

## **HANDLING FORECLOSURES WITHIN ASSOCIATIONS: From Collection to Clean Up**

Our last article on the topic of foreclosures dealt with the foreclosure storm that Associations were facing and changes to the law. Since the January 2008 article, quite a lot has developed in the foreclosure market and banking world. Foreclosures are still commonplace, but now some banks are looking for ways to delay paying Associations and are unresponsive to maintaining their properties to the standards required by both the law and Associations. This article looks at possible solutions to dealing with the various problems foreclosure properties present to Associations, from collection to clean up.

Just because a bank owns the property does not mean that the bank does not have to pay dues. Whoever owns a unit or home in your Association, whether it is a financial institution or an individual; the owner is responsible for paying the monthly dues. The dues are a covenant in the Declaration that is recorded against the property. The obligation to make payment to the Association is something that runs with the land. In addition to paying the dues, the bank must maintain the property just like any other property owner.

Many banks will hire a management company to handle the maintenance of the home after it has been foreclosed. Banks refer to properties that have completed the foreclose process and that banks own as "REO," which stands for "Real Estate Owned." Some companies that manage REO properties are very good about communicating with Associations and paying the dues and maintaining the property. However, not all management companies maintain REO properties to the Associations' standards. It is properties in the foreclosure process and REO properties, which are creating the most maintenance problems within Associations.

There is an enforcement overlap between government and Associations regarding maintenance of property. The increase in foreclosures has forced some local governments to increase their code enforcement action against delinquent homeowners in Associations before, during, and post foreclosure. This places an additional burden

on local government's resources that are already struggling with reduced tax revenue. Therefore, Associations cannot necessarily rely upon local governments to force a clean up at a property.

Can the Association bill the owner for maintenance costs the Association incurs in cleaning up the foreclosed home? One of the large benefits of owning a home within an Association, is that quality and appearance of your neighbors. Homes that are not being maintained can detract from your community and decrease everyone's property values. So, owners have a collective interest in ensuring everyone maintains their property.

Generally, Associations can bill homeowners for maintenance performed by the Association on a home. The most accurate answer depends on whether the Association's governing documents allow the Association to perform maintenance. Many governing documents include provisions that allow the Association to perform maintenance if the owner is failing to take care of the property. In some cases, such a provision may be limited to emergency repair situations. However, if the Association is authorized to perform the maintenance, the Association can also pass this cost along to the Homeowner. Before Associations take any action on maintaining a foreclosed property or any Homeowner's property, the Board should consult with the firm's attorney.

Associations beware! There are practical concerns about the collection of the costs incurred in repairing properties. If the Homeowner is already in arrears, then those maintenance fees can be tacked on to the tab, but owing the dues and collecting them are very different sides of the same coin. The Association should be practical and cost efficient when dealing with these properties. Hiring a high-end lawn service to mow and landscape the property may technically meet the requirements of maintaining the property, but the Association may not be able to recover those funds. There is also a question of who is the homeowner. If the property is an REO then the bank should be collectible. If the property is still in the middle of the foreclosure process, then collection of the maintenance costs can be a larger concern. Associations need to identify where the property is in the foreclosure timeline before beginning repairs.

If the property is not bank owned, it is best for the Association to operate on the assumption that it is unlikely that the maintenance costs advanced will be fully recovered. Being cost effective is not the same as being cheap. The cheapest vendor for lawn service may not be the best choice for the Association. The Association should balance saving costs and hiring qualified vendors. While it is possible to recover these maintenance costs, the collection of amounts owed by a homeowner in foreclosure can be challenging. The Superlien, the equivalent of six months of dues provides Associations with some financial protection, but that protection can be lost.

Suppose, the bank has foreclosed, but is failing to pay off the Superlien or the current dues. The Association should treat the bank just like any other Homeowner under the collection policy. Associations may have difficulty communicating with the bank if there is not a management company in place to maintain or sell the property, but many lenders have specific departments set up to deal specifically with the REO properties. For additional information on Superliens please see part 1 of this article that can be found online at (INSERT WEB ADDRESS). It is critical for Associations and management companies to be on the lookout for mailings related to foreclosures. **Associations' Superliens can be voided and not paid if the Association ignores a request for an itemization of dues owed to the Association.** Most management companies have a process in place to promptly respond to mailings from the foreclosing parties attorney, so if you do not have a process to address foreclosures, be sure to set up an internal system for the management to handle the itemization request.

If a person is losing her home to her lender, then the homeowner typically has other creditors in pursuit, so Bankruptcy is a more common result these days. There are large collection hurdles with Bankruptcy. Generally, if a homeowner successfully completes a Chapter 7 Bankruptcy the owner will be able to discharge her debt obligations to the Association. Additionally, if a homeowner has completely abandoned their home, then locating the homeowner for service of a lawsuit could be a problem. More people are falling off the grid, which makes locating homeowners for collection more expensive and more inefficient

A possible cost effective solution to maintenance issues is the formation of the Volunteer Maintenance Committee. Associations can organize a group of volunteers to tackle the maintenance issues that arise because of neglected homes in foreclosure. Unfortunately, being neighborly and mowing someone else's yard also carries a certain degree of risk. In our litigious society, Associations have to be wary about creating a situation where a neighborly action leads to an accident creating a liability for the Association. If Associations choose to utilize volunteers, then it is advisable that following steps are taken to minimize problems:

- 1) Notice must be provided to the homeowner whose property is going to be maintained;
- 2) The scope of the work the volunteers will perform must be defined, e.g. mowing yards and pulling weed, but not trimming trees;
- 3) Before organizing a volunteer maintenance group the Association should also consult with their insurance provider to ensure that if, a volunteer is injured that the Association has the appropriate insurance coverage to cover the injury.
- 4) The Association may even consider having the volunteers sign a waiver to protect the Association. Waivers however are not a guaranteed protection against a lawsuit, and they should contain representations as to the competency of the individual volunteering for specific tasks. Associations should consult with their attorney's before instituting a volunteer maintenance committee.

Foreclosures, unfortunately, are part of the challenge Associations face today. Foreclosures lead to declining revenue, a financial drain of money, and a negative esthetic. However, with some dedication from volunteers and timely responses from management the possible negative impact of foreclosed homes on Associations can be minimized.