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# Ownership After Foreclosure

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### **Ownership After Foreclosure**

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The ability to collect assessments is crucial to an association – just like a body's ability to consume food. For the same reasons that a body cannot function without food, an association cannot function without assessments. Therefore, more and more associations are turning to judicial foreclosure as a method of collecting assessments. However, important issues arise if an association acquires title to property after a judicial foreclosure sale. When property is obtained through the judicial foreclosure of an association's assessment lien, the property remains encumbered by any first mortgage. In addition, the property may be in disrepair or have improvements which are in violation of the association's governing documents. This article will discuss what an association should do once it acquires title to the property.

#### STEP ONE: OBTAIN INSURANCE.

The first step of an association after acquiring title to property through a judicial foreclosure should be to obtain property liability insurance to protect the property itself. This will protect the association's interest if there is any damage to the property.

#### STEP 2: OBTAIN POSSESSION.

The second step, done simultaneously with the first, should be to physically secure the premises. This may involve obtaining a locksmith and having the locks changed or if the premises are still occupied, it may involve an eviction suit to seek court assistance in removing the occupant from the property. If not already known, simultaneously with seeking possession of the property, the association should also investigate the status of the first mortgage. Legal counsel can be helpful in obtaining information such as the balance due on the mortgage, the monthly payment amount, the loan number, the current lender and even facilitate payoff of the first mortgage. Associations should be aware that deeds of trust given to mortgage holders often have a "due on sale" clause. This type of clause provides that upon transfer of the property (even by foreclosure), the loan becomes due and payable in full. Therefore, there is a possibility that when the association takes title to the property, the full amount of the unpaid mortgage will immediately become due and payable. If this occurs, the association will be required to 1) sell the property and payoff the first mortgage (in which case the association gets to keep the amount in excess of the mortgage balance); 2) obtain a new mortgage using the property as collateral (the proceeds of this new mortgage would be used to pay off the existing mortgage); or 3) use funds of the association to pay off the mortgage. However, in some cases, the mortgage company may accept monthly payments by the association or another third party, towards the unpaid mortgage.

#### STEP 3: MAINTAIN PROPERTY.

Once the association obtains ownership of the property, it may wish to remove or modify unapproved improvements or to improve the property to help with resale or rentability. However, even if no improvements are made, the association should also undertake at least basic maintenance of the property. In a recent Florida case, an association was sued by a mortgage holder for failure to maintain a property which it had acquired through foreclosure. The mortgage holder claimed the association had misused and neglected the premises under a theory of "waste". The Court held that the association had failed to take reasonable care of the property. Contacting the first mortgage holder and advising it of the status of the property may help reduce an association's liability for claims of waste, particularly, if the mortgage is in

default and the mortgage holder has the right to enter the premises. Frequently, a mortgage company will not know of the situation and notification may produce results. It is not advisable for an association to simply do nothing with the property. At a minimum, the association should 1) winterize the property if appropriate; 2) provide minimal utilities to the property; 3) secure the premises; 4) properly insure the premises in the event that there is an act of God or vandalism; 5) advise the first mortgage holder that it has taken title and that only minimal steps will be taken to protect the property if that is what is intended. Because associations are often not prepared for the end results of a judicial foreclosure — ultimate ownership of the property, it is important that ownership responsibilities be discussed prior to commencing the foreclosure.