

# Protect your homeowners group against foreclosures

By Robert Ryan  
CONTRIBUTING WRITER

Imagine you are a director of your neighborhood homeowners association. You notice on your drive home several new "for sale" signs among the growing number that dot the landscape of your neighborhood. In a time when more than one percent of all households have slipped into foreclosure and many other borrowers struggle to keep up on their mortgage payments, you might wonder what effect this will have on your neighborhood association — especially its ability to collect its assessments.

Then you recall that once the association budget amount is approved and the pro-rata general assessment levied by the board, the members are generally given a short period of time to pay their assessment before it becomes delinquent. With the association's annual budget envisioning that all members will contribute equally to the cost of operating the association, your lingering concern resurfaces as those new signs of trouble emerge. One thing you as a sitting board member are keenly aware of is that association expenses continue, regardless of the assessment collection rate.

As a director, it is not uncommon to hear a delinquent neighborhood owner remark that he or she never signed an agreement to become a neighborhood association member or pay assessments at the closing on his or her property. Of course, informed directors know the proper

response is that your association's restrictive covenants provide (as most do) that any individual accepting a deed to property in that neighborhood agrees to become a member of the association. The deed holder also agrees to abide by the rules and regulations of the association and to be personally liable for the payment of the association's assessments levied during the time he or she owns the property.

More comprehensive restrictive covenants provide for the imposition of late fees, interest and expenses for nonpaying members. These late payments are necessary, since it is unfair for the large percentage of the members to pay in a timely manner while others who enjoy the same benefits fail to do so. If the built-in incentives for payment are not sufficient to encourage voluntary payment, then the board will need to consider using other enforcement provisions in the restrictive covenants, or otherwise afforded by law.

As a sitting board member, you should know of the lien rights and enforcement remedies available to your association. In many restrictive covenants, not only is the property owner personally liable for the association assessments, the association is accorded a lien in the delinquent member's neighborhood property. Typically, that lien is stated to be a second mortgage lien behind a valid first mortgage lien on the member's neighborhood real property. By law in Kentucky, the lien of any unpaid real property taxes is accorded super priority, even over first mortgage liens.

As a lienholder, the directors should be aware that the association may be drawn into any foreclosure action against a neighborhood property. This makes it prudent for the association to file a notice of lien in the appropriate county clerk's office against the delinquent property. This notifies title searchers of the association's lien claim. Filing will not only protect the association should the property go into foreclosure, it will also help to ensure payment on the sale or refinance of the property by the owner. It is likewise very important that the notice of association lien be filed against the correct record title owner using a current legal description.

With foreclosures expected to steadily increase and the next wave of subprime adjustable-rate mortgages expected to reset later this year, an astute association board should be proactive in collecting its association's assessments. An earlier demand letter from association counsel may be warranted. Board members would be better served to continually check the local lawsuits section of their local newspaper to ferret out any newly filed foreclosures on neighborhood properties, so they will know of suits in which they must preserve the association's lien position. By law, after a foreclosure action is filed and a document entitled "Notice of Lis Pendens" is filed in the foreclosure action, a foreclosing lender has no duty to continue to check the record title documents or add any later filed

lienholders to that action.

While a foreclosure action is pending, contact should be established with any listing broker or foreclosing mortgage holder's attorney to alert them to the association's outstanding lien claim, as well as to address any compliance issues with restrictive covenants in vacated houses. Depending upon the size of the association's claim, it may seek to intervene in the foreclosure action to obtain a share of any remaining sale proceeds. After the foreclosure sale has taken place and recordation of the master commissioner's deed for the property to the highest bidder, contact should be made with the new purchaser to ensure that the future assessments are paid current.

With vigilance and patience, your neighborhood association will weather these troubling times in the real estate market with as little negative impact as possible on its ability to promote the social welfare and serve the common good of the members of your association.

*If you have a question about business, real estate or associations law, e-mail Robert at [RRyan@FowlerLaw.com](mailto:RRyan@FowlerLaw.com). Your question may be anonymously addressed in a future issue.*

*Robert Ryan is a member in the Lexington*