

SHAKESPEARE WAS ONLY KIDDING! – Part II

By Patrick Niland

When refinancing your co-op's underlying mortgage, your first call should be to your lawyer – not a lender.

This is the second of a two-part article discussing the importance of involving your attorney in every aspect of your co-op's refinancing effort.

At Commitment

Believe it or not, some boards don't contact their attorney until after they have signed a commitment. In fact, they notify their attorney about the refinancing by sending a copy of the commitment letter along with instructions to "get it closed as soon as possible!" Better late than never, I suppose, but such boards are not taking full advantage of their attorney's knowledge and experience. With a lender already chosen and the major terms of the new loan already finalized in a commitment, these boards have undercut the ability of their attorney to fully protect their co-op's interests. While the board *might* have saved a little on legal fees, they also may have cost their shareholders a bundle over the life of their new loan. Don't *you* be so penny-wise and pound-foolish!

Don't forget, every lender is represented by a team of very competent attorneys who, unchallenged, will include every possible benefit for *their* client. Therefore, if your board is not properly represented, it could find itself at a severe disadvantage at (or, even worse, *after*) the closing. Conversely, whenever the lender *and* the co-op have experienced counsel, *both* parties get a fair deal.

When your commitment letter is issued, your attorney will do much more than review it. They will analyze every loan document to assure that the deal the lender actually is giving you is the same as the one you applied for. They will order new title insurance and a new (or updated) survey. They will prepare several "opinion letters" to affirm the co-op's corporate and tax status, the board's legal right to undertake the proposed refinancing, the status of any litigation that may affect the co-op, and other important issues. Before allowing you to accept a commitment, your attorney also will nail down the following additional issues (unless they were covered previously in the application):

1. the time allowed to close the new loan;
2. what happens if either you or the lender cannot close within the allotted time;
3. the treatment of insurance proceeds should your property be substantially damaged or destroyed;
4. the treatment of sublets and unsold shares;

5. the investment, accounting, and release of any required escrows;
6. the availability or permissibility of secondary financing (second mortgages, credit lines, etc.);
7. the lender's right of first refusal on any subsequent refinancings;
8. proper insurance coverage;
9. prepayment terms and "windows";
10. other terms particular to your situation.

No board member can remain current on all of these issues, regardless of their experience or expertise. Even I, dealing with these issues almost every day, do not have the broad legal experience of my clients' attorneys. Therefore, I always alert my clients to the importance of these various issues, and then strongly urge them to call their attorney for specific advice. I know that my skill and experience is in finding and negotiating the lowest rates and best terms for each of my clients – not in playing lawyer.

Similarly, board members never should play lender, lawyer, or mortgage broker. Instead, they should decide exactly what their co-op needs, and then rely on their professional team to provide it. Don't forget, board members who do not make full use of their outside advisors could be charged with imprudent judgment or (more serious) negligence, thus leaving themselves open to shareholder lawsuits. Involving your co-op's attorney in all major decisions virtually closes that possibility.

At the Closing

Your co-op's attorney is indispensable at this very special event. They will explain the seemingly endless chain of documents that you will sign, and they will ensure that every one matches the draft that was reviewed and approved earlier. They also will verify all disbursements made from the new loan's proceeds, as well as every fee the board is asked to pay. Finally, they will make sure that all of the requisite documents are ready for recording. In the unlikely event of a last-minute problem, your attorney will be right there to solve it.

After the Closing

After everyone shakes hands and goes home, most board members assume that their refinancing job is done. Not so for your attorney, who still must ensure that each document is properly recorded in the public records and that any post-closing requirements are satisfied. Your attorney then will assemble copies of every document, form, and check into binders that are sent to the board, your managing agent, and your accountant. Your attorney will keep the master copy for future reference.

Conclusion

As this article hopefully showed, refinancing an underlying mortgage is a very complex, time-consuming, and expensive process. To make sure your next refinancing is a complete success, involve every member of your professional team from the very start. But, to paraphrase William Shakespeare, “firstly, *call* your lawyer!”