

## **The Foreclosure Process and Resident Impact Fiddlers Creek Community Development Districts #1 and #2**

On September 9, 2009, the Board of Directors for the Fiddlers Creek Community Development Districts #1 & #2 (collectively, the “CDDs”) authorized legal counsel to proceed with the initiation of foreclosure proceedings as a result of more than \$4.15M of unpaid non ad-valorem special assessments (the “Obligations”) owed by Developer 951 Land Holdings, Ltd. and/or its affiliates (the “Developer”) for the current Fiscal Year. The decision to initiate action was prompted by the Developer’s failure to pay its Obligations in a timely manner and its failure (after months of negotiations) to present suitable terms upon which to temporarily forbear legal action.

Bondholders whose bonds are secured by the Developer’s repayment Obligations (the “Bondholders”) specifically instructed the Board of Directors of the CDDs to initiate the foreclosure lawsuit, having rejected the last minute terms of forbearance presented by the Developer. The Bondholders requested that the Boards of Directors of the CDDs take action pursuant to contractual and statutory duties owed to the Bondholders. Further opportunity for the Developer to present satisfactory terms of forbearance exists, provided the terms are suitable to the CDDs and the Bondholders.

The legal foreclosure process enables the CDDs to adjudicate the amount of the Obligations (unpaid principal, accrued interest and recoverable costs, including attorneys’ fees) and to seek repayment of the Obligations through the foreclosure and sale of all units of real property securing the Obligations (the “Property”). The foreclosure process allows the CDDs to foreclose the interests not only of the Developer, but of all inferior interests and encumbrances (“Junior Lienors”), so as to obtain clear title to the Property. The procedure rests upon judicial actions, which are often subject to the discretion and delay of the court and its administration.

The foreclosure process first requires the CDDs to perform title searches and to obtain suitable title commitments to ensure that all parties in interest, including the Developer and all Junior Lienors are properly notified of the foreclosure action (the “Action”). The Action is required to be filed where the Property is located, in Collier County Circuit Court. Once served with the Action, defendants must file a response thereto, normally within twenty (20) days of service. Any party challenging the right and entitlement of the CDDs to foreclose its interest must assert affirmative defenses to the Action or file defensive motions, which preliminary proceedings can take weeks to months to resolve.

The litigation also usually requires “discovery” proceedings whereby the parties exchange documents and depose witnesses to substantiate their positions. Informal discovery, including witness interviews, may also assist in developing important facts underlying the Action, and any alleged defenses thereto. While the Developer has not advised the Board of Directors of the CDDs of any specific defenses, it is foreseeable that the Developer may vigorously defend against foreclosure, so as to gain time to locate alternative financing prior to a foreclosure sale of the Property.

Once discovery is completed regarding the issues and any defenses related to the Action, a “summary” judgment could be entered without the need for protracted trial, but only where there are no material issues of disputed fact. Unresolved material factual issues often require a trial to adjudicate the amount of the Obligations and entitlement to a foreclosure sale of the Property. Given the current economic climate and the increase in the number of foreclosures pending throughout South Florida, the foreclosure process can easily span a year or more. In complex cases that are vigorously defended or where multiple parties are involved, the procedure may take even longer.

Should the CDDs prevail in the foreclosure, by motion or trial, a judgment may be entered for the amount of the Obligations, interest and recoverable costs (the “Judgment”). Trial courts routinely require parties to “mediate” an Action prior to trial. That is, courts encourage the parties to resolve the litigation out of court through a negotiated, mediation process. While mediation often occurs after discovery and prior to trial, the process can occur at any time by agreement of the parties.

Upon entry of the Judgment, the clerk of court will schedule a date for a foreclosure sale of the Property, typically about ninety (90) days after entry of the Judgment. The foreclosure sale of the Property must then be advertised in local newspapers and the Property scheduled for sale. At the sale, the Judgment holder is entitled to credit bid in the amount of the Judgment to purchase the Property. Other potential bidders must be prepared to pay cash.

Unit owners that remain current in the payment of their taxes, which include the special assessments imposed by the CDDs, are not subject to foreclosure in the Action and remain responsible only for the payment of their personal tax bill obligations. Thus, their ownership interests will not be affected by the Action and any Judgment therein. However, the CDDs must anticipate that the Developer’s payment defaults regarding the Obligations may also extend to “off roll” obligations of the Developer. While ultimately, the Developer’s non-payment of such obligations may lead to the potential loss of parcels through collection procedures, owners within the community may feel the impact of the loss of such revenues. The CDDs maintain assessment powers to fund shortfalls in the future. The failure to timely pay subsequent assessments could lead to an owner’s loss of property through subsequent foreclosure proceedings.