

DEALING WITH BANK-OWNED PROPERTIES IN AN ASSOCIATION

By Phaedra J. Howard

As the numbers of foreclosures continue to rise, Associations are experiencing an increase in the number of bank-owned properties and the myriad of issues that result from this once unique situation.

One issue that arises when a bank or mortgage company takes over ownership of an association property is that the association now has an absentee owner. The property itself may or may not be vacant, depending on whether the prior owner has moved out or been evicted, but the actual owner who is responsible for the property is absent from the property. In many cases, associations have trouble even finding a contact person at the bank or the asset management company that is (or will be) managing the property on behalf of the bank. Because of the high number of foreclosures taking place in recent years, banks are overwhelmed with foreclosed properties and can often take three to six months or longer to evict a former owner who may still be occupying the foreclosed unit after the redemption period has expired. Meanwhile, the former owner

may continue to live in the property, which could place the property (and potentially other units within the Association) at risk of being damaged. A bank owner is only interested in selling the property as quickly as possible to recoup its money and has no time or interest in dealing with any of the day to day issues with the property or the Association. This means that the bank owner is unlikely to participate in any meetings or votes of the members. This may not seem like a big deal for associations having only a small amount of bank owned properties. But the higher the percentage of properties in an Association that are in foreclosure, the harder it will be for the Association to make quorum, to approve special assessments, to amend governing documents, or to conduct any other business requiring the approval of a certain percentage of owners. Unfortunately, the Association cannot force a bank owner to participate in the Association. But this may be an opportunity for the Board to try to encourage better participation by the remaining owners by offering incentives to members who do show up at the meetings either in person or by proxy, such as having a drawing for door prizes or other free gifts.

As the weather starts getting colder, associations will also want to be sure to keep a close eye on any foreclosed properties to ensure that vacant properties

are adequately heated or otherwise winterized and protected from the elements. A new law went into effect August 1, 2009 requiring foreclosing lenders to take possession of vacant homes in foreclosure and to protect the property from any waste or damage. Prior to enactment of this statute, banks had the right but not the legal obligation to do so. Under the new statute, if a bank has information that would support a court determination that the property has been abandoned, the bank has the legal obligation to enter the property, secure it by changing locks and ensure that the locks are functioning. Further, under the new statute, the city now has the authority to send a notice to an owner or foreclosing lender to secure the vacant property. If the lender fails to do so, the city may secure the property and charge the cost of doing so back to the property. An Association may request to be notified by the city of any vacant properties under the new statute as well. Cities also have the ability to bring an action to reduce the redemption period on a foreclosed property that has been


abandoned. Previously, this right was limited solely to the foreclosing lender. Under most associations' governing documents, the Association also has the right to secure the property to the extent that is necessary to prevent that unit or neighboring units from waste or damage (including damage from frozen water pipes) and charge the costs of doing so back to the unit.

Another problem associations face in the context of mortgage foreclosure is that many bank owners do not pay the association assessments as they come due and opt instead to wait until the property is sold before paying off the delinquent balance. Depending on how long it takes for a particular unit to sell, the Association could be waiting quite a while before receiving any payment from the bank owner. However, associations should keep in mind that bank owners are responsible for regular payment of assessments just as any other owner in the Association. If the Association is subject to the Minnesota Common Interest Ownership Act ("MCIOA"), which applies to practically all condominium associations, as well as most townhome associations formed after June 1, 1994 (as well as any other associations that have "opted in" to MCIOA), the foreclosing lender will take title to the

property subject to a "super lien" in favor of the Association for certain amounts that became due during the six months prior to the expiration of the redemption period. The super lien includes installments of the annual assessment, special assessments, maintenance and repair charges and certain other amounts, but does not include late fees, fines or legal fees or costs that came due during that six-month period. Once the redemption period has expired, however, the bank owner is responsible for all amounts that come due with respect to the property, regardless of whether the association is subject to MCIOA or not. If a bank owner is not paying the assessments, the Association has the ability to charge late fees and to pursue collection action against the bank. Because the bank will typically own the property free and clear of any encumbrances, the best option for collection is usually to accelerate the assessments, if applicable, and file a lien statement to ensure that the assessments are paid at closing. In some circumstances, it may even be appropriate to foreclose that lien. The Association may also opt to pursue a personal judgment against the former owner of the unit for amounts that were wiped out by the mortgage foreclosure, assuming the former owner has not discharged the debt in bankruptcy.

As with any other owner, a bank owner is

responsible for complying with the Association's rules and regulations, including rules regarding pets, architectural control, replacing light bulbs, repairing damage to the property, registering the owner's information with the Association, and any other rules and regulations that have been adopted by the Association. The bank owner is also responsible for compliance with the rules by any occupants of the property, including a former owner who may be holding over after the redemption period has expired. A bank owner can and should be notified of any rule violations that occur with respect to the foreclosed property and fined or otherwise sanctioned in accordance with the Association's governing documents if the violations are not remedied.

If your association has questions concerning foreclosed properties in your community, you can contact the author, Phaedra J. Howard, Esq., at (952) 746-2142 or phoward@hjlawfirm.com. 

IMPACT OF ALTERNATIVE ENERGY ON ASSOCIATIONS

By Jack K. Bouquet, Esq.

A recent headline set the tone of the conflict between community associations and municipalities seeking alternative forms of energy for use by their residents. The headline read "Woodbury Homeowner Associations an Obstacle to City's Hopes for Alternative Energy: Associations Opposing Renewable-Energy Options Cite Aesthetics."

The issue arose when the city of Woodbury notified its residents that an ordinance was being studied that contained a provision overriding the associations' Declarations in the event that the Declaration contained a provision prohibiting solar energy installations. As reported in the article, several associations appeared at a planning commission meeting at which the ordinance was being considered. Objection was raised by the associations that the provision in the ordinance was a violation of the governing documents of the associations and would require legislative action not merely a city ordinance.

For associations governed by Minnesota Statutes, the proper manner of asserting the position of the city of Woodbury would be to amend Chapter 515B. For other associations not governed by statute, the city would have to secure voluntary compliance, unless the governing documents were expressly made subject to city ordinances, which would be unusual.

A copy of the ordinance that was proposed can be obtained at the City of Woodbury's website at <http://www.ci.woodbury.mn.us/planning/draftaltenergyord.pdf>. The legislative action committee of the Minnesota Chapter of the Community Association Institute, CAI LAC, reviewed the

proposed ordinance, and wrote a letter to the city explaining its concerns. Foremost among them was the override of the declarations of the associations. The language objected to in the initial draft of the ordinance was "Notwithstanding any provision contained within the common interest community organization documents, an Association shall not prohibit the installation or use of an alternate energy system as defined in Section 24-403."

The article would have the reader believe that the associations are "obstacles" to efforts by the city to create green initiatives. This just isn't a correct interpretation. The residents of the communities governed by declarations purchased their homes in reliance on the declaration of the association, and in most cases, Minnesota Statute 515B. They knew that the declaration could be amended by its terms; however, they relied on the fact that the declaration would remain as it was at the time of their purchase unless the members of the association voted to amend the declaration.

The City Council of the City of Woodbury considered the results of the study by the planning commission and on September 21, 2009 recommended that staff work with associations to develop model bylaws to allow alternative energy systems rather than a regulatory approach. The section in the ordinance that addressed common interest communities has been deleted. The removal of the override of the governing documents is positive, and CAI LAC will be offering its assistance in formulating a revised ordinance.

The associations are not obstacles, but have declarations that should be respected. Citizens of Woodbury purchased in reliance upon the declaration and to the right to participate in the amendment process set forth in the declaration should there be a change.

This is one example of public officials not understanding the nature of associations.



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SAVE THE DATE! FALL ASSOCIATION SEMINAR NOVEMBER 7, 2009

Association residents, board members and property managers are invited to join us to review and discuss the latest developments in Community Association Law on Saturday, November 7, 2009.

This 2 1/2 hour session will feature an in-depth panel discussion on construction defects, legislative updates, and insurance and will also include a Q&A. We invite attendees to pose their questions confidentially to us prior to the program. Application will be made for Real Estate continuing education credit, and continental breakfast will be served.

WHEN: Saturday, November 7, 2009
9:00-11:30 a.m.

WHERE: Embassy Suites Minneapolis Airport
7901 34th Avenue South; Bloomington, MN

There is no charge for the program, but space is limited. Please RSVP by October 30, 2009 to 952-746-2158 or e-mail marketing@hjlawfirm.com.