

Check out our
new look!

RECENT DEVELOPMENTS

- The Giardinelli Law Group, APC recently negotiated a settlement of an apartment owner's dispute regarding a lease for its laundry facilities.
- The Giardinelli Law Group, APC recently settled a large medical malpractice claim.
- The Giardinelli Law Group, APC recently negotiated a settlement where two REALTORS® were sued over a residential purchase.

CALENDAR

2010 RPA Changes

Date: September 16, 2010
Sponsor: Pacific West Association of REALTORS®
Where: Cardinal Pacific Escrow Training Center, Long Beach

Risk Management

Date: September 23, 2010
Sponsor: Inland Valleys Association of REALTORS®
Where: Inland Valleys Association of REALTORS®, Riverside

Please contact the sponsoring Association to sign up!

GRI Seminar – Legal Issues

Date: September 24, 2010
Where: San Diego Association of REALTORS®, San Diego

Please contact the Greater Realty Institute at
<http://www.edesignations.com/>
to sign up!

Courtside Newsletter

Informing local Real Estate Brokers & Association members for over twenty years.

Risks and Benefits of a Deed in Lieu of Foreclosure

IN TODAY'S ECONOMY, IS A DEED IN LIEU OF FORECLOSURE THE BEST DECISION FOR YOU?

BY: J NISWONGER, ATTORNEY AT LAW



This month we provide a brief overview of whether a property owner facing foreclosure should consider giving the property back to the lender through a deed in lieu of foreclosure. If the property owner is willing to let go of the property, the lender may be willing to accept a deed for the property from the owner instead of going through with a foreclosure sale. This is known as a "deed in lieu of foreclosure." Property owners facing foreclosure should be aware that it may be possible for them to avoid some negative consequences of foreclosure if they are willing to give the property to the lender before the foreclosure sale.

A deed in lieu of foreclosure is a transfer of title in real property from the property owner/borrower to the lender in order to avoid foreclosure entirely or to stop the foreclosure process. The deed in lieu of foreclosure consists of an agreement between the borrower and lender that is negotiated after the possibility of a foreclosure arises. Such an agreement cannot be part of the original loan documents. That is, the lender cannot agree in advance that it will accept a deed in lieu of foreclosure. Thus, borrowers cannot create a contractual obligation at the time they borrow money that would allow them to force a lender to accept the property instead of going through the foreclosure process.

Lenders cannot force borrowers to surrender a deed in lieu of foreclosure, as this would infringe on a borrower's rights. An agreement to accept a deed in lieu of foreclosure must be negotiated

between the borrower and the lender. The HAFAs program provides for a deed in lieu process if a loan modification fails. However, a borrower faced with losing property through foreclosure cannot simply execute and record a deed granting the property to the lender. If a borrower attempts to do this, the lender will record a "Notice of Nonacceptance," which provides legal notice that it has not accepted the deed in lieu of foreclosure.

A senior lienholder may not want to accept a deed in lieu of foreclosure. If the property owner has other liens against the property, such as a second mortgage or judgment liens, a senior lender who accepts a deed in lieu of foreclosure accepts the property subject to those other liens. A foreclosure, on the other hand, will wipe out any junior liens (a junior lien is one that is recorded after the lien foreclosed upon). It may be more economically advantageous, therefore, for the lender to go through the foreclosure process. Other reasons that a lender may not wish to accept a deed in lieu of foreclosure include the risk that the borrower may seek to set the deed aside and the risk that a borrower's creditors may claim that the deed constitutes a fraudulent conveyance. Lenders generally do not face these risks if they proceed with the foreclosure.

Even if the lender is willing to accept a deed in lieu of foreclosure, it may not be in the borrower's best interest to execute the deed. If the property is worth more than the amount owed to the lender, a deed in lieu of foreclosure results in the borrower waiving any right to the excess

Continued...

proceeds from the sale of the property. It is rare in this economic climate that a property is worth more than what is owed on it, but there is another situation where a borrower may benefit from a foreclosure. If a borrower has more than one loan against the property, for example, a foreclosure sale may result in a junior lien holder receiving part of the money owed. In some situations, payment through foreclosure of part of the money owed to a junior lien holder may prevent that lien holder from seeking a deficiency judgment.

To illustrate, assume that a borrower owes \$150,000.00 on a first mortgage and \$50,000.00 on a second mortgage. Assume also that the property that secures these mortgages is worth \$175,000.00. If the property sells for \$175,000.00 at the foreclosure sale, the second mortgage holder will receive \$25,000.00 (for purposes of this illustration, assume that foreclosure costs are negligible). The fact that the second mortgage holder receives some payment through the foreclosure will prevent it from obtaining a deficiency judgment. Of course, if the second mortgage is a purchase-money mortgage no deficiency judgment is available anyway. (See the September 2009 Courtside Newsletter for further discussion of purchase-money and non-purchase-money loans at www.glawgroupapc.com.) Nonetheless, there may be circumstances under which the borrower benefits from a foreclosure sale.

A deed in lieu of foreclosure, however, may create a significant benefit to a borrower. If the lender agrees to accept a deed in lieu of foreclosure, a borrower can minimize the injury to his or her credit. Further, a lender may agree to cancel the debt and forego any claims to recover a deficiency in exchange for a deed in lieu of foreclosure. The lender benefits by avoiding the costs of foreclosure, including costs associated with a delay in recovering the property. Under the right circumstances, a deed in lieu of foreclosure can be a win-win situation for both the borrower and the lender.

As discussed above, a number of factors must be considered in determining whether to execute a deed in lieu of foreclosure. As with all legal issues, it is important to consult a qualified legal professional in order to understand all of the risks and benefits associated with such action.

The author of this month's newsletter is J Niswonger, an attorney with THE GIARDINELLI LAW GROUP, APC. Mr. Niswonger may be reached at jniswonger@glawgroupapc.com or (951) 245-9163.

BUSINESS CORNER
"We want to help."



BUSINESS TIPS

– How to Avoid Legal Disputes –

The following are some tips that may help business owners to avoid legal disputes and problems as well as potentially provide some help in a down economy:

1. If you are trying to decide whether or not to hire that additional employee, but are not sure if you can afford it, you may want to check to see if you qualify for California State or Federal Tax Credits.
2. You can avoid violations of ADA laws by hiring a certified inspector to inspect your premises. Often the inspector's sticker will put potential litigants on notice that you are in the process of complying and discourage lawsuits.
3. If you are trying to avoid costs associated with hiring full-time employees, simply calling them a contractor and sending them a 1099 does not necessarily relieve you from having to treat them as employees. Make sure you know the factors to avoid severe penalties for classification as independent contractors.
4. Is your employee handbook up to date? Do you even have one? We strongly recommend that you do.
5. Does your business have a social media policy? Not having one opens up a business to risk of liability.

For any legal questions related to the above, or if you would like to see one of these topics discussed in greater detail, contact us at:

(951) 245-9163

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CLIENT FOCUS

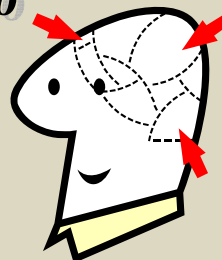


**Southwest Communities
Animal Shelter**

Animal Friends of the Valley (AFV) are looking forward to the opening of the Southwest Communities Animal Shelter. The shelter has been a dream of AFV since at least 2005, when local cities formed the Joint Powers Authority to finance construction of the SWCAS. AFV faced many difficulties, including burrowing owls, underground pipes and wells as well as old CC&Rs, to get the project completed, not to mention negotiations and drafting agreements with the Joint Powers Authority. The Giardinelli team is thankful to have been able to help AFV during the entire process and congratulates AFV on the upcoming realization of its long awaited dream.

RIDDLE ME THIS... 1-2-3-4-5-6

- I am a 6 letter word.
- Letters 6-5-2 spell out a drink.
- Letters 4-5-2-3 spell out a fruit.
- Letters 1-2-6 spell out a pet.
- Letters 3-2-6 spell out a pest, which often gets eaten by 1-2-6.
- What am I?



Answer

CARPET (1-2-6: pet)(2-3: pear)(3-2-6: cat)(4-5-2: tea)(6-5-2: tea)

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