

Using Self-Help Remedies on Foreclosed Properties

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The real estate market has experienced especially tough years since the latter half of 2006. As the U.S. housing bubble burst, mortgage lenders and brokers increasingly offered loans to high risk or sub-prime borrowers. These borrowers assumed mortgages on the expectation that they could refinance their homes in the future to more favorable terms. But as property values continued to decline, thousands of borrowers found themselves unable to sell or refinance their homes and unable to make their mortgage payments. As a result, communities across the country experienced a rapid increase in the rate of defaults and foreclosures. The country is still feeling the effects of the housing market crisis and continues to experience an increased rate of foreclosures.

The depressed real estate market and the increasing rate of foreclosures have had a dramatic impact on community associations. If a lender or investor takes title to a property, as a result of a foreclosure, the property will often sit vacant until it is sold to a third party who intends to live in the property. In many instances, once an owner receives notice of the pending foreclosure sale of their property, they will often abandon or neglect the property even before the foreclosure sale occurs. The result of all of this is that many properties are unkempt for months at a time.

The most obvious and commonly occurring problems associations are faced with in these situations are landscaping violations. As the properties sit vacant, grass and shrubs will continue to grow. Overgrown landscaping can present not only an eyesore for the community, but a health or safety hazard by attracting rodents and pests and possibly causing damage to neighboring properties or passersby, in the instance of stray tree limbs. Additionally, if a community experiences bad weather or if time merely takes its toll, a house can fall into disrepair as shutters and shingles come loose, or other external structures take a beating.

All of this imposes a heightened responsibility upon associations and their managing agents to inspect their properties for violations of the association's covenants and restrictions, particularly as they relate to landscaping and architecture, to

promptly respond to and investigate membership complaints regarding these issues, and to take whatever action they can and must to protect and preserve the property values and the overall appearance of the community.

One possible course of action that associations can and should take, if possible, is the pursuit of self-help remedies to correct many landscaping or cosmetic architectural violations and charge the applicable owner the costs of the self-help steps taken. As more and more associations find that financial institutions who take title to these properties are either unwilling or unable to perform the necessary maintenance or repair work on their inventory of foreclosed properties, self-help has become an increasingly common and useful remedy.

How to Perform Self-Help

First, it is important to note that whoever is the record owner of a property is responsible for compliance with the association's covenants, restrictions, and conditions as set forth in the association's governing documents. This means that financial institutions and other corporate entities who take title to foreclosed properties are still responsible for maintaining their properties as long as they hold title, just like any other owner within the association.

The initial step before trying self-help is to determine whether the condition of a vacant property is in fact in violation of the association's governing documents. If the property is in violation, the association must typically inform the owner of the property in writing of the violation.

Most associations' governing documents contain express landscaping and architectural standards. Other useful provisions upon which an association may rely include a general reference to the association's duty to maintain the overall appearance of the community, or a use restriction in the association documents prohibiting nuisances.

Once the association determines that it has specific authority to find that a violation exists, the association must then determine

whether it has the ability to perform self-help. The right of the association to enter an owner's property to perform corrective work if the owner fails to maintain the property must be noted in the association's governing documents.

If the association is certain it has the authority to perform self-help, it can rely on either the governing documents or the applicable statutory authority to assess an owner for the costs of the remedial work. In many cases the association's documents will expressly confer the authority to charge the owner for the costs of the work. In the alternative, in Virginia, the Condominium Act and the Property Owners' Association Act both contain provisions which allow the association to impose monetary charges for a violation, although subject to certain due process requirements and a cap on the amount of charges. Although this type of charge would not correspond directly to the costs of self-help, monetary charges for violations can indirectly help to offset the costs an association bears to perform self-help. Further, the Virginia Condominium Act also allows associations to charge individual unit owners a "special assessment" for expenses that result from or benefit less than all the unit owners, such as costs of remedial work.

In the District of Columbia, self help is typically done through the District's Department of Consumer and Regulatory Affairs (DCRA). For example, the District has "Seasonal Grass Cutting Rules," effective May 1 to October 31, that require grass and weeds taller than ten inches to be cut. Problem lot owners may be reported to DCRA, which will start the violations process. In Maryland, associations are limited to taking the action as authorized in their governing documents. Accordingly governing documents should be reviewed closely before any self-help action is taken.

In some instances the association can undertake self-help, but lacks the authority to pass the costs along to the individual owner. If the association is presented with a truly egregious violation, without the ability to directly assess the responsible owner, in the interests of protecting property values and the health and safety of the community, the association may proceed with spreading the costs of remedial work as a common expense across the entire membership; assuming such action is not prohibited by the governing documents.

Once the association confirms the violation and its authority to proceed with self-help, as well as its ability to assess the costs thereof to the owner, the next issue is to determine who to contact about the violation. Often, a quick search of land or tax records for the county in which the association lies will reveal the owner of the property and the proper mailing address. Oftentimes, the association's legal counsel is another good source of ownership information, as many have online access to real-time ownership records. It is recommended that the association use separate notices to both the mailing address and to the property address when a written notice is sent to a bank owner. Sometimes, a real estate agent or another third party working on behalf of the lender owner will obtain the mail directed to the property and ensure that it is received by the owner.

In general, and regardless of the requirements specific to the association, it's recommended that the notice of violation contain: 1) the nature of the violation; 2) the specific provision of the association's documents that is being violated; and 3) the time frame within which the owner must take remedial action to correct the violation.

While it is not necessarily required by statute or the association's documents, it's advisable for associations to afford owners an opportunity to contest the charges, in accordance with any due process requirements imposed by the applicable statutory authority or the association's documents. To properly do so, associations should prepare the violation notice to double as a hearing notice, informing the owner of a pending hearing date, typically no less than 14 days from the hearing notice when issued for a Virginia property, whereupon the owner may contest the violation. The notice should also provide that in the event the owner does not respond to contest the violation, perform the necessary corrective work by the date of the hearing, or provide proof that arrangements have been made for such corrective work, the association intends to enter upon the property, perform self-help, and assess all costs back to the owner or charge the owner the authorized violation charges in accordance with any applicable statutory authority.

If the violation still exists and no corrective action has been taken or arranged for after the hearing date and the owner-cure period, the association should issue a final notice to the owner which explains that: 1) the association determined that the violation exists; 2) the association will enter on to the property on a certain date and time to perform corrective work; and 3) the owner will be assessed the costs of the corrective work, or charged the authorized violation charges.

In Virginia, this final notice doubles as a hearing results notice which is required in accordance with the Condominium Act and Property Owners' Association Act and must be issued within seven days of the date of the hearing.

If associations proceed in accordance with the specific requirements of their governing documents, which may impose more stringent notice and hearing restrictions, as well as any applicable statutory due process requirements, the association is on firm footing to perform self-help and recoup those costs directly from the owner.

How to Collect the Charges Once the Work is Complete

Once the work is complete and the charges have been assessed, the association should take care to coordinate with management and legal counsel to confirm that all charges due, including the charges for the remedial work, are included on the owner's statement of account. It's also recommended that the owner be notified promptly about the charges assessed as a result of the remedial work.

Once statutorily sufficient notice is provided to the owner about the charges, a lien may be recorded against the title of the property for the remedial work expenses. Ideally, when the lender sells the property to a third party, the lien will appear on the title of the property and the purchaser's bank will require the lien to be paid at closing in order to ensure that the purchaser is given clear title to the property.

Occasionally, the property sells to a third party and the lien is not paid. Generally speaking, governing documents impute any unpaid liens to the purchaser of the property because the liens remain against the title of the land, but would not be the purchaser's personal obligation. Accordingly, the association would not be able to sue the purchaser for the charges, but the liens would not be released from the property. Sometimes, notifying the settlement company and the purchaser that these liens remain against