Top 10 Foreclosure Issues

The current real estate market and financial climate make foreclosure of assessment liens more complicated than ever. While every situation is different, following are some typical issues we navigate on a regular basis. We recommend, however, that the board consult with a lawyer experienced in common interest development law and the collection of assessments to evaluate your particular situation.

1) Foreclose or Wait?

The answer is not automatic anymore; the glut of foreclosure properties increases any association's risks, burdens and financial obligations. Nevertheless, each association and its board of directors have an obligation to collect assessments and follow the association's collection policy. You may wish to ask legal counsel to review your collection policy.

2) Has The Lender Started the Foreclosure Process?

Typically, if an owner is not paying assessments, he or she is also not making mortgage payments. If the lender has started to foreclose, the board may decide to wait until the lender forecloses, because the owner of the property following the foreclosure sale (quite possibly the lender), will thereafter be obligated to maintain the property and make assessment payments. Although foreclosure by the lender will eliminate the Association's lien, the association still can obtain a personal judgment in small claims court against the defaulting owner.

3) Is There Equity in the Property?

If there is, foreclosure makes more economic sense. If a third party were to purchase the property at the foreclosure sale, that third party would take the property subject to any senior loans, and the association would get paid as well. Unfortunately, this is not typically the case. Frequently, homes are over encumbered, meaning the amount due on the loan or loans is more than the home is worth. In that scenario, a third party likely would not bid on the property and the association would become the owner of a home on which a significant amount of money is owed, severely limiting the association's options.

4) Is the Property Still Occupied?

If the property is still occupied when the association forecloses and takes title, the association may have limited options. Many deeds of trust contain "assignment of lease" provisions which provide that the lender becomes the "landlord" if foreclosure occurs. There are also "rent skimming" laws that may prevent an association from collecting rent.

5) The Condition of the Local Real Estate Market

The possibility of re-sale and/or rental of the property should be carefully evaluated when determining whether the association should foreclose on its lien.

6) Board May Not Delegate Decision to Foreclose

The board itself must make the decision to "initiate foreclosure of a lien." (Civil Code section 1367.4(c)(2)). The decision may not be delegated to the manager or the collection company. A majority of the board must vote to foreclose on a lien at least 30 days prior to any public sale. While the vote must be recorded in the minutes of the next open board meeting, the confidentiality of the owners (by reference to the property only by parcel number) must be maintained as well.

7) Judicial or Non-Judicial Foreclosure?

The board should consult with counsel, the collection company and other professionals (such as real estate agents) to determine whether judicial or non-judicial foreclosure is most appropriate in a particular situation. While non-judicial foreclosure is a fairly quick process, judicial foreclosure allows the association to obtain damages and a deficiency judgment against the delinquent owner.

8) If Foreclosure Is Non-Judicial, Owners Have a 90 Day Right of Redemption

If an association forecloses and becomes the record owner of a property, there is little that can be done for the first 90 days after the sale because the owner has a right to redeem the property. (Civil Code section 1367.4(c)(4).)

9) A Deed in Lieu of Foreclosure May Be an Option

A "deed in lieu" (where the owner offers to deed the property to a creditor "in lieu" of foreclosure) might be a viable option for a delinquent owner or for an association if the primary lender will agree.

10) The Record Owner Must Maintain the Property

Governing documents universally require owners to maintain their separate interests, regardless of whether the owner is an individual, a corporation, or an association or a lender following a foreclosure sale. If the association becomes the owner, it must maintain the separate interest obtained. Similarly, the association should enforce the obligation to maintain the property against a lender that takes title following a foreclosure sale. If the lender refuses, the association's governing documents may permit the board to cause the necessary work to be performed and a reimbursement assessment or a special individual assessment be levied against the bank to reimburse the association for the costs incurred in performing the maintenance.