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PART DEUX: TO FORECLOSE OR NOT TO FORECLOSE, THAT IS THE QUESTION . . . SO WHAT IS THE ANSWER?

By: Tracy Neal, Supervising Attorney at Association Lien Services and David Swedelson, Partner, Swedelson & Gottlieb

This article follows an earlier article we prepared entitled "To Foreclose Or Not To Foreclose; That Seems To Be The Question (which can be found at hoalawblog.com). We had hoped that the economy would have improved so we would not have to revisit the issue. However, board members and managers are still asking the question: Do we foreclose or not? This question is coming up more and more as banks continue to delay foreclosing themselves as they do not want to take title to the property, adding it to unsold inventory and picking up responsibility for its maintenance and the association's assessments and fees.

The answer to the question is that boards need to seriously consider foreclosing on the assessment liens recorded against the properties of non-paying owners in order to protect the community association — and to protect the other owners who are paying their assessments. Associations need and rely upon the timely payment of assessments to pay the bills, and to maintain the common areas and other amenities. If one owner doesn't pay, the other owners have to pay and in some instances pay more. Desperate times often require desperate measures, and it may be necessary to force the hand of a non-paying owner (and subsequently the bank) by foreclosing. The ultimate goal by foreclosing is to get a property owner who will pay the assessments; in our experience, the quickest and most efficient way to accomplish this goal is through non-judicial foreclosure.

Community associations are able to foreclose non-judicially on Notices of Delinquent Assessments (Liens) recorded against delinquent owners' property relying on the power of sale in the association's governing documents and the California Civil Code. Community association foreclosure sales are conducted on the courthouse steps in the county in which the property is located, in the same manner in which bank foreclosure sales are conducted. Board members do not need to attend. The opening bid is called in the day of the sale, and will be the amount owed to the association, at least $1,800.00 or include twelve months of delinquent assessments, whichever is greater, in addition to late fees, interest, and collection fees and costs.

At foreclosure sales on assessment liens, there are two possible outcomes. Either the foreclosure sale will attract a third party bidder or the property

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reverts to the association. If a third party purchases the property, they take the property subject to an owner's ninety-day right of redemption and subject to a senior lender's earlier recorded trust deed(s). The third party purchaser may pay off the senior lender's trust deed/lien or negotiate a better loan for itself and begin paying assessments to the association.

If there are no third party bidders, the homeowners association takes the property (subject to an owner's ninety-day right of redemption and to the senior lender's trust deed(s)). If the Association has no interest in keeping the property, it can choose to do nothing and wait for the bank to foreclose after the homeowners' association foreclosure sale has been conducted. If a bank's foreclosure proceedings have stalled or have otherwise been postponed (due to mortgage modification programs, logistics in that there are so many properties to foreclose against, or a bank does not want to foreclose), the bank may be goaded into commencing or resuming its foreclosure proceedings after the association's foreclosure sale has concluded. The bank (as the new owner) is responsible for assessments from the date of its foreclosure sale.

Another option for the association is to market the property in order to recoup its losses, by selling or renting the unit or home (bearing in mind California rent skimming laws).

If in the long term the association intends to keep the property, then it must begin making monthly payments on the property to the senior lender and pay any other encumbrances on the property or risk losing the property if a senior encumbrance perfects its interest in the property by its own foreclosure sale.

By foreclosing, a community association will begin collecting assessments from the new owner/bank on a property where the prior owner was not paying assessments. Or, if the association rents the property, it will collect rental income on a previously non-income generating property.

Tracy Neal is the Supervising Attorney at Association Lien Services. Tracy can be contacted at trn@alslien.com. David Swedelson is a founding and senior partner of the Southern California Community Association Law Firm of Swedelson & Gottlieb and a Principal of Association Lien Services, The Assessment Lien Collection Experts. David can be contacted at dcs@sghoalaw.com. For more articles regarding this and other issues impacting California Community Associations, please visit hoalawblog.com.