

# To Record or Not Record? That Is The Question!

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By: K. Joy Mattingly

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Community association boards often ask the question of whether they must record a claim of lien on a property in order to protect the association's right to recover past due assessments on the property. Although the answer to this question changes based on the specific set of facts controlling each scenario, there is at least one scenario where the answer is **NO!**

In *Calendar v. Stonebridge Gardens Section III Condominium Association, Inc.*, the association was faced with a scenario where a property was sold at a tax deed sale and there were surplus funds in the registry as a result of the tax deed sale. Pursuant to §§197.582(2) and 197.522, Fla. State., the association was entitled to file a statement of claim against the surplus funds. However, the association did not have a claim of lien recorded in the public records at the time of the tax deed sale. The association filed a statement of claim against the surplus funds, as did the prior homeowner. The prior homeowner argued that the association was not entitled to the surplus funds as the association did not have a recorded claim of lien on the property. The trial court disagreed and entered an order awarding the surplus funds to the association. The prior owner appealed.

The Fourth District Court of Appeal affirmed the trial court's ruling, citing to the case of *Bessemer v. Gerstein*, 381 So.2d 1344, 1348 (Fla. 1980) and the specific language found in §718.116(5)(a), Fla. Stat, which states:

The association has as lien on each condominium parcel to secure the payment of assessments. [T]he lien is effective from and shall relate back to the recording of the original declaration of condominium. However as to first mortgages of record, the lien is effective from and after recording of a claim of lien in public records of the county in which the property is located.

Based on this language and the holding in *Bessemer* that the owner's acceptance of a deed referencing the recorded Declaration of Condominium puts the owner on notice of the lien provisions found in the Declaration, the

appeals court found that the association had a statutory lien on the subject property and that this was sufficient to protect the association's ability to collect the surplus funds from the tax deed sale.

While in this case the appeals court ruled in favor of the association despite the lack of a recorded claim of lien, uncertainty remains as to whether the statutory lien alone will always protect the association's ability to collect past due assessments. In its opinion, the appeals court references scenarios in which an association also needs to have a recorded claim of lien to recover past due assessments, namely scenarios where a first mortgagee is also asserting a claim. Given this uncertainty and the various fact-specific scenarios faced by associations, obtaining the advice of counsel on this issue is the best way to protect the association and its membership.