be noted that the duty may be one which is imposed upon either the unit owner or the condominium corporation. Section 25(4) provides that the ability of the mortgagee to have the matter heard by the Supreme Court

does not restrict the right to any other remedies for failure to perform the duty. Effectively this permits the provision suggested above regarding default under the mortgage.

**WASTE:**

The standard mortgage document will contain a provision regarding waste of the secured property by the mortgagor. In the context of a condominium, the question arises whether the mortgagee should be protected against waste occurring not to the unit itself but to the common elements. There may be some assistance provided to the mortgagee through Section 25 referred to in the previous paragraph. However, it may also be advisable to extend the provision regarding waste to any waste which occurs to the common elements. Caution might be in order with this advice in that there may be a concern over enforceability of a provision which is largely beyond the control of the mortgagor.

**CONCLUSION**

As mentioned in the introduction, I have attempted to look at the condominium mortgage from the point of view of the mortgagee as to proper instructions and the various methods and advice followed and required to implement those instructions. The point I wish to emphasize to all solicitors involved in putting a condominium mortgage on record at the Registry of Deeds is to read your instructions from the mortgagee carefully with particular emphasis on the points raised in this paper. It has been my experience that mortgagees are becoming more knowledgeable in what they require as security on condominium units but I find that very few lenders have comprehensive condominium unit mortgage instructions available and in some cases a few lenders are still using a standard mortgage instruction form which is totally inappropriate. It is the well advised solicitor who contacts the lender upon receipt of

instructions and goes through with the lender the detailed points of exception when dealing with condominiums. It is most advisable that the solicitor follow up that conversation in writing with the lender and request a variance of instructions when and if required for file purposes.