

Dear Condominium Managers:

You have requested our opinion relating to Condominium Associations and Lender Affidavits. As we understand the issue, in the course of performing services for condominium associations you were asked by lenders financing units in the Condominium to fill out Lender Affidavits provided by them. Your issue is that you wish to have our opinion as to the obligation of the Condominium Association or your company to fill out the affidavits provided for by the lenders.

The simple answer to your question is that neither the Condominium Associations that you manage nor you as managing agent are required to fill out Lender Affidavits. Neither the Massachusetts Condominium Act nor any of the governing documents of the condominiums in which you manage require you or the Association to fill out Lender Affidavits. Furthermore, it is our understanding that Lender Affidavits have arisen over the years in response to guidelines of Fannie Mae relating to Condominium Associations. However, the Fannie Mae Guidelines as most recently updated in 2007 and 2008 clearly provide that it is the lender, not the Condominium Association or the managing agent, that is required to certify to Fannie Mae that Fannie Mae's legal requirements and underwriting requirements have been met.

In addition to having no obligation to fill out these forms, it should be noted that we have reviewed many of the forms which lenders request to have filled out and have found them to be problematic. Our concerns are twofold. Firstly, in many cases, the affidavits request that you provide a legal interpretation to the Condominium Documents. It is our opinion that lender's counsel should provide any legal interpretations and that it would be dangerous and inappropriate for the Condominium Association or the management agent to do so. Secondly, some questions requested by lenders are not fair and reasonable. Examples of a few of these questions are as follows:

- Right of First Refusal – Many lenders request that you give an opinion as to whether the right of first refusal materially affects lenders. As stated above, it is our opinion that neither the Condominium Association nor the managing agent should be giving legal opinions and therefore, we suggest that lender's counsel should address this particular issue.
- Adequacy of Reserves and Budgets – We understand that lenders at times ask you to give an opinion as to adequacy of reserves and the budget. It is our opinion that this is beyond the scope of information, which the Condominium Association or managing agent should provide. It is our opinion that the lender should determine the adequacy of reserves and of the budget.
- Insurance – Lenders often times ask for opinions as to the scope of insurance coverage. It is our opinion that you should merely give the lender the name and contact information for the insurance agent and/or a copy of the master insurance policy but should not be giving opinions as to the interpretation of the insurance contract.

- Zoning – Some affidavits ask for opinions as to zoning of the particular condominium. It is our opinion that lender’s counsel should be providing this legal opinion.
- FHA Loans – Some lenders ask the Association to state the number of loans that are with FHA. Because to properly answer this question you would need to do a title search of every unit in the condominium, it is our opinion that this question is not fair or reasonable.

Notwithstanding the foregoing, it is our understanding that you have developed your own form of Lender Affidavit over the past fifteen (15) years and we have reviewed same. Based on our review of your form, it is our opinion that your form adequately provides the lender with the information that it needs while not putting you or the Condominium Association at risk. Therefore, it is our opinion that you should only provide lenders with your form of Lender Affidavit.

Finally, it should be noted that the condominium associations should not incur expenses (e.g. legal fees) related to the completion of lender affidavits. Therefore, in the rare case where the lender is requiring additional information, the lender should be responsible for reimbursing the association for any legal fees incurred.

Please contact me if you have any questions or comments relating to the foregoing.

Very truly yours,

MARCUS, ERRICO, EMMER
& BROOKS, P.C.

Stephen M. Marcus