

QUORUM™

A Magazine for Community Association Volunteer Leaders, Professional Managers and Business Partners

A pair of hands is shown from the bottom, palms up, holding a small, white, single-story house with a brown tiled roof and a chimney. The house is set against a background of green grass and trees under a blue sky. The word "Covenants" is written in large white letters across the hands and the house.

Covenants

ALSO IN THIS ISSUE

Why Associations Need Covenants

How To Conduct a "Thorough" Inspection

... and more!



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Ursula Koenig Burgess has been an attorney with Rees Broome, PC for seven and a half years and her practice is devoted entirely to issues related to community associations. Ursula is an active member of WMCCAI and is the co-chair of the Education Committee.

Kathleen Machado represents community association clients, including condominiums and homeowners associations located in the District of Columbia and Virginia. She has experience in working with declarant-controlled associations, as well as more established associations which have made the transition to owner control. Machado's experience includes representation of associations in collections and other covenants enforcement efforts, as well as working with boards of directors to handle the associations' various general legal needs including interpretation and amendment of governing documents and contract negotiations.



Foreclosures: Help Thy Self

With the spring showers past us and the dog days of summer upon us, community associations are suffering from the headaches caused by vacant homes, a result of the tidal wave of lender foreclosures that this area has experienced. Community associations are motivated to get new owners into these vacant properties to start paying the assessments. In addition, current owners who want to sell their properties are pressuring boards to take action to clean up these unkempt properties. While the process of getting a paying owner into a home after a lender foreclosure can take months—or even years—many associations do have one weapon in their arsenals to combat the overgrown lawns, weeds, rotted trim and falling gutters—self-help.

By self-help, we mean the authority given to a community association in its governing documents to take action on a lot which is the lot owner's responsibility. Unfortunately, not all associations have the right to self-help—that right exists only if specifically authorized in a community association's governing documents and is limited by those express provisions. For example, a community association's declaration may state, "The association shall have the right to enter any lot, without the consent of the owner and/or occupant thereof, for the purpose of performing lawn maintenance, including cutting the grass, if applicable." If this is the only language regarding self-help in the governing documents, the association may enter the lot for lawn maintenance only and for no other reason, i.e., cannot enter the lot and replace the siding on the side of the exposed townhouse which has melted due to use of a grill. So community associations must first confirm that they have the right to enter the property and the right to perform the maintenance work needed.

If the governing documents authorize self-help, another consideration is whether

the documents allow the association to charge the owner for the maintenance work. There are poorly written governing documents out there that give the association the right to enter and correct a condition, but no right to charge the owner for the work. If this is the case, the board will have to determine whether the expenditure of the money is worthwhile since they will not be able to seek reimbursement from the owner for the work. If you believe that this is the case with your governing documents, we recommend that you consult with the association's attorney—he or she may interpret the documents differently or may be able to find justification to impose the charges through other provisions of the governing documents or applicable law.

Once the board has confirmed that there is in fact a condition requiring corrective action, pursuant to the terms of the association's legal documents, and that it can enter the property and perform the maintenance work, the next step is to notify the owner of the violations and the time frame within which the owner must take corrective action, before the association will proceed with self-help and where applicable assess the related costs. With foreclosed units, it can often be difficult ascertaining who is the record owner of the property. For example, often times an owner has already vacated the property and/or claimed an intention to surrender the property to their lender via a bankruptcy, in anticipation of a foreclosure. But, until the foreclosure sale occurs, the lender is not the record owner. If you are unclear on the status of title, a search of public land and tax records should provide a good start.

If the property has in fact been the subject of a foreclosure and is listed with a real estate agent for sale by the lender, a letter to that agent may prompt a reply. The agent is obviously motivated to sell the property and to that end, may authorize the association to take over the exterior maintenance

with reimbursement for those costs to be forthcoming at settlement. If the property is not actively listed for sale, it can be a challenge to locate the owner, but the lender's address of record should be noted in the foreclosure deed and that address, along with the property address can be used to issue any required notices.

Once the proper notices have been issued and the work has been performed, 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.

For those instances where the owner has abandoned the property and the lender has not yet foreclosed, collecting regular assessments, let alone self-help and violation charges, from a financially distressed owner can be a challenge and the lien may not be such a desirable option if there is a foreclosure sale on the horizon. In many cases, because there is no equity in the property, hence the reason the owner has chosen to abandon it and let the lender foreclose, the lien will be extinguished and remain unpaid.

In the alternative, it is possible for the association to pursue an owner personally via the filing of a civil lawsuit to recover the charges. It is important to note that if the association levies charges against an owner and the property subsequently forecloses, the charges do not become the obligation of the bank owner and are unrecoverable from any party other than the prior owner. All that being said, it may be the case that the association ultimately decides that although it is unlikely to recoup the costs of any self-help work from the owner in these cases, the benefits to taking such action, preventing major damage and preserving overall property values, are worth the cost. 