

## **EFFECT OF LENDER FORECLOSURES ON HOA DELINQUENCIES**

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It was not that long ago that property values in California were at an all-time high. If an Association member neglected to pay assessments, and the Association had to go so far as to record a lien, the delinquent account would often be paid immediately through escrow or otherwise. Rarely did an Association Board have to worry about foreclosing on a property with no equity, and eventually becoming the owner of that property. However, those good times have come to a screeching halt. Whether it is due to loans which homeowners can no longer make payments on, or insufficient income to meet expenses, we are seeing an unprecedented increase in lender foreclosures. With the large number of California homes built in common interest developments in the last decade, Associations are being severely impacted by the increasing number of lender foreclosures. If an Association member is unable to pay his or her lender and a lender foreclosure is imminent, chances are that the Association member will also stop paying assessments to the Association. Associations are most often nonprofit corporations. The income on which Association Boards rely to fulfill their duties to Association members comes directly from the assessments paid by those members. With the increase in lender foreclosures, and the resulting explosion of Association members failing to pay their assessments, it is no surprise that Association Boards must reevaluate their approaches to enforcing the assessment obligation in order to attempt to reduce the impact of delinquencies on the Association. Following are steps that Association Boards can take to minimize the impact of delinquencies on their Associations.

- **ADOPT AND FOLLOW AN AGGRESSIVE COLLECTION POLICY.** California law allows Associations to record assessment liens against Association properties owned by delinquent members to secure delinquent assessment accounts. Before an Association may record an assessment lien, it must provide certain information to the delinquent member via certified mail. The next step is recording a lien against the delinquent member's Association property in accordance with the California Civil Code, the Association's governing documents and the Association's collection policy.

At the very least, it is important to record liens to secure delinquent assessment accounts. With the increase in lender foreclosures, Boards frequently ask whether they should even bother recording liens. It is true that if a senior lender forecloses, this will eliminate the Association's lien. However, a lien may catch the delinquent member's attention and encourage payment arrangements. Even if the lien does not cause payment to be immediately forthcoming, if the member sells or refinances the Association property, or files bankruptcy, the lien will cause the Association to be classified as a secured creditor, increasing the Association's chances of being paid.

- **TAKE INTO ACCOUNT THE POSSIBILITY OF LENDER FORECLOSURE WHEN CONSIDERING NONJUDICIAL FORECLOSURE.** Following recordation of a lien, Associations have the power to nonjudicially foreclose on the lien, if the assessments are delinquent \$1,800 or 12 months. In those cases where the Board determines that a nonjudicial foreclosure is appropriate, the decision to foreclose must be made by a majority of the Board in

executive session. The vote must be recorded in minutes of the next open meeting, referring to the property by parcel number. Then, the Association member must then be notified of the Board's decision to foreclose in the method required by the Civil Code.

Once a nonjudicial foreclosure is properly authorized and the Association member has been properly notified, a Notice of Default is recorded, and a mandatory 90-day waiting period is initiated, during which the Association member can "redeem" the obligation to the Association by paying all delinquent assessments, late fees, interest and cost of collection including legal fees owed. If the 90-day redemption period passes without the member paying, a Notice of Sale can be recorded. Thereafter, a public sale of the property can be held as early as twenty-one days later. Nonjudicial foreclosure sales of Association assessment liens are also subject to a 90-day right of redemption following the foreclosure sale.

Nonjudicial foreclosure can be effective in encouraging an Association member to bring his or her account current, especially if the member lives in the Association property or is collecting rents, and especially if there is equity in the property. Throughout the foreclosure process, the decision to foreclose should be examined several times. For example, if a lender initiates its own foreclosure action shortly after the Association records its Notice of Default, it is often unwise to continue the Association's foreclosure, as the lender's foreclosure usually takes priority over the Association's. This usually occurs when there is no equity in the property. In such a case, the Board may wish to consider filing either a small claims or superior court action against the owner. If the Board decides to proceed to a foreclosure sale, be prepared, especially if there is no equity in the property, for the possibility that the Association may take back title to the property.

- **CONSIDER SMALL CLAIMS COURT FOR PURSUING FORMER ASSOCIATION MEMBERS, OR WHEN LENDER FORECLOSURE IS IMMINENT OR LIKELY.** Even if a lender forecloses and eliminates the Association's lien, the Board does not necessarily have to write off the debt. The former Association member remains personally obligated to pay the assessments and late charges which accrued during his or her period of ownership, plus interest and costs of collection incurred. The Association can enforce this obligation by seeking a judgment against the former owner in small claims or superior court.

- **IF YOU RECEIVE A BANKRUPTCY NOTICE** or otherwise learn of a bankruptcy filed by a delinquent Association member, contact the Association's legal counsel immediately. There are certain timeframes in which claims for payment must be submitted to the bankruptcy court, and you may not pursue collection activity without permission from the bankruptcy court.

- **MAXIMIZE LATE CHARGES AND INTEREST ON DELINQUENT ASSESSMENT ACCOUNTS.** Unless the Association's Declaration provides for a lesser amount, Associations are entitled to late charges of 10% of the delinquent assessment or \$10.00, whichever is greater, and interest at 12% per annum on unpaid assessments, late charges and costs of collection. This may provide an incentive for Association members to pay their assessments sooner rather than later. Also, if the Association is able to collect maximum late charges and interest from delinquent owners, this will provide additional income to the Association.

- **EXAMINE THE ASSOCIATION'S BUDGET.** Perhaps there are nonessential expenditures that the Board can remove or reduce. In addition, there will unavoidably be more uncollectible debt that Boards must take into account when preparing their budgets.
- **CONSIDER AN INCREASE IN REGULAR ASSESSMENTS OR LEVYING A SPECIAL ASSESSMENT.** As unfair as it seems to require paying Association members to absorb the burden of non-paying members, this may be necessary to allow the Association to fulfill its duties to its members.
- **CONSIDER ALLOWING PAYMENT PLANS.** Association Boards may have been reluctant to allow payments plans in the past, instead taking the position that members must immediately bring their accounts current, or be faced with the increased costs of foreclosure and risk of losing their home. With lender foreclosure possible, this may no longer provide the required incentive to pay the Association. If the debt is secured by a lien, as addressed above, the Board may wish to consider allowing the owner a reasonable period of time to bring their account current. Income over a period of time is better than no income at all, and would also reduce the costs of collection expended.
- **TREAT LENDERS AS YOU DO OTHER ASSOCIATION MEMBERS.** If a lender forecloses on an Association property, be sure to begin billing the lender for current assessments once the lender becomes the record title holder. Lenders are holding on to properties longer before reselling them. If the lender becomes delinquent in payment of assessments, send a pre-lien letter and record a lien. As with non-lender owned properties, a lien will mean that the Association is secured and will ensure that the delinquent assessments will be paid so that the buyer can have the lien released and obtain clean title. It is possible to actually proceed to foreclosure on a lender-owned property, but it is unlikely you will need to go that far.
- **HELP REGARDING MAINTENANCE ISSUES.** Once foreclosing lenders become record title holders of Association properties and therefore members of Associations, they become responsible not only for paying assessments, but also for abiding by other provisions of the Association's governing documents, such as maintenance. Association Boards can treat lenders the same as other owners for violations of maintenance responsibilities as well as assessment collection. In addition, recently, some local municipalities have recognized the problems caused to neighborhoods with and without Associations when foreclosing lenders leave properties abandoned. They have enacted ordinances which require foreclosing lenders to maintain property, and provide for fines if they do not. (See, for example, City of Chula Vista Abandoned Residential Property Program, information attached.) In addition, Section 2929.3 was recently added to the California Civil Code (text at end of these materials) which provides for similar penalties.

As lenders foreclose and resell their Association properties, new owners will take title and will hopefully honor their maintenance and assessment obligations. In the meantime, Associations will need to budget accordingly and pursue collections and violations diligently, in hopes of minimizing the impact of the mortgage crisis.

## **CITY OF CHULA VISTA MUNICIPAL CODE CHAPTER 15.60 ABANDONED RESIDENTIAL PROPERTY REGISTRATION**

### **15.60.010 Purpose/scope.**

It is the purpose and intent of the Chula Vista City Council, through the adoption of this chapter, to establish an abandoned residential property registration program as a mechanism to protect residential neighborhoods from becoming blighted through the lack of adequate maintenance and security of abandoned properties. (Ord. 3080 § 1, 2007).

### **15.60.020 Definitions.**

For the purposes of this chapter, certain words and phrases used in this chapter are defined as follows:

“Abandoned” means a property that is vacant and is under a current notice of default and/or notice of trustee’s sale, pending tax assessor’s lien sale and/or properties that have been the subject of a foreclosure sale where the title was retained by the beneficiary of a deed of trust involved in the foreclosure and any properties transferred under a deed in lieu of foreclosure/sale.

“Accessible property” means a property that is accessible through a compromised/breached gate, fence, wall, etc.

“Accessible structure” means a structure/building that is unsecured and/or breached in such a way as to allow access to the interior space by unauthorized persons.

“Agreement” means any agreement or written instrument which provides that title to residential property shall be transferred or conveyed from one owner to another owner after the sale, trade, transfer or exchange.

“Assignment of rents” means an instrument that transfers the beneficial interest under a deed of trust from one lender/entity to another.

“Beneficiary” means a lender under a note secured by a deed of trust.

“Buyer” means any person, co-partnership, association, corporation, or fiduciary who agrees to transfer anything of value in consideration for property described in an agreement of sale, as defined in this subsection.

“Dangerous building” means any building/structure that is violation of any condition referenced in Chapter 15.18 CVMC.

“Days” means consecutive calendar days.

“Deed of trust” means an instrument by which title to real estate is transferred to a third party trustee as security for a real estate loan. Used in California instead of a mortgage. This definition applies to any and all subsequent deeds of trust, i.e., second trust deed, third trust deed, etc.

“Deed in lieu of foreclosure/sale” means a recorded document that transfers ownership of a property from the trustor to the holder of a deed of trust upon consent of the beneficiary of the deed of trust.

“Default” means the failure to fulfill a contractual obligation, monetary or conditional.

“Distressed” means a property that is under a current notice of default and/or notice of trustee’s sale and/or pending tax assessor’s lien sale or has been foreclosed upon by the trustee or has been conveyed to the beneficiary/trustee via a deed in lieu of foreclosure/sale.

“Evidence of vacancy” means any condition that on its own or combined with other conditions present would lead a reasonable person to believe that the property is vacant. Such conditions include, but are not limited to, overgrown and/or dead vegetation, accumulation of newspapers, circulars, flyers and/or mail, past due utility notices and/or disconnected utilities, accumulation of trash, junk and/or debris, the absence of window coverings such as curtains, blinds and/or shutters, the absence of furnishings and/or personal items consistent with residential habitation, statements by neighbors, passersby, delivery agents, government employees that the property is vacant.

“Foreclosure” means the process by which a property, placed as security for a real estate loan, is sold at auction to satisfy the debt if the trustor (borrower) defaults.

“Local” means within 40 road/driving miles distance of the subject property.

“Neighborhood standard” means those conditions that are present on a simple majority of properties within a 300-foot radius of an individual property. A property that is the subject of a neighborhood standard comparison, or any other abandoned property within the 300-foot radius, shall not be counted toward the simple majority.

“Notice of default” means a recorded notice that a default has occurred under a deed of trust and that the beneficiary intends to proceed with a trustee’s sale.

“Out of area” means in excess of 40 road/driving miles distance of the subject property.

“Owner” means any person, co-partnership, association, corporation, or fiduciary having a legal or equitable title or any interest in any real property.

“Owner of record” means the person having recorded title to the property at any given point in time the record is provided by the San Diego County Recorder’s Office.

“Property” means any unimproved or improved real property, or portion thereof, situated in the City and includes the buildings or structures located on the property regardless of condition.

“Residential building” means any improved real property, or portion thereof, situated in the City, designed or permitted to be used for dwelling purposes, and shall include the buildings and structures located on such improved real property. This includes any real property being offered for sale, trade, transfer, or exchange as “residential” whether or not it is legally permitted and/or zoned for such use.

“Securing” means such measures as may be directed by the Director of Planning and Building or his or her designee that assist in rendering the property inaccessible to unauthorized persons, including but not limited to the repairing of fences and walls, chaining/padlocking of gates, the repair or boarding of door, window and/or other openings. Boarding shall be completed to a minimum of the current HUD securing standards at the time the boarding is completed or required.

“Trustee” means the person, firm or corporation holding a deed of trust on a property.

“Trustor” means a borrower under a deed of trust, who deeds property to a trustee as security for the payment of a debt.

“Vacant” means a building/structure that is not legally occupied. (Ord. 3080 § 1, 2007).

### **15.60.030 Recordation of transfer of loan/deed of trust/assignment of rents.**

Within 10 days of the purchase and/or transfer of a loan/deed of trust secured by residential property the new beneficiary/trustee shall record, with the San Diego County Recorder’s Office, an assignment of rents, or similar document, that lists the name of the corporation, and/or

individual, the mailing address and contact phone number of the new beneficiary/trustee responsible for receiving payments associated with the loan/deed of trust. (Ord. 3080 § 1, 2007).

#### **15.60.040 Registration.**

Any beneficiary/trustee, who holds a deed of trust on a property located within the City of Chula Vista, shall perform an inspection of the property that is the security for the deed of trust, upon default by the trustor, prior to recording a notice of default with the San Diego County Recorder's Office. If the property is found to be vacant or shows evidence of vacancy, it is, by this chapter, deemed abandoned and the beneficiary/trustee shall, within 10 days of the inspection, register the property with the Director of Planning and Building or his or her designee on forms provided by the City.

If the property is occupied but remains in default it shall be inspected by the beneficiary/trustee, or his designee, monthly until (1) the trustor or party remedies the default or (2) it is found to be vacant or shows evidence of vacancy at which time it is deemed abandoned, and the trustee shall, within 10 days of that inspection, register the property with the Director of Planning and Building or his designee on forms provided by the City.

In either case the registration shall contain the name of the beneficiary/trustee (corporation or individual), the direct street/office mailing address of the beneficiary/trustee (no P.O. boxes), a direct contact name and phone number for the beneficiary/trustee and, in the case of a corporation or out-of-area beneficiary/trustee, the local property management company responsible for the security, maintenance and marketing of the property. Registration fees will not be prorated.

An annual registration fee shall accompany the registration form. The fee and registration shall be valid for the calendar year, or remaining portion of the calendar year, in which the registration was initially required. Subsequent registrations and fees are due January 1st of each year and must be received no later than January 31st of the year due.

This section shall also apply to properties that have been the subject of a foreclosure sale where the title was transferred to the beneficiary of a deed of trust involved in the foreclosure and any properties transferred under a deed in lieu of foreclosure/sale.

Properties subject to this chapter shall remain under the annual registration requirement, security and maintenance standards of this section as long as they remain vacant.

Any person, firm or corporation that has registered a property under this chapter must report any change of information contained in the registration within 10 days of the change. (Ord. 3080 § 1, 2007).

#### **15.60.050 Maintenance requirements.**

Properties subject to this section shall be, in comparison to the neighborhood standard, kept free of weeds, dry brush, dead vegetation, trash, junk, debris, building materials, any accumulation of newspapers, circulars, flyers, notices, except those required by federal, state or local law, discarded personal items including but not limited to furniture, clothing, large and small appliances, printed material or any other items that give the appearance that the property is abandoned.

The property shall be maintained free of graffiti, tagging or similar markings by removal or painting over with an exterior grade paint that matches the color of the exterior of the structure.

Visible front and side yards shall be landscaped and maintained to the neighborhood standard at the time registration was required.

Landscape includes, but is not limited to, grass, ground covers, bushes, shrubs, hedges or similar plantings, decorative rock or bark or artificial turf/sod designed specifically for residential installation.

Landscape does not include weeds, gravel, broken concrete, asphalt, decomposed granite, plastic sheeting, mulch, indoor-outdoor carpet or any similar material.

Maintenance includes but is not limited to regular watering, irrigation, cutting, pruning and mowing of required landscape and removal of all trimmings.

Pools and spas shall be kept in working order so the water remains clear and free of pollutants and debris or drained and kept dry. In either case properties with pools and/or spas must comply with the minimum security fencing requirements of the State of California.

Adherence to this section does not relieve the beneficiary/trustee or property owner of any obligations set forth in any covenants, conditions and restrictions and/or homeowners' association rules and regulations which may apply to the property. (Ord. 3080 § 1, 2007).

#### **15.60.060 Security requirements.**

Properties subject to this section shall be maintained in a secure manner so as not to be accessible to unauthorized persons.

Secure manner includes but is not limited to the closure and locking of windows, doors (walk-through, sliding and garage), gates and any other opening of such size that it may allow a child to access the interior of the property and or structure(s). In the case of broken windows securing means the reglazing or boarding of the window.

If the property is owned by a corporation and/or out-of-area beneficiary/trustee/owner, a local property management company shall be contracted to perform weekly inspections to verify that the requirements of this section, and any other applicable laws, are being met.

The property shall be posted with name and 24-hour contact phone number of the local property management company. The posting shall be no less than 18 inches by 24 inches and shall be of a font that is legible from a distance of 45 feet and shall contain along with the name and 24-hour contact number the words "THIS PROPERTY MANAGED BY" and "TO REPORT PROBLEMS OR CONCERNS CALL." The posting shall be placed on the interior of a window facing the street to the front of the property so it is visible from the street, or secured to the exterior of the building/structure facing the street to the front of the property so it is visible from the street or, if no such area exists, on a stake of sufficient size to support the posting in a location that is visible from the street to the front of the property but not readily accessible to vandals. Exterior posting must be constructed of and printed with weather resistant materials.

The local property management company shall inspect the property on a weekly basis to determine if the property is in compliance with the requirements of this chapter. (Ord. 3080 § 1, 2007).

#### **15.60.070 Additional authority.**

In addition to the enforcement remedies established in Chapters 1.20, 1.30 and 1.41 CVMC, the Director of Planning and Building or his or her designee shall have the authority to require the beneficiary/trustee/owner and/or owner of record of any property affected by this section to

implement additional maintenance and/or security measures including but not limited to securing any/all door, window or other openings, installing additional security lighting, increasing on-site inspection frequency, employment of an on-site security guard or other measures as may be reasonably required to arrest the decline of the property. (Ord. 3080 § 1, 2007).

#### **15.60.080 Fees.**

The fee for registering an abandoned residential property shall be set by resolution of the City Council. (Ord. 3080 § 1, 2007).

#### **15.60.090 Enforcement.**

Violations of this chapter may be enforced in any combination as allowed in Chapters 1.20, 1.30 and 1.41 CVMC. (Ord. 3080 § 1, 2007).

#### **15.60.100 Appeals.**

Any person aggrieved by any of the requirements of this section may appeal insofar as such appeal is allowed under Chapter 1.40 CVMC. (Ord. 3080 § 1, 2007).

#### **15.60.110 Violation/penalty.**

Violations of this chapter shall be treated as a strict liability offense regardless of intent. Any person, firm and/or corporation that violates any portion of this section shall be subject to prosecution and/or administrative enforcement under Chapters 1.20 and 1.41 CVMC. (Ord. 3080 § 1, 2007).

#### **15.60.120 Severability.**

Should any provision, section, paragraph, sentence or word of this chapter be determined or declared invalid by any final court action in a court of competent jurisdiction or by reason of any preemptive legislation, the remaining provisions, sections, paragraphs, sentences or words of this chapter shall remain in full force and effect. (Ord. 3080 § 1, 2007).

### **CIVIL CODE SECTION 2929.3**

(a) (1) A legal owner shall maintain vacant residential property purchased by that owner at a foreclosure sale, or acquired by that owner through foreclosure under a mortgage or deed of trust. A governmental entity may impose a civil fine of up to one thousand dollars (\$1,000) per day for a violation. If the governmental entity chooses to impose a fine pursuant to this section, it shall give notice of the alleged violation, including a description of the conditions that gave rise to the allegation, and notice of the entity's intent to assess a civil fine if action to correct the violation is not commenced within a period of not less than 14 days and completed within a period of not less than 30 days. The notice shall be mailed to the address provided in the deed or other instrument as specified in subdivision (a) of Section 27321.5 of the Government Code, or, if none, to the return address provided on the deed or other instrument.

(2) The governmental entity shall provide a period of not less than 30 days for the legal owner to remedy the violation prior to imposing a civil fine and shall allow for a hearing and opportunity to contest any fine imposed. In determining the amount of the fine, the governmental entity shall take into consideration any timely and good faith efforts by the legal owner to remedy the violation. The maximum civil fine authorized by this section is one thousand dollars (\$1,000) for each day that the owner fails to maintain the property, commencing on the day following the expiration of the period to remedy the violation established by the governmental entity.

(3) Subject to the provisions of this section, a governmental entity may establish different compliance periods for different conditions on the same property in the notice of alleged violation mailed to the legal owner.

(b) For purposes of this section, "failure to maintain" means failure to care for the exterior of the property, including, but not limited to, permitting excessive foliage growth that diminishes the value of surrounding properties, failing to take action to prevent trespassers or squatters from remaining on the property, or failing to take action to prevent mosquito larvae from growing in standing water or other conditions that create a public nuisance.

(c) Notwithstanding subdivisions (a) and (b), a governmental entity may provide less than 30 days' notice to remedy a condition before imposing a civil fine if the entity determines that a specific condition of the property threatens public health or safety and provided that notice of that determination and time for compliance is given.

(d) Fines and penalties collected pursuant to this section shall be directed to local nuisance abatement programs.

(e) A governmental entity may not impose fines on a legal owner under both this section and a local ordinance.

(f) These provisions shall not preempt any local ordinance.

(g) This section shall only apply to residential real property.

(h) The rights and remedies provided in this section are cumulative and in addition to any other rights and remedies provided by law.

(i) This section shall remain in effect only until January 1, 2013, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2013, deletes or extends that date.

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