Ex. 20

AMENDMENTS TO
UNIFORM COMMON INTEREST OWNERSHIP ACT

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-SEVENTEENTH YEAR
IN BIG SKY, MONTANA
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WITH PREFATORY NOTE AND COMMENTS

December 8, 2008

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a minimum heat in their units of 55 degrees. The teenage son of the Owner of Unit C turns off all the heat after his last run on Sunday, and on Monday night, the pipes in Unit C burst. A finder of fact might properly conclude that the son of the owner of Unit C was grossly negligent.

SECTION 3-116. LIEN FOR ~~ASSESSMENTS~~; SUMS DUE ASSOCIATION; ENFORCEMENT.

(a) The association has a statutory lien on a unit for any assessment ~~levied against~~ attributable to that unit or fines imposed against its unit owner. Unless the declaration otherwise provides, reasonable attorney's fees and costs, other fees, charges, late charges, fines, and interest charged pursuant to Section 3-102(a)(10), (11), and (12), and any other sums due to the association under the declaration, this [act], or as a result of an administrative, arbitration, mediation, or judicial decision are enforceable in the same manner as unpaid assessments under this section. If an assessment is payable in installments, the lien is for the full amount of the assessment from the time the first installment thereof becomes due.

(b) A lien under this section is prior to all other liens and encumbrances on a unit except:

~~(i)~~(1) liens and encumbrances recorded before the recordation of the declaration and, in a cooperative, liens and encumbrances ~~which~~ that the association creates, assumes, or takes subject to;~~,~~;

~~(ii)~~(2) except as otherwise provided in subsection (c), a first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent; or, in a cooperative, the first security interest encumbering only the unit owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent;; and

~~(iii)~~(3) liens for real estate taxes and other governmental assessments or charges against the unit or cooperative.

(c) A ~~The~~ lien under this section is also prior to all security interests described in

subsection (b)(2) ~~clause (ii) above~~ to the extent of both the common expense assessments based on the periodic budget adopted by the association pursuant to Section 3-115(a) which would have become due in the absence of acceleration during the six months immediately preceding institution of an action to enforce the lien and reasonable attorney's fees and costs incurred by the association in foreclosing the association's lien. ~~This subsection~~ Subsection (b) and this subsection ~~does~~ do not affect the priority of mechanics' or materialmen's liens, or the priority of liens for other assessments made by the association. [~~The~~ A lien under this section is not subject to ~~the provisions of~~ [insert appropriate reference to state homestead, dower and curtesy, or other exemptions].]

~~(c)~~(d) Unless the declaration otherwise provides, if two or more associations have liens for assessments created at any time on the same property, those liens have equal priority.

~~(d)~~(e) Recording of the declaration constitutes record notice and perfection of the lien. No further recordation of any claim of lien for assessment under this section is required.

~~(e)~~(f) A lien for unpaid assessments is extinguished unless proceedings to enforce the lien are instituted within ~~[3]~~ [three] years after the full amount of the assessments becomes due.

~~(f)~~(g) This section does not prohibit actions against unit owners to recover sums for which subsection (a) creates a lien or prohibit an association from taking a deed in lieu of foreclosure.

~~(g)~~(h) A judgment or decree in any action brought under this section must include costs and reasonable attorney's fees for the prevailing party.

~~(h)~~(i) The association upon ~~written~~ request made in a record shall furnish to a unit owner a statement setting forth the amount of unpaid assessments against the unit. If the unit owner's interest is real estate, the statement must be in recordable form. The statement must be furnished within [10] business days after receipt of the request and is binding on the association, the

executive board, and every unit owner.

~~(i)~~(j) In a cooperative, upon nonpayment of an assessment on a unit, the unit owner may be evicted in the same manner as provided by law in the case of an unlawful holdover by a commercial tenant, and the lien may be foreclosed as provided by this section.

~~(j)~~(k) The association's lien may be foreclosed as provided in this subsection and subsection (p):

(1) ~~In~~ in a condominium or planned community, the association's lien must be foreclosed in like manner as a mortgage on real estate [or by power of sale under [insert appropriate state statute]];

(2) ~~In~~ in a cooperative whose unit owners' interests in the units are real estate ~~(Section 1-105)~~, the association's lien must be foreclosed in like manner as a mortgage on real estate [or by power of sale under [insert appropriate state statute]] [or by power of sale under subsection ~~(k)~~(l)]; [~~or~~ and]

(3) ~~In~~ in a cooperative whose unit owners' interests in the units are personal property ~~(Section 1-105)~~, the association's lien must be foreclosed in like manner as a security interest under [insert reference to Article 9, Uniform Commercial Code][;and]

[(4) ~~In the case of~~ in a foreclosure under [insert reference to state power of sale statute], the association shall give the notice required by statute or, if there is no such requirement, reasonable notice of its action to all lien holders of the unit whose interest would be affected].†

[(l)][(k) ~~In a cooperative, if~~ If the unit owner's interest in a unit in a cooperative is real estate, the following requirements apply ~~(Section 1-105)~~:

(1) The association, upon ~~non-payment~~ nonpayment of assessments and compliance with this subsection, may sell that unit at a public sale or by private negotiation; and

at any time, date, and place. ~~Every aspect of the sale, including the method, advertising, time, place, and terms must be reasonable.~~ The association shall give to the unit owner and any ~~lessees~~ lessee of the unit owner reasonable ~~written~~ notice in a record of the time, date, and place of any public sale or, if a private sale is intended, ~~or~~ of the intention of entering into a contract to sell and of the time and date after which a private disposition may be made. The same notice must also be sent to any other person ~~who~~ that has a recorded interest in the unit which would be cut off by the sale, but only if the recorded interest was on record seven weeks before the date specified in the notice as the date of any public sale or seven weeks before the date specified in the notice as the date after which a private sale may be made. The notices required by this subsection may be sent to any address reasonable in the circumstances. ~~Sale~~ A sale may not be held until five weeks after the sending of the notice. The association may buy at any public sale and, if the sale is conducted by a fiduciary or other person not related to the association, at a private sale.

(2) Unless otherwise agreed, the ~~debtor~~ unit owner is liable for any deficiency in a foreclosure sale.

(3) The proceeds of a foreclosure sale must be applied in the following order:

~~(i)~~(A) the reasonable expenses of sale;

~~(ii)~~(B) the reasonable expenses of securing possession before sale; the reasonable expenses of holding, maintaining, and preparing the unit for sale~~,~~; including payment of taxes and other governmental charges; and premiums on ~~hazard and liability~~ insurance~~,~~; and, to the extent provided for by agreement between the association and the unit owner, reasonable attorney's fees, costs, and other legal expenses incurred by the association;

~~(iii)~~(C) satisfaction of the association's lien;

~~(iv)~~(D) satisfaction in the order of priority of any subordinate claim of

record; and

~~(v)~~(E) remittance of any excess to the unit owner.

(4) A good faith purchaser for value acquires the unit free of the association's debt that gave rise to the lien under which the foreclosure sale occurred and any subordinate interest, even though the association or other person conducting the sale failed to comply with ~~the requirements of~~ this section. The person conducting the sale shall execute a conveyance to the purchaser sufficient to convey the unit and stating that it is executed by ~~him~~ the person after a foreclosure of the association's lien by power of sale and that ~~he~~ the person was empowered to make the sale. Signature and title or authority of the person signing the conveyance as grantor and a recital of the facts of ~~non-payment~~ nonpayment of the assessment and of the giving of the notices required by this subsection are sufficient proof of the facts recited and of ~~his~~ the authority to sign. Further proof of authority is not required even though the association is named as grantee in the conveyance.

(5) At any time before the association has disposed of a unit in a cooperative or entered into a contract for its disposition under the power of sale, the unit owners or the holder of any subordinate security interest may cure the unit owner's default and prevent sale or other disposition by tendering the performance due under the security agreement, including any amounts due because of exercise of a right to accelerate, plus the reasonable expenses of proceeding to foreclosure incurred to the time of tender, including reasonable attorney's fees and costs of the creditor.]

~~(l)~~(m) In an action by an association to collect assessments or to foreclose a lien for ~~unpaid assessments~~ on a unit under this section, the court may appoint a receiver to collect all sums alleged to be due and owing to a unit owner before commencement or during pendency of the action. The receivership is governed by [insert state law generally applicable to

receiverships]. The court may order the receiver to pay any sums held by the receiver to the association during pendency of the action to the extent of the association's common expense assessments based on a periodic budget adopted by the association pursuant to Section 3-115.]

(n) An association may not commence an action to foreclose a lien on a unit under this section unless:

(1) the unit owner, at the time the action is commenced, owes a sum equal to at least [three] months of common expense assessments based on the periodic budget last adopted by the association pursuant to Section 3-115(a) and the unit owner has failed to accept or comply with a payment plan offered by the association; and

(2) the executive board votes to commence a foreclosure action specifically against that unit.

(o) Unless the parties otherwise agree, the association shall apply any sums paid by unit owners that are delinquent in paying assessments in the following order:

(1) unpaid assessments;

(2) late charges;

(3) reasonable attorney's fees and costs and other reasonable collection charges; and

(4) all other unpaid fees, charges, fines, penalties, interest, and late charges.

(p) If the only sums due with respect to a unit are fines and related sums imposed against the unit, a foreclosure action may not be commenced against the unit unless the association has a judgment against the unit owner for the fines and related sums and has perfected a judgment lien against the unit under [insert reference to state statute on perfection of judgments].

(q) Every aspect of a foreclosure, sale, or other disposition under this section, including the method, advertising, time, date, place, and terms, must be commercially reasonable.

Comment

1. Section 3-116(a) was amended in 1994 to delete the language "from the time the assessment or fine becomes due." The deleted clause was intended to make clear that the lien was enforceable at the time the assessment became due. Commentators have observed, however, that the language caused confusion with respect to priority issues. The intention of the statute, as demonstrated by the Comments, was that the inchoate statutory lien was the functional equivalent of real estate taxes except with respect to the special priorities identified in subsection (b) of the section. The deletion of the language as suggested makes clear that the lien arises immediately upon the effective date of the statute for old common interest communities and upon recording of the declaration for new common interest communities.

As a result of this deletion, it is clear that in the absence of an exception in a title insurance policy for common charges, a title insurer would be liable for post-insurance obligations which have a priority established prior to the time the policy was issued. This, however, is no different than in other inchoate liens such as real estate taxes and mechanics liens, all of which have become standard exceptions in the title industry.

2. To ensure prompt and efficient enforcement of the association's lien for unpaid assessments, such liens should enjoy statutory priority over most other liens. Accordingly, subsection (b) provides that the association's lien takes priority over all other liens and encumbrances except those recorded prior to the recordation of the declaration, those imposed for real estate taxes or other governmental assessments or charges against the unit, and first security interests recorded before the date the assessment became delinquent. However, as to prior first security interests the association's lien does have priority for six months' assessments based on the periodic budget. A significant departure from existing practice, the six months' priority for the assessment lien strikes an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of lenders. As a practical matter, secured lenders will most likely pay the six months' assessments demanded by the association rather than having the association foreclose on the unit. If the lender wishes, an escrow for assessments can be required. Since this provision may conflict with the provisions of some state statutes which forbid some lending institutions from making loans not secured by first priority liens, the law of each State should be reviewed and amended when necessary.

In cooperatives, the association has legal title to the units and depending on the election made in the declaration pursuant to Section 2-118(i) may have power to create, assume, or take subject to security interests in the units which have priority over the interest of unit owners. Obviously, the cooperative association's lien should not have priority over an interest which the association itself has given, assumed, or taken subject to and subsection (b) expressly so provides.

The special reference to cooperatives in subsection (b)~~(ii)~~(2) merely recognizes that in a cooperative both the association and the unit owner have an interest in a unit.

3. Units may be part of two common interest communities. For example, a large real estate development may consist of one or more condominiums which are also part of a larger planned community. In that case, the planned community association might assess the

condominium units for the general maintenance expenses of the planned community and the condominium association would assess for the direct maintenance expenses of the building itself. In such a situation, subsection ~~(c)~~(d) provides that unpaid liens of the two associations have equal priority regardless of the relative time of creation of the two regimes and regardless of the time the assessments were made or became delinquent.

4. Subsection ~~(f)~~(g) makes clear that the association may have remedies short of foreclosure of its lien that can be used to collect unpaid assessments. The association, for example, might bring an action in debt or breach of contract against a recalcitrant unit owner rather than resorting to foreclosure.

5. The rights of the association against a unit upon nonpayment of an assessment on that unit depends on whether the common interest community is a condominium or planned community on the one hand, or a cooperative on the other.

In the typical cooperative the association will have a substantial underlying mortgage on all or a substantial portion of the real estate in the cooperative and a large part of each unit owner's periodic assessment will go toward payment of that particular unit's proportionate share of the mortgage. If the unit owner fails to pay his assessment on time, the association may be forced into default on its own mortgage payments with consequent possible foreclosure of the underlying mortgage and loss by all unit owners of their interests in the cooperative. Therefore, in the cooperative context it is essential that the cooperative association have a fast and effective remedy for failure of a unit owner to pay his assessment. The act provides in subsection (i) that upon nonpayment the cooperative unit owner may be evicted in the same manner as an unlawfully holding over commercial tenant. Those rules will ordinarily be the most rapid and efficient rules in the State as to eviction of tenants.

If the unit owner's interest is real estate, subsection ~~(j)~~(k)(2) then offers the State two alternatives as to nonjudicial foreclosure of a cooperative association's lien. The first alternative is power of sale under any existing state statute authorizing power of sale under mortgages. If there is no power of sale statute or if the legislature chooses to adopt a special power of sale provision for foreclosure of the lien on cooperative units, the State can choose the 2d alternative: power of sale under subsection ~~(k)~~(l) of this section.

Subsection ~~(k)~~(l), which is patterned after the power of sale foreclosure provisions of the Uniform Land Transactions Act, is a modern power of sale provision which frees private power of sale foreclosure from many of the costly, time consuming, and inefficiency producing strictures of most existing private power of sale statutes. At the same time, it provides reasonable protection to the unit owner and junior interests.

If the unit owners' interest in a cooperative is personal property, the association's lien is foreclosed as if it were a security interest under Article 9 of the Uniform Commercial Code. Article 9 foreclosure is generally less expensive and faster than either judicial or power of sale real estate foreclosure. This difference in cost and speed of foreclosure, both for association liens and security interests, is one of the major factors to be considered in choosing whether, under Section 1-105, the unit owner's interest in a cooperative will be real property or personal property. Article 9 foreclosure is currently used in foreclosing security interests in mobile homes, and has been accepted in the various States as a permissible method of foreclosure in that

housing area without serious challenge.

In a condominium or planned community, there is not likely to be a substantial underlying mortgage for which unit owners are assessed. Therefore, failure to pay assessments on time will have less serious consequences for the association than in the case of cooperatives. The section provides that the association lien in a condominium or planned community is to be foreclosed according to the rules generally applicable to real estate mortgages in the State rather than setting out a special faster method of foreclosure in the statute.

6. New subsection ~~(l)~~(m) makes clear that the courts have authority to appoint receivers upon request by associations to aid in collection of common charges.

7. Few issues are more contentious in common interest communities than the prospect of unit owners losing their homes as a consequence of non payment of common charges – and the loss of all or most of their equity – when the association forecloses. The reaction in state legislatures in recent years has been widespread.

At the same time, it is crucial that the association be able to secure timely payment of common charges in order to provide services to all the residents of the common interest community.

In an effort to balance these competing interests, the 2008 amendments provide additional safeguards governing foreclosure of liens for unpaid common charges. These new procedures may be summarized as follows;

First, Section 3–116(n) bars foreclosure for sums that are less than 3 months of common charges;

Second, Section 3–116(n) also requires the association board, to first, offer the delinquent owner a payment plan which the owner rejects, and second, expressly approve each foreclosure action;

Third, Section 3–116(o) requires that payments of delinquent assessments be applied first to principal rather than to interest and fees, in order to avoid the usual practice of accruing additional interest and late charges as the monthly fees remain unsatisfied while the attorneys fees and interest are paid first.

Fourth, Section 3–116(p) bars any foreclosure for fines alone unless the association first secures a personal judgment against the unit owner.

Finally, Section 3–116(q) requires that if a foreclosure does go forward, any sale of a unit must be commercially reasonable. In the first reported case of foreclosure arising in a state that has adopted this Act, the court required that the sale be reasonable. See *Will v. Mill Condominium Owners Association et al*, 176 VT 380, 848 A2d 336 [2004].

These special procedures would comprise an overlay on existing state foreclosure procedures, whether judicial or non-judicial. Taken together, they respond in a concise but responsible way to the widespread reports of abuses in this field. Hopefully, they will also be

viewed by the various States as a responsible and balanced response to the issues confronting elected officials, defaulting unit owners and homeowners association directors with a fiduciary responsibility to maintain the property.

8. Associations must be legitimately concerned, as fiduciaries of the unit owners, that the association be able to collect periodic common charges from recalcitrant unit owners in a timely way. To address those concerns, the section contains these 2008 amendments:

First, subsection (a) is amended to add the cost of the association's reasonable attorneys fees and court costs to the total value of the association's existing 'super lien' – currently, 6 months of regular common assessments. This amendment is identical to the amendment adopted by Connecticut in 1991; see C.G.S. Section 47-258(b). The increased amount of the association's lien has been approved by Fannie Mae and local lenders and has become a significant tool in the successful collection efforts enjoyed by associations in that state.

Second, subsection (f) has been amended to emphasize that the association has a variety of other remedies available against a unit owner in addition to the foreclosure remedy. In many cases, an action for sums due may be less costly, less disruptive and more efficient than a foreclosure action in collecting the funds properly due the association.

9. Section 3-116 rejects more extreme provisions favoring defaulting unit owners espoused in various forums. For example, extensive provisions were adopted by North Carolina regarding fines enforcement and collection which may pose significant impediments to the financial well being of unit owner associations. See, e.g., 2205 North Carolina Session Act No. 422). Similarly, the section does not adopt the extensive borrower protections contained in the Uniform Non-Judicial Foreclosure Act. That act contains provisions dealing with repetitive and detailed default notices, mandated meetings before foreclosure, a period of limitation on foreclosures, mandated judicial supervision of foreclosures, extensive redemption rights after foreclosure, and the like. In those cases where foreclosure is supervised by a judge, those procedures are not likely to be of significant benefit to defaulting to unit owners, but will impose significant transaction costs on associations in non-judicial foreclosure states; there is no reason to distinguish common interest community foreclosures from every other procedure.

10. The issue of how the association protects itself from non-payment of assessments may be of concern in a state with a homestead exemption. Either direct foreclosure of the association's statutory lien for unpaid assessments, or foreclosure of a perfected judgment lien which the association might have secured in lieu of foreclosure, may conflict with existing homestead statutes. Further consideration of this issue in those states, in order to reconcile conflicting statutes, would then be appropriate.

11. In requiring a delay for 3 months in commencement of a foreclosure proceeding, subsection 3-116(n)(1) imposes some risk on the association. Since the association's lien has only a limited priority over that of a first mortgage, anything which delays the commencement and completion of a foreclosure by the association, but does not result in the unit owner bringing his or her account current, may be seen as simply raising the cost to the association, and, therefore, to all of the other unit owners who are paying their common charges on time.

12. It may be that the reaction of some legislators to this Section will depend on the

extent to which foreclosure actions in the respective states are subject to judicial supervision. In states where non-judicial foreclosure is either not available or not used in association lien foreclosures, the active role played by the court may minimize the need for certain of the borrower protections in this section.

SECTION 3-117. OTHER LIENS.

(a) In a condominium or planned community:

(1) Except as otherwise provided in paragraph (2), a judgment for money against the association [if recorded] [if docketed] [if [insert other procedures required under state law to perfect a lien on real estate as a result of a judgment]], is not a lien on the common elements, but is a lien in favor of the judgment lien holder against all of the other real estate of the association and all of the units in the common interest community at the time the judgment was entered. No other property of a unit owner is subject to the claims of creditors of the association.

(2) If the association has granted a security interest in the common elements to a creditor of the association pursuant to Section 3-112, the holder of that security interest shall exercise its right against the common elements before its judgment lien on any unit may be enforced.

(3) Whether perfected before or after the creation of the common interest community, if a lien, other than a deed of trust or mortgage~~(~~, including a judgment lien or lien attributable to work performed or materials supplied before creation of the common interest community~~)~~, becomes effective against two or more units, the unit owner of an affected unit may pay to the lien holder the amount of the lien attributable to ~~his~~ the unit, and the lien holder, upon receipt of payment, promptly shall deliver a release of the lien covering that unit. The amount of the payment must be proportionate to the ratio ~~which~~ that the unit owner's common expense liability bears to the common expense liabilities of all unit owners ~~whose~~ the units of which are subject to the lien. After payment, the association may not assess or have a lien against that unit owner's unit for any portion of the common expenses incurred in connection with that lien.

Ex. 21

ADOPTED DECEMBER 8, 2010

COMMISSION FOR COMMON INTEREST COMMUNITIES
AND CONDOMINIUM HOTELS
ADVISORY OPINION NO. 2010-01

Subject: Inclusion of Fees and Costs as an Element of the Super Priority Lien

QUESTION

Under NRS 116.3116, the super priority of an assessment lien includes "assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration" during the 6 or 9 month super priority period. May the association also recover, as part of the super priority lien, the costs and fees incurred by the association in collecting such assessments?

ANSWER

An association may collect as a part of the super priority lien (a) interest permitted by NRS 116.3115, (b) late fees or charges authorized by the declaration, (c) charges for preparing any statements of unpaid assessments and (d) the "costs of collecting" authorized by NRS 116.310313.

ANALYSIS

Statutory Super Priority. NRS Chapter 116 provides for a "super priority" lien for certain association assessments. NRS 116.3116 provides, in pertinent part, as follows:

> **NRS 116.3116 Liens against units for assessments.**
>
> 1. The association has a lien on a unit for . . . any assessment levied against that unit . . . from the time the . . . assessment . . . becomes due. . . .
>
> 2. A lien under this section is prior to all other liens and encumbrances on a unit except:
>
> (a) Liens and encumbrances recorded before the recordation of the declaration and, in a cooperative, liens and encumbrances which the association creates, assumes or takes subject to;
>
> (b) A first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent or,

> in a cooperative, the first security interest encumbering only the unit's owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent; and
>
> (c) Liens for real estate taxes and other governmental assessments or charges against the unit or cooperative.
>
> The lien is also prior to all security interests described in paragraph (b) to the extent of any charges incurred by the association on a unit pursuant to NRS 116.310312[1] and to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien, unless federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien. If federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien, the period during which the lien is prior to all security interests described in paragraph (b) must be determined in accordance with those federal regulations, except that notwithstanding the provisions of the federal regulations, the period of priority for the lien must not be less than the 6 months immediately preceding institution of an action to enforce the lien. . .

NRS 116.3116 further provides that "Unless the declaration otherwise provides, any penalties, fees, charges, late charges, fines and interest charged pursuant to paragraphs (j) to (n), inclusive, of subsection 1 of NRS 116.3102 are enforceable as assessments under this section."

UCIOA. The "super priority" provisions of NRS Chapter 116, like the rest of the chapter, are based on the 1982 version of the Uniform Common Interest Ownership Act (UCIOA) adopted by the National Conference of Commissioners

[1] NRS 116.310312, enacted in 2009, provides for the recovery by the association of certain costs incurred by an association with respect to a foreclosed or abandoned unit, including costs incurred to "Maintain the exterior of the unit in accordance with the standards set forth in the governing documents" or "Remove or abate a public nuisance on the exterior of the unit...."

of Uniform State Laws (NCCUSL). A comparison of the statutory language in UCIOA[2] and NRS reveals few material changes:

UCIOA 3-116. (1994)	**NRS 116.3116 Liens against units for assessments.**(2009)
(a) The association has a statutory lien on a unit for any assessment levied against that unit or fines imposed against its unit owner. Unless the declaration otherwise provides, fees, charges, late charges, fines, and interest charged pursuant to Section 3-102(a)(10), (11), and (12) are enforceable as assessments under this section. If an assessment is payable in installments, the lien is for the full amount of the assessment from the time the first installment thereof becomes due.	1. The association has a lien on a unit for . . . any assessment levied against that unit or any fines imposed against the unit's owner from the time the . . . assessment or fine becomes due. Unless the declaration otherwise provides, any penalties, fees, charges, late charges, fines and interest charged pursuant to paragraphs (j) to (n), inclusive, of subsection 1 of NRS 116.3102 are enforceable as assessments under this section. If an assessment is payable in installments, the full amount of the assessment is a lien from the time the first installment thereof becomes due.
(b) A lien under this section is prior to all other liens and encumbrances on a unit except	2. A lien under this section is prior to all other liens and encumbrances on a unit except:
(i) liens and encumbrances recorded before the recordation of the declaration and, in a cooperative, liens and encumbrances which the association creates, assumes, or takes subject to,	(a) Liens and encumbrances recorded before the recordation of the declaration and, in a cooperative, liens and encumbrances which the association creates, assumes or takes subject to;
(ii) a first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent, or, in a cooperative, the first security interest encumbering only the unit owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent, and	(b) A first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent or, in a cooperative, the first security interest encumbering only the unit's owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent; and

[2] The 1982 version of UCIOA was superseded by a 1994 version, which is used here, and a 2008 version, discussed below.

(iii) liens for real estate taxes and other governmental assessments or charges against the unit or cooperative. The lien is also prior to all security interests described in clause (ii) above to the extent of the common expense assessments based on the periodic budget adopted by the association pursuant to Section 3-115(a) which would have become due in the absence of acceleration during the six months immediately preceding institution of an action to enforce the lien.	(c) Liens for real estate taxes and other governmental assessments or charges against the unit or cooperative. The lien is also prior to all security interests described in paragraph (b) to the extent of any charges incurred by the association on a unit pursuant to NRS 116.310312 and to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien, unless federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien. If federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien, the period during which the lien is prior to all security interests described in paragraph (b) must be determined in accordance with those federal regulations, except that notwithstanding the provisions of the federal regulations, the period of priority for the lien must not be less than the 6 months immediately preceding institution of an action to enforce the lien.

Reported Cases. There are no reported Nevada cases addressing the issue of whether the super priority lien may include amounts other than just the 6 or 9 months of assessments. Because NRS Chapter 116 is based on a Uniform

Act, however, decisions in other states that have adopted UCIOA can be helpful. Colorado and Connecticut are both UCIOA states; reported cases in both these states have addressed the question presented in this opinion.

In *Hudson House Condominium Association, Inc. v. Brooks*, 611 A.2d 862 (Conn., 1992), the Connecticut Supreme Court rejected an argument by the holder of the first mortgage that "because [the statute] does not specifically include 'costs and attorney's fees' as part of the language creating [the association's] priority lien, those expenses are properly includable only as part of the nonpriority lien that is subordinate to [the first mortgagee's] interest." In reaching its conclusion, however, the court relied on a non-uniform statute dealing with the judicial enforcement of the association lien.[3] In a footnote the court also noted that the super priority language of the Connecticut version of UCIOA 3-116 had since been amended to expressly include attorney's fees and costs in the priority debt.

The two Colorado cases that have considered this issue reached their conclusion, that the priority debt *includes* attorneys' fees and costs, based on statutory language similar to Nevada's. The language of the court in *First Atl. Mortgage, LLC v. Sunstone N. Homeowners Ass'n*, 121 P.3d 254 (Colo. App 2005) is very helpful:

> Within the meaning of Section 2(b), a "lien under this section" may include any of the expenses listed in subsection (1), including "fees, charges, late charges, attorney fees, fines, and interest." Thus, ***although the maximum amount of a super priority lien is defined solely by reference to monthly assessments, the lien itself may comprise debts other than delinquent monthly assessments***.[Emphasis added.]

[3] C.G.S.A. Section 47-258(g)

In support of its holding, the Sunstone court quoted the following language from James Winokur, *Meaner Lienor Community Associations: The "Super Priority" Lien and Related Reforms Under the Uniform Common Ownership Act*, 27 Wake Forest L. Rev. 353, 367:

> A careful reading of the . . . language reveals that the association's Prioritized Lien, like its Less-Prioritized Lien, may consist not merely of defaulted assessments, but also of fines and, where the statute so specifies, enforcement and attorney fees. The reference in Section 3-116(b) to priority "to the extent of" assessments which would have been due "during the six months immediately preceding an action to enforce the lien" merely limits the maximum amount of all fees or charges for common facilities use or for association services, late charges and fines, and interest which can come with the Prioritized Lien.

The decision of the court in Sunstone was followed in *BA Mortgage, LLC v. Quail Creek Condominium Association, Inc.*, 192 P.2d 447 (Colo. App, 2008).

A comparison of the language of the Colorado statute and the language of the Nevada statute reveals that the two are virtually identical:

CRS 38-33.3-316 Lien for assessments. (2008)	**NRS 116.3116 Liens against units for assessments**. (2009)
(1) The association . . . has a statutory lien on a unit for any assessment levied against that unit or fines imposed against its unit owner. Unless the declaration otherwise provides, **fees, charges, late charges, attorney fees, fines, and interest** charged pursuant to section 38-33.3-302 (1) (j), (1) (k), and (1) (l), section 38-33.3-313 (6), and section 38-33.3-315 (2) are enforceable as assessments under this article. The amount of the lien shall include all those items set forth in this section from the time such items become due. . . .	. The association has a lien on a unit for . . . any assessment levied against that unit or any fines imposed against the unit's owner from the time the . . . assessment or fine becomes due. Unless the declaration otherwise provides, any . . . **fees, charges, late charges, fines and interest** charged pursuant to paragraphs (j) to (n), inclusive, of subsection 1 of NRS 116.3102 are enforceable as assessments under this section. . . .

(2) (a) A lien under this section is prior to all other liens and encumbrances on a unit except: * * * (b) Subject to paragraph (d) of this subsection (2), a lien under this section is also prior to the security interests described in subparagraph (II) of paragraph (a) of this subsection (2) to the extent of: (I) **An amount equal to the common expense assessments based on a periodic budget adopted by the association under section 38-33.3-315 (1) which would have become due, in the absence of any acceleration, during the six months immediately preceding** institution by either the association or any party holding a lien senior to any part of the association lien created under this section of an action or a nonjudicial foreclosure either to enforce or to extinguish the lien. [Emphasis added.]	2. A lien under this section is prior to all other liens and encumbrances on a unit except: * * * The lien is also prior to all security interests described in paragraph (b) to the extent of any charges incurred by the association on a unit pursuant to NRS 116.310312 and **to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding** institution of an action to enforce the lien, unless federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien. If federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien, the period during which the lien is prior to all security interests described in paragraph (b) must be determined in accordance with those federal regulations, except that notwithstanding the provisions of the federal regulations, the period of priority for the lien must not be less than the 6 months immediately preceding institution of an action to enforce the lien. This subsection does not affect the priority of mechanics' or materialmen's liens, or the priority of liens for other assessments made by the association. [Emphasis added.]

2008 UCIOA. In 2008 NCCUSL proposed the following amendment to 3-116 of UCIOA[4]:

> SECTION 3-116. LIEN FOR ~~ASSESSMENTS;~~ SUMS DUE ASSOCIATION; ENFORCEMENT.
>
> (a) The association has a statutory lien on a unit for any assessment ~~levied against~~ attributable to that unit . . .. Unless the declaration otherwise provides, **reasonable attorney's fees and costs, other fees, charges, late charges, fines, and interest** charged pursuant to Section 3-102(a)(10), (11), and (12), and any other sums due to the association under the declaration, this [act], or as a result of an administrative, arbitration, mediation, or judicial decision are enforceable in the same manner as unpaid assessments under this section. If an assessment is payable in installments, the lien is for the full amount of the assessment from the time the first installment thereof becomes due.
>
> (b) A lien under this section is prior to all other liens and encumbrances on a unit except:
>
> ~~(i)~~(1) liens and encumbrances recorded before the recordation of the declaration and, in a cooperative, liens and encumbrances ~~which~~ that the association creates, assumes, or takes subject to~~,~~;
>
> ~~(ii)~~(2) except as otherwise provided in subsection (c), a first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent~~,~~ or, in a cooperative, the first security interest encumbering only the unit owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent~~,~~; and
>
> ~~(iii)~~(3) liens for real estate taxes and other governmental assessments or charges against the unit or cooperative.
>
> (c) A ~~The~~ lien under this section is also prior to all security interests described in subsection (b)(2) ~~clause (ii) above~~ to the extent of **both** the common expense assessments based on the periodic budget adopted by the association pursuant to Section 3-115(a) which would have become due in the absence of acceleration during the six months immediately preceding institution of an action to enforce the lien **and reasonable attorney's fees and costs incurred by the association in foreclosing the association's lien**. . . [Emphasis added.]

[4] The changes noted are to 1994 UCIOA.

New Comment No. 8 to 3-116 states as follows:

> 8. Associations must be legitimately concerned, as fiduciaries of the unit owners, that the association be able to collect periodic common charges from recalcitrant unit owners in a timely way. To address those concerns, the section contains these 2008 amendments:
>
> **First, subsection (a) is amended to add the cost of the association's reasonable attorneys fees and court costs to the total value of the association's existing 'super lien'** – currently, 6 months of regular common assessments. This amendment is identical to the amendment adopted by Connecticut in 1991; see C.G.S. Section 47-258(b).[5] The increased amount of the association's lien has been approved by Fannie Mae and local lenders and has become a significant tool in the successful collection efforts enjoyed by associations in that state. [Emphasis added.]

Discussion. The Colorado Court of Appeals and the author of the Wake Forest Law Review article quoted by the court in the *Sunstone* case both concluded that although the assessment portion of the super priority lien is limited to a finite number of months, because the assessment lien itself includes "fees, charges, late charges, attorney fees, fines, and interest," these charges may be included as part of the super priority lien amount. This language is the same as NRS 116.3116, which states that "fees, charges, late charges, fines and interest charged pursuant to paragraphs (j) to (n), inclusive, of subsection 1 of NRS 116.3102 are enforceable as assessments." As the *Sunstone* court noted "although the maximum amount of the super priority lien is defined solely by reference to monthly assessments, the lien itself may comprise debts other than delinquent monthly assessments."

[5] The statutory change noted by the Connecticut Supreme Court in the Hudson House case referred to above.

The referenced statute, NRS 116.3102, provides that an association has the power to:

> (j) Impose and receive any payments, fees or charges for the use, rental or operation of the common elements, other than limited common elements described in subsections 2 and 4 of NRS 116.2102, and for services provided to the units' owners, including, without limitation, any services provided pursuant to NRS 116.310312.
>
> (k) Impose charges for late payment of assessments pursuant to NRS 116.3115.
>
> (l) Impose construction penalties when authorized pursuant to NRS 116.310305.
>
> (m) Impose reasonable fines for violations of the governing documents of the association only if the association complies with the requirements set forth in NRS 116.31031.
>
> (n) Impose reasonable charges for the preparation and recordation of any amendments to the declaration or any statements of unpaid assessments, and impose reasonable fees, not to exceed the amounts authorized by NRS 116.4109, for preparing and furnishing the documents and certificate required by that section.

It is immediately apparent that the charges authorized by NRS 116.3102(1)(j) through (n) cover a wide variety of circumstances. The fact that "fees, charges, late charges, fines and interest" that may be included as part of the assessment lien under NRS 116.3116 include amounts unrelated to monthly assessments does not mean, however, that such amounts should not be included in the super lien if they do relate to the applicable super priority monthly assessments. It appears that only those association charges authorized under NRS 116.3102(1) Subsections (k) and a portion of (n) apply to the collection of unpaid assessments, i.e., Subsection (k)'s charges for late payment of

assessments and Subsection (n)'s charges for preparing any statements of unpaid assessments. Subsection (j)'s charges for use of common elements or providing association services, Subsection (l)'s construction penalties and Subsection (n)'s amendments to the declaration and providing resale information clearly do not relate to the collection of monthly assessments.

The inclusion of the word "fines" authorized by NRS 116.3102(1)(m) as part of the assessment lien presents an additional problem in Nevada. The "fines" referred to in NRS 116.3116/NRS 116.3102(1)(m) are fines authorized by NRS 116.31031. While fines may be imposed for "violations of the governing documents," which, of course, could include non-payment of assessments required by the governing documents, the hearing procedure mandated by NRS 116.31031 prior to the imposition of "fines" refers to an inquiry involving conduct or behavior that violates the governing documents, not the failure to pay assessments. Because "fines" involve conduct or behavior, enforcement of fines are given special treatment under NRS 116.31162:

> 4. The association may not foreclose a lien by sale based on a fine or penalty for a violation of the governing documents of the association unless:
>
> (a) The violation poses an imminent threat of causing a substantial adverse effect on the health, safety or welfare of the units' owners or residents of the common-interest community; or
>
> (b) The penalty is imposed for failure to adhere to a schedule required pursuant to NRS 116.310305.

Thus, to use the words of the *Sunstone* court, the "plain language" of NRS 116.3116, when read in conjunction with NRS 116.3102(1) (j) through (n), supports the conclusion that the only additional amounts that can be included as part of the super priority lien in Nevada are "charges for late payment of

assessments pursuant to NRS 116.3115" and "reasonable charges for the preparation and recordation of . . . any statements of unpaid assessments." NRS 116.3102(1)(k),(n). Note that the reference in Subsection (k) to NRS 116.3115 appears to be solely for the purpose of identifying what is meant by the word "assessment," though NRS 116.3115(3) provides for the payment of interest on "Any assessment for common expenses or installment thereof that is 60 days or more past due...."

Conclusion. The super priority language contained in UCIOA 3-116 reflected a change in the traditional common law principle that granted first priority to a mortgage lien recorded prior to the date a common expense assessment became delinquent. The six month priority rule contained in UCIOA 3-116 established a compromise between the interests of the common interest community and the lending community. The argument has been advanced that limiting the super priority to a finite amount, i.e., UCIOA's six months of budgeted common expense assessments, is necessary in order to preserve this compromise and the willingness of lenders to continue to lend in common interest communities. The state of Connecticut, in 1991, NCCUSL, in 2008, as well as "Fannie Mae and local lenders"[6] have all concluded otherwise.

Accordingly, both a plain reading of the applicable provisions of NRS 116.3116 and the policy determinations of commentators, the state of Connecticut and lenders themselves support the conclusion that associations should be able to include specified costs of collecting as part of the association's super priority lien. We reach a similar conclusion in finding that Nevada law

[6] See New Comment No. 8 to UCIOA 3-116(2008) quoted above.

authorizes the collection of "charges for late payment of assessments" as a portion of the super lien amount.

In 2009, Nevada enacted NRS 116.310313, which provides as follows:

> **NRS 116.310313 Collection of past due obligation; charge of reasonable fee to collect.**
>
> 1. An association may charge a unit's owner reasonable fees to cover the costs of collecting any past due obligation. The Commission shall adopt regulations establishing the amount of the fees that an association may charge pursuant to this section.
>
> 2. The provisions of this section apply to any costs of collecting a past due obligation charged to a unit's owner, regardless of whether the past due obligation is collected by the association itself or by any person acting on behalf of the association, including, without limitation, an officer or employee of the association, a community manager or a collection agency.
>
> 3. As used in this section:
>
> (a) "Costs of collecting" includes any fee, charge or cost, by whatever name, including, without limitation, any collection fee, filing fee, recording fee, fee related to the preparation, recording or delivery of a lien or lien rescission, title search lien fee, bankruptcy search fee, referral fee, fee for postage or delivery and any other fee or cost that an association charges a unit's owner for the investigation, enforcement or collection of a past due obligation. The term does not include any costs incurred by an association if a lawsuit is filed to enforce any past due obligation or any costs awarded by a court.
>
> (b) "Obligation" means any assessment, fine, construction penalty, fee, charge or interest levied or imposed against a unit's owner pursuant to any provision of this chapter or the governing documents.

Since Nevada law specifically authorizes an association to recover the "costs of collecting" a past due obligation and, further, limits those amounts, we conclude that a reasonable interpretation of the kinds of "charges" an association

may collect as a part of the super priority lien include the "costs of collecting" authorized by NRS 116.310313. Accordingly, the following amounts may be included as part of the super priority lien amount, to the extent the same relate to the unpaid 6 or 9 months of super priority assessments: (a) interest permitted by NRS 116.3115, (b) late fees or charges authorized by the declaration in accordance with NRS 116.3102(1)(k), (c) charges for preparing any statements of unpaid assessments pursuant to NRS 116.3102(1)(n) and (d) the "costs of collecting" authorized by NRS 116.310313.

Ex. 14

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DISTRICT COURT

CLARK COUNTY, NEVADA

WINGBROOK CAPITAL, LLC., Plaintiff, vs. PEPPERTREE HOMEOWNERS ASSOCIATION; and DOES 1-10 and ROE ENTITIES 1-10, INCLUSIVE Defendants.	Case No. A-11-636948-B Dept. No. XI **ORDER**

This matter came before the Court on May 24, 2011 at 9:00 a.m., upon the Plaintiff's Motion for Summary Judgment on Claim of Declaratory Relief. James R. Adams, Esq., of Adams Law Group, Ltd., and Puoy K. Premsrirut, Esq., of Puoy K. Premsrirut, Esq., Inc., appeared on behalf of the Plaintiff. Kurt Bonds, Esq., of Alverson, Taylor, Mortensen & Sanders appeared on behalf of the Defendant. The Honorable Court, having read the briefs on file and having heard oral argument, and for good cause appearing hereby rules:

WHEREAS the Parties have engaged in and have concluded a Nevada Real Estate Division mediation (ADR #11-25) wherein the Parties mediated a dispute over the sum of $13,190.33; and

mediation (ADR #11-25) wherein the Parties mediated a dispute over the sum of $13,190.33; and

WHEREAS the subject of the mediation was whether NRS 116.3116 permitted Defendant to charge to Plaintiff $14,037.83, or whether some lesser amount was due pursuant to NRS 116.3116; and

WHEREAS, the Court has determined that a justiciable controversy exists in this matter as Defendant claims it has a right pursuant to NRS 116.3116 to charge and retain proceeds in the amount $14,037.83 from Plaintiff and Plaintiff, a purchaser of a home at foreclosure which is located within the Defendant homeowners' association, contests this charge and claims that Defendant exceeded the limits of NRS 116.3116 and overcharged it for the super priority lien; and

WHEREAS there exists in this case a controversy in which a claim of right is asserted by Plaintiff against Defendant who has an interest in contesting it; and

WHEREAS Plaintiff and Defendant, the contesting parties hereto, are clearly adverse and hold different views regarding the meaning and applicability of NRS §116.3116 (including whether Defendant charged too much for the super priority lien); and

WHEREAS Plaintiff has a legal interest in the controversy as it was Plaintiff's money which had been demanded and transferred to Defendant and it was Plaintiff's property that had been the subject of a homeowners' association lien by Defendant; and

WHEREAS the issue of the meaning, application and interpretation of NRS 116.3116 is ripe for determination in this case as the present controversy is real, it exists now, and it affects the Parties hereto; and

WHEREAS, therefore, the Court finds that issuing a declaratory judgment relating to the meaning and interpretation of NRS 116.3116 would terminate some of the uncertainty and controversy giving rise to the present proceeding; and

///

///

WHEREAS, pursuant to NRS 30.040 Plaintiff and Defendant are parties whose rights, status or other legal relations are affected by NRS 116.3116 and they may, therefore, have determined by this Court any question of construction or validity arising under NRS 116.3116 and obtain a declaration of rights, status or other legal relations thereunder;

THE COURT, THEREFORE, DECLARES, ORDERS, ADJUDGES AND DECREES as follows:

1. NRS 116.3116 is a statute which creates for the benefit of Nevada homeowners' associations a lien against a homeowner's unit for any construction penalty that is imposed against the unit's owner pursuant to NRS 116.310305, any assessment levied against that unit or any fines imposed against the unit's owner from the time the construction penalty, assessment or fine becomes due (the "Statutory Lien"). The homeowners' associations' Statutory Lien is noticed and perfected by the recording of the associations' declaration and, pursuant to NRS 116.3116(4), no further recordation of any claim of lien for assessment is required.

2. Pursuant to NRS 116.3116(2), the homeowners' association's Statutory Lien is junior to a first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent ("First Security Interest") except for a portion of the homeowners' association's Statutory Lien which remains prior to the First Security Interest (the "Super Priority Lien").

3. Homeowners' associations, therefore, have a Super Priority Lien which has priority over the First Security Interest on a homeowners' unit. However, the Super Priority Lien amount is not without limits and NRS 116.3116 provides that the amount of the Super Priority Lien (i.e., that amount of a homeowners' associations' Statutory Lien which retains priority status over the First Security Interest) is limited "to the extent" of those assessments for common expenses based upon the associations' periodic budget that would have become due in the 9 month period immediately preceding an

associations' institution of an action to enforce its Statutory Lien and "to the extent of" external repair costs pursuant to NRS 116.310312:

of" external repair costs pursuant to NRS 116.310312:

4. The words "to the extent of" contained in NRS 116.3116(2) mean "no more than," which clearly indicates a maximum figure or a cap on the Super Priority Lien which cannot be exceeded.

5. Therefore, after the foreclosure by a First Security Interest holder of a unit located within a homeowners' association, pursuant to NRS 116.3116 the monetary limit of a homeowners' association's Super Priority Lien is limited to a maximum amount equaling 9 times the homeowners' association's monthly assessment amount to unit owners for common expenses based on the periodic budget which would have become due immediately preceding the institution of an action to enforce the lien (the "Assessment Cap Figure") plus external repair costs pursuant to NRS 116.310312.

6. While assessments, penalties, fees, charges, late charges, fines and interest may be included within the Assessment Cap Figure, in no event can the total amount of the Assessment Cap Figure exceed an amount equaling 9 times the homeowners' association's monthly assessment amount to unit owners for common expenses based on the periodic budget which would have become due immediately preceding the association's institution of an action to enforce the lien.

7. The Super Priority Lien equals the Assessment Cap Figure plus external repair costs pursuant to NRS 116.310312.

8. After providing a homeowner with notice and hearing, NRS 116.310312 permits a homeowners' association to enter the grounds of a homeowners' unit and maintain the exterior of the unit in accordance with the standards set forth in the association's governing documents. Pursuant to NRS 116.310312(2)(b), a homeowners' association may also remove or abate a public nuisance on the exterior of a unit. The association may order that the costs of such maintenance or abatement, including interest, inspection fees, notification fees and collection costs for such maintenance

or abatement to be charged against the unit ("Exterior Repair Costs"). NRS 116.310312(9)(a) provides that "Exterior" of the unit includes, without limitation, all landscaping outside of a unit and the exterior of all property exclusively owned by the unit owner.

9. Therefore, the Super Priority Lien consists solely and exclusively of the Assessment Cap Figure and the Exterior Repair Costs. No other costs, fees, fines, penalties, assessments, charges, late charges, or interest or any other costs may be included within the Super Priority Lien.

10. Pursuant to NRS 116.3116, the maximum amount of the Assessment Cap Figure portion of Defendant's Super Priority Lien cannot exceed $1,552.50 which equals 9 times the Defendant's monthly assessments. As Defendant has assessed against Plaintiff $1,552.50 for past due assessments incurred prior to Plaintiff's ownership of the property, the additional late fees of $135.00 and accrued interest on the Assessment Cap Figure are impermissible and cannot be included in the Assessment Cap Figure as the addition of those costs exceed the Assessment Cap Figure of $1,552.50 and violates NRS 116.3116.

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11. The External Repair Costs portion of the Super Priority Lien shall be determined by this Court at a later date when the Court is provided with all necessary evidence to this Court at a later date when the Court is provided with all necessary evidence to make that determination.

IT IS SO ORDERED.

DISTRICT COURT JUDGE

June 2, 2011
Date

BK

Submitted by:

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Ex. 15

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STATE OF NEVADA
DEPARTMENT OF BUSINESS AND INDUSTRY
FINANCIAL INSTITUTIONS DIVISION

1179 Fairview Drive, Ste. 201
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(775) 687-5922

In Re:

The Petition of Prem Investment, LLC, a Nevada limited liability company; Rutt Premsrirut, Manager, for an application for Advisory Opinion and Declaratory Order pursuant to NAC 232.040,

Petitioner.

DECLARATORY ORDER AND ADVISORY OPINION REGARDING COLLECTION AGENCY FEES FROM HOMEOWNER ASSOCIATION LIENS FOLLOWING FORECLOSURE

DECLARATORY ORDER AND ADVISORY OPINION REGARDING COLLECTION AGENCY FEES FROM HOMEOWNER ASSOCIATION LIENS FOLLOWING FORECLOSURE

Nevada, Department of Business and Industry, Financial Institutions Division (hereinafter "Division") hereby issues its Declaratory Order and Advisory Opinion regarding Petitioner PREM INVESTMENTS, LLC (hereafter "the Petitioner") regarding the collection of fees and charges by collection agencies and community managers for homeowners associations following the foreclosure of residential real estate.

JURISDICTION

1. The business of collecting claims for others or of soliciting the right to collect or receive payment from another of any claim in the State of Nevada is governed by chapter 649 of the Nevada Revised Statutes (NRS) and chapter 649 of the Nevada Administrative Code (NAC). The State of Nevada, Department of Business and Industry, Financial Institutions Division (hereinafter "Division") has primary jurisdiction for the licensing and regulation of persons operating and/or engaging in collection services. NRS 649.026.

2. The rule regarding the issuing of Declaratory Orders and Advisory Opinions by this agency are governed by NRS 233B.120, which reads as follows:

> Each agency shall provide by regulation for the filing and prompt disposition of petitions for declaratory orders and advisory opinions as to the applicability of any statutory provision, agency regulation or decision of the agency. Declaratory orders disposing of petitions in such cases shall have the same status as agency decisions. A copy of the declaratory order or advisory opinion shall be mailed to the petitioner.

3. The Nevada Administrative Code (NAC) 323.040(1) establishes the procedure for filing a petition for declaratory order as follows:

> Except as otherwise provided in subsection 4, an interested person may petition the Director to issue a declaratory order or advisory opinion concerning the applicability of a statute, regulation or decision of the Department or any of its divisions.

4. Upon receipt by the Director, the petition is then referred to the Commissioner for the Financial Institutions Division for determination. NAC 232.045.

FACTUAL BACKGROUND

5. Petitioner PREM INVESTMENTS, LLC is registered under the laws of the State of Nevada and has submitted this Petition by and through its attorney, James Adams, Esq. from the law firm Adams Law Group, Ltd.

6. On September 24, 2010, Petitioner filed its Petition for a Declaratory Order and Advisory Opinion with the Division.

7. Petitioners present a factual scenario which is all too common in the State of Nevada. A homeowner is unable to pay the mortgage and the monthly assessments to the homeowners' association.

8. Two actions are initiated. The bank begins foreclosure proceedings on the property.

9. At the same time, the homeowners association (hereafter "the association") initiates collection of its delinquent assessments by filing a lien on the property.

10. The property is sold at foreclosure, but the association's assessments continue because the association maintains a priority lien for its assessments.

11. The association's claim for assessments is sent to a collection agency or a community management company acting as a collection agency. When the bank attempts to sell the property, the new homeowner must pay the assessments and fees associated with the lien in order to obtain a clear title.

12. The lien includes additional fees and charges added by the collection agency, which often dwarf the amount of the original assessment.

13. Moreover, the fees being charged to the current homeowner or subsequent purchaser are generally not part of the collection contract between the agency and the association nor are they included in the governing documents of the association.

14. Therefore, the association never approves of the fees and charges added to the original assessment and fines charged to the homeowner who is subject to a lien or a subsequent purchaser at a foreclosure sale.

15. While the central focus of the issues raised by the Petition for Declaratory Order and Advisory Opinion concerns the priority of collection fees being charged, the Division has additional concerns regarding the undisclosed nature of these fees which are charged to homeowners and purchasers alike.

QUESTION PRESENTED

16. The Petitioner presents the following question for an advisory opinion:

a. Under NRS 116.3116, a homeowners' association has a lien on a unit for any assessments levied against that unit and any fines imposed against the unit's owner from the time the assessment or fine becomes due. Pursuant to NRS 116.3116, what portion of the lien, if any, is superior to the unit's first mortgage lender's security interest ("super priority lien") and may the sum total of the super priority lien amount, whether it be comprised of assessments, fees,

costs of collection or other charges, ever exceed 9 times the monthly assessment amount for common expenses based on the periodic budget adopted by the association pursuant to NRS 1116.3115 plus any charges incurred by the association on a unit pursuant to NRS 116.310312 (unit repair expenses)?

b. Pursuant to NRS 116.3116, does a "super priority lien" exist in the absence of a homeowners' association's failure to file a complaint with the court to enforce the lien, i.e., the failure to institute a "civil action" as defined by Nevada Rules of Civil Procedure 2 and 3?

17. While the questions address an interpretation of NRS Chapter 116, the Division will address the issues as they relate to collection agencies and the implications of the federal Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692f, prohibition against false, deceptive or misleading communications.

18. The federal Fair Debt Collection Practices Act (FDCPA) was made applicable to licensed collection agencies under NRS 649.370. More generally, a violation of the FDCPA can be considered a deceptive trade practice pursuant to NRS 598.023(3) which defines deceptive trade practice as "Violates a state or federal statute or regulation relating to the sale or lease of goods or services."

LEGAL ANALYSIS

19. NRS 649.020(3)(a) defines collection agency as including "a community manager while engaged in the management of a common-interest community or the management of an association of a condominium hotel if the community manager, or any employee, agent or affiliate of the community manager, performs or offers to perform any act associated with the foreclosure of a lien pursuant to NRS 116.31162 to 116.31168, inclusive, or 116B.635 to 116B.660, inclusive."

20. As a collection agency, any "interest, charge, fee or expense" added to the principal obligation must be "authorized by law or as agreed to by the parties." NRS 649.375(2).

21. As the associations have not established amounts of fees for collection services in their governing documents and collection agency contracts do not include the type and amount of fees which will be collected, the analysis of the questions presented will focus on what, if any, is permitted by law to be collected.

A. **Is the amount of the "super priority" lien established pursuant to NRS 116.3116 capped at the amount of 9 months of assessments?**

22. Pursuant to NRS 116.3116(1), the association can impose a lien for assessments and the fees and late charges for those assessments.

> The association has a lien on a unit for any construction penalty that is imposed against the unit's owner pursuant to NRS 116.310305, any assessment levied against that unit or any fines imposed against the unit's owner from the time the construction penalty, assessment or fine becomes due. **Unless the declaration otherwise provides, any penalties, fees, charges, late charges, fines and interest charged pursuant to paragraphs (j) to (n), inclusive, of subsection 1 of NRS 116.3102 are enforceable as assessments under this section.** If an assessment is payable in installments, the full amount of the assessment is a lien from the time the first installment thereof becomes due.

23. The association can impose a lien on assessments which have priority over the first mortgage on the real property. However, the lien amount is not without limits and the statute is clear that the amount of a lien which retains its priority status is "to the extent" that those assessments would have become due in the preceding nine (9) months prior to enforcement of the lien. NRS 116.3116(2) reads in part as follows:

> The lien is also prior to all security interests described in paragraph (b) to the extent of any charges incurred by the association on a unit pursuant to NRS 116.310312 and **to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien.** .... This subsection does not affect the priority of mechanics' or materialmen's liens, or

the priority of liens for other assessments made by the association.

24. NRS 116.3116(1) includes as part of the lien for assessments fees, charges, interest and costs which are permitted by NRS 116.3102(1)(n). That statute permits the addition of fees by "the association" which are "**reasonable** charges for the preparation and recordation of any amendments to the declaration or **any statements of unpaid assessments, and impose reasonable fees**, not to exceed the amounts authorized by NRS 116.4109, for preparing and furnishing the documents and certificate required by that section." NRS 116.3102(1)(n).

25. The types of charges authorized by NRS 116.4109 are extensive. The list of charges which can be collected, include, "any transfer fees, transaction fees or any other fees associated with the resale of a unit," NRS 116.4109(1)(e), and "association fees, fines, assessments, late charges or penalties, interest rates on delinquent assessments, additional costs for collecting past due fines and charges for opening or closing any file for each unit." NRS 116.4109(1)(f).

26. Since the statute includes the additional fees and charges as part of the "super priority" lien, then those fees, charges, interest and penalties, as stated above, are also subject to the nine (9) month assessment limitation established in NRS 116.3116(2).

27. As the Petitioner points out, numerous policy reasons exist to limit the amount which has priority not the least of which is to provide needed understanding by the first mortgage holder that its security interest in the property is not reduced by assessments and the unlimited amount of fees, charges, interest, penalties, fines and interest imposed by the association or its collection agent.

28. Further, Petitioner is correct in stating that the remainder of the lien is not removed from the property, but only the priority status over the first mortgage holder.

29. The Division adopts the interpretation that NRS 116.3116(2) is a limit on the amount an association can place a lien which has priority over the first mortgage holder.

30. While the Petitioner refers to this amount as "9 times" the monthly assessment by the association, that statement would not be entirely correct because changes in the amount of assessments may occur during the time period. The amount of the lien which has priority over the first mortgage cannot exceed what the association would have regularly charged for common expenses for the unit in the nine (9) months prior to the institution of an action to enforce a lien.

31. Any balance exceeding the nine (9) month limitation would be subordinate to the first mortgage holder's security interest.

32. Consequently, pursuant to the requirements of NRS 649.375(2)(a), the only charges "authorized by law" to collect after the foreclosure of the first mortgage are those that do not exceed the amount charged over the preceding nine (9) months of normal association assessments.

33. The Division further concludes that additional fees and charges can be included in the "super priority" lien as permitted by statute but the total of all of the amounts cannot exceed the nine (9) month assessment limitation.

34. While the associations and their collection agencies should be mindful that the charges must be reasonable, the Division concludes that collection agencies are not permitted to add fees of any amount without the expressed approval of the association.

35. As the statutes cited above make clear, the association is the entity required to impose the fees and charges, not its collection agency. NRS 116.3116(1) ("The **association** has the lien"); NRS 116.3102(1) ("the **association** may do any or all of the following ..."); NRS 116.4109(3) ("the **association** shall furnish all of the following to the unit's owner or his or her authorized agent for inclusion in the resale package ...").

36. Consequently, no additional collection charges are "permitted by law" unless they are first approved by the association.

37. NRS 649.375(2) prohibits the collection of "interest, charge, fee or expense" which is not "authorized by law or as agreed to by the parties..."

38. A similar requirement exists in the federal Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692f(1) defining an "unfair practice" as "[t]he collection of amount (including any interest, fee, charge or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law."

39. As stated above, the association is permitted to make additional charges to the assessments for the collection of assessments, however, the statute requires that the association approve the charge, and it may not leave it to the collection agency to determine the amount of fees it may collect.

40. The collection agencies are operating as agents of the homeowners' association and it is a relationship based upon contract. *Hamm v. Arrowcreek Homeowners' Ass'n*, 183 P.3d 895, 902 (Nev. 2008) ("An agency relationship results when one person possesses the contractual right to control another's manner of performing the duties for which he or she was hired.") However, the collection agency, alone, does not have the power to create and impose fees, where, as here, the statutes have delegated that authority to the association.

41. Therefore, the Division further concludes that if any charges or fees are added to the assessments to be charged pursuant to NRS 116.3102, or added to a lien pursuant to NRS 116.3116, then those fees, interest and charges must have been expressly approved by the association pursuant to its governing documents or in the contract with the collection agency prior to the time those fees, charges, interest, costs and penalties were incurred.

B. <u>Is the association required to file a civil action prior to asserting its lien for assessments with "super priority" status?</u>

42. Petitioner requests clarification of what is meant by the "action" in NRS 116.3116 in order to determine the "super priority" status of the association's lien. As above NRS 116.3116(2) reads, in part, as follows:

> The lien is also prior to all security interests described in paragraph (b) to the extent of any charges incurred by the association on a unit pursuant to NRS 116.310312 and **to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien,** .... This subsection does not affect the priority of mechanics' or materialmen's liens, or the priority of liens for other assessments made by the association.

43. Petitioner's claim that the language "institution of an action to enforce the lien" creates a statutory requirement that the association is required to file a civil action before the lien can achieve priority status. The Division disagrees. Nothing in the statute would indicate an intent to require a court action to secure priority status during the non-judicial foreclosure process.

44. As the Nevada Supreme Court stated, in order to determine what is meant by a term, an examination of the context and spirit of the statute is necessary.

> To clarify a statute's ambiguity, we look at the "context" and "spirit" in which it was enacted to effect a construction that best represents the legislative intent in enacting the statute. *Boucher v. Shaw*, 124 Nev. 96, —, 196 P.3d 959, 961 (2008). Our goal is to read "statutes within a statutory scheme harmoniously with one another to avoid an unreasonable or absurd result." *Allstate Insurance Co. v. Fackett*, 206 P.3d 572, 576 (2009).

Citizens for Cold Springs v. City of Reno, 218 P.3d 847, 851 (Nev.,2009)(citations included)..

45. In the present case, the term "action" appears at the conclusion of the point of measurement for the limitation period in order to determine when to begin the nine (9) month period.

46. In no other part of NRS 116.3116 does the statute mention any civil action requirement for either the creation of the lien or its status of priority. NRS 116.3116(1)

clearly states, "the association has a lien on a unit" and that lien "is prior to all other liens and encumbrances..." NRS 116.3116(2).

47. Given that Nevada is a non-judicial foreclosure state and that NRS 116.31162 specifically states the procedure for foreclosure and means of enforcing an association lien, the term "action" was not used to establish a civil action requirement prior to determining the priority of an association's lien.

CONCLUSION

48. Based upon the foregoing, the Division hereby issues its Advisory Opinion and Declaratory Order as follows:

49. A collection agency is limited to the total of nine (9) months of assessments for common charges on the amount it can collect pursuant to priority status provided in NRS 116.3116(2). This nine (9) month cap includes any additional fees, charges, interest, costs, penalties or fines which the association could apply towards a lien pursuant to NRS 116.3116.

50. Additionally, prior to the imposition of any additional fees, charges, penalty and interest to any assessment or fine by a collection agency, the association must expressly approve the fees, charges, penalty and interest pursuant to the provisions in its governing documents.

51. Finally, neither associations nor their collection agencies are required to initiate civil action in order to secure the priority status of an association lien pursuant to NRS 116.3116.

DATED this 18th day of November, 2010.

STATE OF NEVADA
DEPARTMENT OF BUSINESS AND INDUSTRY,
FINANCIAL INSTITUTIONS DIVISION

By: _____
GEORGE E. BURNS,
Commissioner

Ex. 16

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Arbitrator

STATE OF NEVADA

DEPARTMENT OF BUSINESS AND INDUSTRY

REAL ESTATE DIVISION

OFFICE OF THE OMBUDSMAN FOR OWNERS IN COMMON-INTEREST COMMUNITIES AND CONDOMINIUM HOTELS

HIGHER GROUND, LLC, A Nevada limited liability company; RRR HOMES, LLC, a Nevada limited liability company; TRIPLE BRANDED CORD, LLC, Nevada limited liability company; EQUISOURCE, LLC, a Nevada limited liability company; EQUISOURCE HOLDING, LLC, a Nevada limited liability company; APPLETON PROPERTIES, LLC, a Nevada limited liability company; CBRIS, LLC, a Nevada limited liability company; MEGA, LLC, a Nevada limited liability company; SOUTHERN Nevada ACQUISITIONS, LLC, a Nevada limited liability company, VESTEDSPEC, INC., a Nevada corporation; CUSTOM ESTATES, LLC, a Nevada limited liability company; KINGFUTT'S PFM LLC, a Nevada limited liability company; THORNTON & ASSOCIATES, LLC, a Nevada limited liability company; WINGBROOK CAPITAL LLC, a Nevada limited liability company; ELSINORE, LLC, a Nevada limited liability company; MONTESA, LLC, a Nevada limited liability company; EKNV, LLC, a a Nevada limited liability company; on behalf of themselves and as representatives of the class herein defined, Claimants,	NRED Control # 10-87

v.

NEVADA ASSOCIATION SERVICES, INC, a Nevada corporation; RMI MANAGEMENT, LLC, dba RED ROCK FINANCIAL SERVICES, a Nevada limited liability company; HOMEOWNER ASSOCIATION SERVICES, INC., a Nevada Corporation; ALESSI & KOENIG, LLC, a Nevada limited liability company; HAMPTON & HAMPTON, a professional corporation; ANGIUS & TERRY COLLECTIONS, LLC, a Nevada limited liability company; SILVER STATE TRUSTEE SERVICES, LLC, a Nevada limited liability company,

Respondents.

ORDER GRANTING IN PART AND DENYING IN PART CLAIMANTS' MOTION FOR SUMMARY JUDGMENT ON CLAIM OF DECLARATORY RELIEF.

This matter came before the undersigned arbitrator pursuant to NRS 38.231(2) on the Claimants' Motion for Summary Judgment on Claim of Declaratory Relief, by and through their attorney James R. Adams, Esq., of Adams Law Group, LTD. Respondents, Nevada Association Services, Inc. ("NAS"), RMI Management, LLC. ("RMI"), and Angius & Terry Collections, LLC ("Angius & Terry"), by and through their attorney, Patrick J. Reilly, Esq., of Holland & Hart, LLP., Robert Massi, Esq., of Robert Massi & Associates representing Respondents Hampton & Hampton, a professional corporation; Robert J. Walsh, Esq., of Walsh & Friedman, LTD, who was representing Respondent Silver State Trustee Services, LLC[1]; Kaleb Anderson, Esq., of

[1] Mr. Scott R. Cook, Esq. of Gordon & Rees, LLP., is Respondent Silver State Trustee Services' current attorney.

Lipson, Neilson, Cole, Seltzer, Garin, P.C., representing Respondent Homeowners Association Services; Ryan M. Kerbow, Esq., of Alessi & Koenig, LLC, representing Respondent Alessi & Koenig, LLC., opposed the Claimants' above-titled motion.

In the subtitle of their opposition to the above-titled motion, Respondents NAS, RMI and RMI noted: "COUNTERMOTION FOR SUMMARY JUDGMENT." However, there is no countermotion attached to their opposition. Therefore, this arbitrator finds that there is no countermotion properly brought before him to rule on.

1. Scope of this order.

The Claimants are requesting this arbitrator to interpret NRS 116.3116. The Claimants are requesting the following under the Declaratory Relief in their Amended Complaint:

1. After the foreclosure by a first mortgage lender (first recorded deed of trust holder) of a unit located within homeowners' association (HOA), pursuant to NRS 116.3116, the amount of HOA 's super priority lien[2] is limited to an amount equaling 9 times the monthly assessment (plus repair costs pursuant to NRS 116.310312); and

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[2]"Super priority lien" means an HOA's lien for unpaid assessments as defined by NRS 116.3116(2), which remains senior or superior to the interest of first security interest holder's deed of trust on the unit located within the community subject to an HOA's governing documents.

2. Pursuant to NRS 116.3116, a super priority lien does not exist, if an HOA fails to file a complaint with the court to enforce its lien.

Motion for Summary Judgment (MSJ), p.5.

Respondents NAS, RMI and RMI contend that the Claimants have failed to support their allegations "with affidavits or other admissible evidence." Opposition to MSJ, p.4. This arbitrator finds that the Claimants are requesting this arbitrator's interpretation of NRS 116.3116 and not to determine any factual issues regarding liability, if any, of the Respondents. Therefore, the Claimants' MSJ is properly before this arbitrator and there is no need for any affidavits or any other admissible evidence.

Respondents Hampton & Hampton contend that in order to determine the scope of an HOA's authority to impose a lien, the propriety of the lien, the amount of super priority lien, and the CC&Rs of the HOA must be examined. Opposition, p.6. Thus, they argue that due to the Claimants' failure "to make any factual inquiry" and their failure to present any evidence of an HOA's budget, the Claimants are not entitled to summary judgment. Id. As it was noted above, the Claimants' MSJ involves their request for this arbitrator's interpretation of NRS 116.3116. Therefore, the Claimants' MSJ is properly before this arbitrator and there is no need to present any CC&Rs or the budget of any HOA for purposes of this motion.

The Amended Complaint shows as part of their declaratory relief, the Claimants' are requesting the return of the amounts that they have allegedly

paid to the Respondents due to the Respondents' alleged violation of NRS 116.3116. In their Reply to Oppositions, the Claimants are seeking through their MSJ "statement of law, i.e., a ruling on liability." Reply, p.4.

The scope of this arbitrator's order regarding the Claimants' MSJ is limited to his interpretation of NRS 116.3116. The issues of whether the Respondents violated NRS 116.3116, whether the Claimants have met the elements of their claims (such as unjust enrichment) against the Respondents, the Respondents' defenses, if any, and the Claimants' damages, if any, will be decided on a case-by-case basis.

2. Whether the conditions exist for declaratory relief to be available.

NRS 30.030 provides in relevant part: "Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed."

NRS 30.040(1) provides in relevant part: "Any person ... whose rights, status or other legal relations are affected by a statute ... may have determined any question of construction or validity arising under ... statute obtain a declaration of rights, status or other legal relations thereunder."

In Kress v. Corey, 65 Nev. 1, 26, 189 P.2d 352, 364 (1948), the Nevada Supreme Court held that the following conditions must exist for declaratory relief be available:

> (1) There must exist a justiciable controversy; that is to say, a controversy in which a claim of right is asserted against one who has an interest in contesting it; (2) the controversy must be between persons whose interests are adverse; (3) the party seeking declaratory

relief must have a legal interest in the controversy, that is to say, a legally protectable interest; and (4) the issue involved in the controversy must be ripe for judicial determination.

In this case, there exists a justiciable controversy related to the proper interpretation of NRS 116.3116. The Claimants' and the Respondents' interests are adverse because the Claimants are seeking to recover from the Respondents the amounts the Claimants allegedly paid for the HOAs' liens. The exhibits attached to the Claimants' Reply to Opposition to Request for Class Certification and the Claimants' Opposition to Amended Motion to Dismiss Re: Substantive Claims show that some of the Claimants have legal interest in the controversy. The exhibits show that some of the Respondents made demands upon some of the Claimants for payment on the liens on the properties that the Claimants had purchased in foreclosure action held by the first mortgage security holder. The issue in this controversy is ripe for judicial determination.

Based on the above, this arbitrator finds that the conditions exist for declaratory relief to be available.

3. Whether pursuant to NRS 116.3116, costs and fees related to unpaid assessments[3] may be included to the super priority lien amount.

There is no Nevada Supreme Court decision addressing this issue.

NRS 116.3116 provides, in pertinent part:

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[3] By "costs and fees related to unpaid assessments," this arbitrator is referring to the following: (1) Interest authorized by NRS 116.3115; (2) late fees or charges authorized by the declaration pursuant to NRS 116.3102(1)(k); (3) charges for preparing any statements of unpaid assessments pursuant to NRS 116.3102(1)(n); and (4) the "costs of collecting" as defined under NRS 116.310313.

1. The association has a lien on a unit for any construction penalty that is imposed against the unit's owner pursuant to NRS 116.310305, any assessment levied against that unit or any fines imposed against the unit's owner from the time the construction penalty, assessment or fine becomes due. Unless the declaration otherwise provides, **any penalties, fees, charges, late charges, fines and interest charged pursuant to paragraphs (j) to (n), inclusive, of subsection 1 of NRS 116.3102 are enforceable as assessments under this section.** If an assessment is payable in installments, the full amount of the assessment is a lien from the time the first installment thereof becomes due.

2. The lien is also prior to all security interests described in paragraph (b) to the extent of any charges incurred by the association on a unit pursuant to NRS 116.310312 and **to the extent of the assessments** for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration **during the 9 months immediately preceding institution of an action to enforce the lien**...,

(Emphasis added).

"Fees" are not defined in NRS 116.3116. However, NRS 116.310313(1) provides in part: "An association may charge a unit's owner reasonable fees to cover the costs of collecting any past due obligation." NRS 116.310313(3)(a) defines "Costs of collecting" as ... any fee, charge or cost, by whatever name, including. without limitation, any collection fee..." NRS 116.310313 (3)(b) defines "Obligation" as: "any assessment, fine, construction penalty, fee, charge or interest levied or imposed against a unit's owner pursuant to any provision of this chapter or the governing documents."

Based on the above, this arbitrator finds that the term "fees" in NRS 116.3116(1) includes costs of collecting on past due assessments.

Based on the clear language of NRS 116.3116 (1) an HOA's costs and fees

related to unpaid assessments must be considered as part of the term "assessment" for purposes of NRS 116.3116. Further, an HOA's lien for assessments under NRS 116.3116 is part of the super priority, which means the HOA has a lien senior to a first recorded deed of trust "to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien. NRS 116.3116 (2)(c). "Common expenses" is defined as all of those "expenditures made by, or financial liabilities of, the association, together with any allocations to reserves." NRS 116.019.

Based on the plain language of NRS 116.3116(1) stating penalties, fees, charges, late charges, fines, and interest "are enforceable as assessments under the section," this arbitrator finds an HOA's costs and fees related to unpaid assessments may be included to the super priority lien amount; however, the total amount may not exceed the numerical cap provided under NRS 116.3116 (2). See below.

4. Whether under NRS 116.3116 the amount of an HOA 's super priority lien together with costs and fees related to unpaid assessments are limited to an amount equaling 9 times the monthly assessment (plus repair costs pursuant to NRS 116.310312).

There is no Nevada Supreme Court decision addressing this issue.

"Where the language of a statute is unambiguous, this court will not look

beyond the statute itself when ascertaining its meaning." Erwin v. State of Nevada, 111 Nev. 1535, 1538-39, 908 P.2d 1367, 1369 (1995). "Where a statute is clear on its face, court may not go beyond the language of the statute in determining the legislature's intent." Diaz v. Eight Judicial Dist. Court ex rel. County of Clark 116 Nev. 88, 94, 993 P.2d 50, 54-55 (2000).

NRS 116.3116 (2) clearly provides in part: "The lien is also prior to all security interests described in paragraph (b) **to the extent** ..." (Emphasis added.)

The words "to the extent" clearly show that the statute imposes a numerical limit on an HOA's super priority lien. The language of the statute clearly shows that the limit is not temporal, but it is numerical. Thus, super priority lien is comprised of the following:

1. Repair costs incurred by an HOA pursuant to NRS 116.310312; and
2. Assessments for common expenses that is based on an HOA's adopted periodic budget pursuant to NRS 116.3115, which would have become due in the absence of acceleration during the 9 months immediately preceding institution of accept action to enforce the liens.

As noted above, costs and fees related to unpaid assessments may be included to an HOA's super priority lien amount; however, they may not be added on top of the super priority lien amount. In other words, they may not be added to super priority lien amount to exceed the limit on the super priority lien amount (i.e., the limit of 9 times the monthly assessment amount).

This arbitrator finds the language of NRS 116.3116 to be plain and clear. The statute provides that penalties, fees (collection costs), charges, late charges, fines, and interest are enforceable as assessments. NRS 116.3116(1). NRS 116.3116(2) provides for a cap of 9 months on assessments for super priority lien purposes. Therefore, costs and fees related to unpaid assessments are subject to the 9-month cap. There is no language in NRS 116.3116 that excludes costs and fees related to unpaid assessments from the 9-month cap, nor is there any language stating "plus" costs and fees related to unpaid assessments (i.e., super priority lien "plus" costs and fees related to unpaid assessments). Thus, the cap on the amount of super priority lien applies to these fees and costs because of clear and plain wording of the statute.

There are several states such as Colorado, Minnesota, New Jersey, Vermont, Alaska, and Delaware, whose super priority lien statutes are substantially similar to Nevada's super priority lien statute (i.e., NRS 116.3116). None of the courts of these states have interpreted their statute to mean that costs and fees related to unpaid assessments may be added to super priority lien amount even though such addition would increase super priority lien amount above the cap provided under their statute.

In First Atlantic Mortg., LLC v. Sunstone North Homeowners Ass'n, 121 P. 3d 254, 255-256 (Colo. App., 2005), the Colorado Court of Appeals held:

> Thus, although the maximum amount of super priority lien is identified by reference to monthly assessments, **the lien itself may comprise debts other than delinquent monthly assessments.** (Emphasis added.)

The Court further held:

> The reference in section 3-116(b) to priority "to the extent of" assessments which would have been due "during the six months immediately preceding an action to enforce the lien" **merely limits the maximum amount of all fees or charges for common facility use or for association services, late charges and fines, and interest which can come with the Prioritized Lien.** Id. (Emphasis added.)

In BA Mortg., LLC v. Quail Greek Condominium Ass'n, Inc., 192 P.3d 447, 451 (Colo. App. 2008), the Colorado Court of Appeals held:

> The association then has a super-priority lien over the lender's otherwise senior deed of trust in the event of a foreclosure commenced by the association or the lender, which lien is limited to delinquent assessments accruing within six months of the initiation of foreclosure proceeding. §38-33.3-31(2)(b)(1). Further, the association's super-priority lien includes interest, charges, late charges, fines, and attorney fees **so long as the total does not exceed the limit.** (Emphasis added.)

In First Atlantic, the court cited the following law review article regarding this issue: James Winokur "Meaner Lienor Community Association: The Super Priority" Lien and Related Reforms Under the Uniform Common Ownership Act, 27 Wake Forest L. Rev. Rev.353. He states:

> In its most heralded break with traditional law, UCIOA [Uniform Common Interest Ownership Act] grants the association a lien priority over first mortgages recorded before any assessment delinquency "to the extent of the common expense assessments based on the periodic budget adopted by the association pursuant to section 3-115(a) which would have become due in the absence of acceleration during the six months immediately preceding an action to enforce the lien." **Any excess of total assessment defaults, in addition to other lienable fines or costs over the six-month ceiling remains a lien on the property. The portion of the association lien securing this excess will be junior to the first mortgage on the unit but senior to other mortgages and encumbrances not recorded before the declaration.** Thus, although

> the association's lien is a single lien, its varying priority effectively separates the association's rights in a given unit into what may be conceived of as two liens, which are hereinafter referred to as the "Prioritized Lien" and "Less-Prioritized Lien."
>
> A careful reading of the quoted language reveals that the association's Prioritized Lien, like its Less- Prioritized Lien, may consist not merely of defaulted assessments, but also of fines and, where the statute so specifies, enforcement and attorney fees. **The reference in section 3-116(b) to priority "to the extent of" assessments which would have been due "during the six months immediately preceding an action to enforce the lien" merely limits the maximum amount of all fees or charges for common facilities use or for association services, late charges and fines, and interest which can come within the Prioritized Lien.** So, for example, if a unit owner fell three months behind in assessments, the Prioritized Lien might include-in addition to the three months of arrearages-the other fees, charges, costs, etc. enforceable as assessments under UCIOA.. However,, for any assessments or other charges to be included within the Prioritized Lien , there must have been a properly adopted periodic budget promulgated "at least annually" by the association from which the appropriate six months a8 ceiling cab be computed. Id. 367. (Emphasis added.)

In Hudson House Condo. Ass'n. Inc. v. Brooks, 223 Conn. 610, 616, 611 A.2d 862, 865 (1992), the Supreme Court of Connecticut held:

> While the plaintiff may disagree with the equities of limiting the §47-258(b) priority to six months of common expense assessments, this is a matter not for the judiciary but rather for the legislature that enacted the statute. We conclude that the trial court correctly determined that HHCA's priority debt was limited to the common expense assessments that accrued in the six months immediately preceding the commencement of the foreclosure.

Respondents NAS, RMI and RMI argue that the Hudson House supports their interpretation of NRS 116.3116 in that attorney's fees and costs incurred by an HOA to enforce its lien are part of super priority lien and do not come "on

top of" super priority lien. P.20 of their Opposition. Further, they argue that Hudson House did not impose a numerical cap and "it merely stated the association was limited to costs and charges over the relevant period..." Id. Respondents Hampton & Hampton also rely on the Hudson House by arguing "the Supreme Court of Connecticut unanimously rejected an argument by the holder of a first security interest that 'because [the statute] does not specifically include 'costs and attorney's fees' as part of the language creating [the association's] priority lien, those expenses are properly includable only as part of the nonpriority lien." P.12 of their Opposition. Respondents Alessi & Koenig, LLC also rely on Hudson House and argue: "... that reasonable fees and costs are included within the super priority lien in addition to six months of common assessments." P. 8 of their opposition.

As noted above, this arbitrator finds that NRS 116.3116(2) imposes a cap of 9 months on the super priority lien amount. The Supreme Court of Connecticut in Hudson House affirmed the trial court's decision to limit the HOA's super priority lien to six-months of assessments despite the HOA's contention that the super priority lien statute authorized more than 6-months of assessments because of the use of the word "assessments" in the statute rather than the word "assessment." Further, as noted above, this arbitrator finds that collection costs and fess (including attorney's fees and cost) may be included to the super priority lien amount, but it may not exceed the cap of 9-months.

Regarding the issue of collection costs and fees as part of super priority lien, Hudson House is distinguishable because the HOA obtained a judgment against the homeowner and the first mortgage lender by instituting a judicial foreclosure. Thus, the Supreme Court of Connecticut held that pursuant to another provision of Connecticut law (Section 47-258(g))[4], when an HOA obtains a judgment, only then can an HOA obtain both six months of assessments plus attorneys' fees and costs. Thus, Hudson House is distinguishable from the instant case because the Respondents' have not alleged that they have obtained a judgment against the homeowners or the first deed of trust holders by instituting a judicial foreclosure.

The court in Hudson House further held:

> Since the amount of monthly assessments are, in most instances, small, and since the statute limits the priority status to only a six month period, and since in most instances, it is going to be only the priority debt that in fact is collectible, it seems highly unlikely that the legislature would have authorized **such foreclosure proceedings** without including the costs of collection in the sum entitled to a priority. To conclude that the legislature intended otherwise would have that body fashioning a bow without a string or arrows. We conclude that § 47-258 authorizes the inclusion of attorney's fees and costs in the sums entitled to a priority. (Emphasis added.)

Id. at 866.

By "such foreclosure proceedings," the court clearly is referring to judicial foreclosure proceeding that the HOA instituted, which, as noted above,

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[4] Section 47-258(g) provides that a "judgment or decree in any action brought under this section shall include costs and reasonable attorney's fees for the prevailing party." NRS 116.3116(7) has the identical language.

is distinguishable from the instant case. Although in Connecticut non-judicial foreclosure is not available for an HOA to enforce its lien, this arbitrator does not find Hudson House ruling persuasive to support the Respondents' argument regarding adding costs and fees related to unpaid assessments to super priority lien that may exceed the 9-month cap. As noted above, Hudson House ruling deals with different facts (i.e., the HOA obtained a judgment against the homeowner and his lender) than the instant case.

As the court in Hudson House noted in a footnote, the Connecticut Legislature amended its super priority lien statute by adding the following subsection to : "(B) the association's costs and attorney's fees in enforcing its lien." However, it became effective on July 5, 1991, and the court in Hudson House could not use as a basis of its decision because the association filed its judicial foreclosure on January 8, 1991. As it will be noted below, Nevada did not amend its super priority lien statute to add such amendment.

At the July 2008 annual conference of the National Conference of Commissioners on Uniform State Laws, the above-referred Connecticut's costs and fees amendment was incorporated into the Uniform Law Commissioners' 2008 revised version of the UCIOA, which provide for super priority lien to consist of both six months of assessments and attorney's fees and costs.[5]

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[5] It provides: "A lien under this section is also prior to all security interests described in subsection (b)(2) clause (ii) above to the extent of both the common expense assessments based on the periodic budget adopted by the association pursuant to Section 3-115(a0 which would have become due in the absence of acceleration during the six months immediately preceding

In 2009, the Nevada Legislature had the opportunity to adopt the newly revised UCIOA, but it chose not to. In March 2009, Mr. Michael Buckley, who is the current Chairman of the Nevada Common Interest Community Commission, and the law firm of Holland & Hart introduced a new legislative amendment to the Nevada's super priority lien statute (NRS 116.3116) in the Seventy Fifth Session of the Assembly Committee on Judiciary. The new legislative amendment they were proposing has the same wording of the 2008 Amendment to the UCIOA amendment, which this arbitrator noted above (i.e., adding "and reasonable attorney's fees and cost incurred by the association incurred in foreclosing the association's lien.").[6] However, the Nevada Legislature did not amend NRS 116.3116 to include what Mr. Buckley and the law firm of Holland and Hart were proposing. Instead, the Legislature revised (effective date of October 1, 2009) NRS 116.3116 to increase the cap on super priority lien amount to 9 times the association's monthly assessments, up from

---

institution of an action to enforce the lien **and reasonable attorney's fees and costs incurred by the association in foreclosing the association's lien.** (Emphasis added.)

[6] The transcripts of the Session show that Mr. Buckley stated in part:

> "What I am saying is that, with the existing law [NRS 116.3116], there is a difference of opinion whether the six-month priority can include the association's costs. The proposal [the new amendment that he and the law Firm of Holland & Hart are proposing] that we sent to the sponsor and that was adopted by the 2008 uniform commissioners [the UCOA Amendment] would clarify that the association can recover, as part of the priority their (sic) costs in attorney's fees. Right now, there is a question whether they can or not."

6 times, and also added unit repair costs under NRS 116.310312 to the super priority lien.

The Respondents also rely of on an unfinished, unpublished draft of an advisory opinion by Mr. Buckley in support of their interpretation of NRS 116.3116.[7] Mr. Buckley finds the Colorado case of First Atlantic "very helpful" regarding whether an HOA may collect as part of its super priority lien costs and fees related to unpaid assessments. As this arbitrator noted above, an HOA may recover as part of its super priority lien costs and fees related to unpaid assessments; however, the total super priority lien amount may not exceed an amount equal to 9 times the monthly assessments (i.e., 9-month cap). The draft of the Advisory Opinion mentions the State of Connecticut Amendment and the UCIOA amendment as rejection of the argument that super priority lien is a finite number. However, as noted above, Nevada has not amended its statute. Therefore, this arbitrator is not persuaded with the Respondents' argument that this draft of the advisory opinion shows the 9 months of assessments is only temporal rather than numerical cap. Further, there is no mention in this draft of advisory opinion that: (1) super priority lien amount can exceed the 9-month cap plus repair costs; or (2) costs and fees related to unpaid assessments can be added "on top of" the super priority lien amount.

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[7] It is a 13-page "Advisory Opinion No. 2010."

Thus, this arbitrator finds the draft of the Advisory opinion does not support the Respondents' interpretation of NRS 116.3116.

The Respondents also rely of a Nevada Real Estate Division publication AB 204, which interprets amended to NRS 116.3116 as "allows HOA's to have a super priority lien for 9 months of unpaid assessments and related costs (increased from 6 months)." It is not clear who wrote this interpretation of the Nevada's super priority lien. However, based on the above, this arbitrator finds such interpretation inconsistent with the plain and clear language of NRS 116.3116 and the out of state court decisions of those states whose statute is substantially similar to the Nevada's super priority lien statute.

The Respondents also rely on Korbel Family Trust v. Spring Mountain Ranch Master Ass'n. Eight Judicial District Court Case No. A-06-523959-C (the 3-page decision is dated December 20, 2006). In the decision, the district court judge allowed 6 months of assessments for common expenses, late fees, interest, "costs of collection" and transfer fee for conveyance. This arbitrator finds the decision unpersuasive for the following reasons:

1. The decision does not contain any legal analysis of the statute (NRS 116.3116) or out of state cases and other legal authorities such as Law Review Articles.

2. The decision does not show the reason for the judge's decision in allowing the HOA to recover the above-referred fees and charges.

3. It is inconsistent with the plain and clear language of NRS 116.3116 and the decisions of all of out-of-state cases who have substantially similar statute.

5. Whether filing a complaint with the court to enforce an HOA's statutory lien is condition precedent to existence of HOA's super priority lien.

There is no Nevada Supreme Court decision addressing this issue.

The language of NRS 116.3116(2) uses the words "institution of an action to enforce the lien." NRS 116.3116(5) provides: "A lien for unpaid assessments is extinguished unless proceedings to enforce the lien are instituted within 3 years after the full amount of the assessments becomes due." However, neither NRS 116 nor NAC 116 defines "action" or "proceeding."

In other sections of NRS 116, the phrase "civil action" is used. For example, NRS 116.31088(1) provides in part: "The Association shall provide written notice to each unit's owner of a meeting at which the commencement of a **civil action** is to be considered ..." It further states: "The provisions of this subsection do not apply to a **civil action** that is commenced: (a) To enforce the payment of an assessment;..." (Emphasis added.) NRS 116. 4117(1) provides in relevant part: [I]f a declarant, community manager or any other person subject to this chapter fails to comply with any of its provisions or any provision of the declaration or bylaws, any person or class of persons suffering actual damages from the failure to comply may bring a **civil action** for

damages or other appropriate relief." (Emphasis added.)

NRS 38.310(1) (a) provides: "No **civil action** based upon a claim relating to: The interpretation, application or enforcement of any covenants, conditions or restrictions applicable to residential property or any bylaws, rules or regulations adopted by an association;" (Emphasis added.)

NRS 116.3116 (2)(c) uses the word "action," it does not use the words "civil action." "When the legislature has employed a term or phrase in one place and excluded it in another, it should not be implied where excluded." Coast Hotels & Casinos, Inc. v. Nev. State Labor Comm'n, 117 Nev. 835, 841, 34 P.3d 546, 550 (2001). "It is not the business of this court to fill in alleged legislative omissions based on conjecture as to what the legislature would or should have done." S. Nev. Homebuilders Ass'n v. Clark County, 121 Nev. 446, 451, 117 P.3d 171, 174 (2005).

The Claimants rely on cases such as Trustees of MacIntosh Condominium Ass'n v. F.D.I.C., 908 F. Supp., 58 (1995), and Benson v. Zoning Bd. of Appeals of Town of Westport, 89 Conn. App. 324, 873 A.2d 1017 (Conn. App., 2005) regarding their argument that filing a civil action in court is a condition precedent for existence of an HOA's super priority lien. This arbitrator finds that these cases are distinguishable from the instant case because in states such as Massachusetts and Connecticut, the only way that an HOA can enforce its lien is to institute a judicial foreclosure, whereas in

Nevada, pursuant to NRS 116.31162 to 116.31168, an HOA may institute non-judicial foreclosure for enforcement of its lien.

The Claimants also rely on the language of NRS 116.31088(1) and argue that because the statute uses the words "civil action" "to enforce the payment of an assessment," the only way to enforce a lien under NRS 116.3116 is to file a civil action with the court. This arbitrator is not persuaded with their argument. There is no language in NRS 116.31088 or NRS 116.3116 that provides the only way for an HOA to enforce its lien is to file an action with the court.

The Claimants also rely on NRCP 2, which provides: "There shall be one form of action to be known as "civil action." And NRCP 3, which provides: "A civil action is commenced by filing a complaint with the court." Thus, the Claimants argue that in order for an HOA's super priority lien to exist, the HOA must file a civil action with the court. The Claimants are requesting this arbitrator to read into the statute a word that does not exist (i.e., "civil" immediately preceding the word "action.") The guidelines that the Nevada Supreme Court has set in its decisions regarding statutory construction would not permit this arbitrator to read words in the statute that do not exist. S. Nev. Homebuilders.

The Claimants also argue that the wording of NRS 116.3116(7) shows that the only way to enforce a lien for purposes of achieving super priority lien is to file an action with the court. NRS 116.3116(7) provides: "A judgment or

decree in **any action** brought under this section must include costs and reasonable fees for the prevailing party." (Emphasis added.) This arbitrator is not persuaded by the Claimants' argument. There is no language in Subsection (7) that sets a condition for existence of an HOA's super priority lien by filing an action in court. It merely states that the prevailing party who obtains a judgment for **any action** under this section is entitled to costs and fees. There is no reference in Subsection (7) that the only way to enforce a lien is to file an action in civil court.

Based on the above, this arbitrator finds that filing a civil action is not a condition precedent for an HOA's super priority lien to exist. An HOA may enforce its lien by instituting a non-judicial foreclosure pursuant to NRS 116.31162 to 116.31168 and maintain its super priority lien without filing a civil action in court. An HOA may file an action with the Real Estate Division pursuant to NRS 38.310(1) (a) to enforce its lien and maintain its super priority lien.

Dated the 28 day of October 2010.

Persi J. Mishel, Esq., Arbitrator
2340 Flower Spring St.
Las Vegas, NV 89134
(702) 255-7029

CERTIFICATE OF MAILING

I hereby certify that a copy of the forgoing Order Granting in Part and Denying in Part Motion for Summary Judgment on Claim of Declaratory Relief placed in the United States mail, with proper postage affixed thereto, addressed as follows, on this 28 day of October 2010:

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Ex. 17

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Arbitrator

STATE OF NEVADA

DEPARTMENT OF BUSINESS AND INDUSTRY

REAL ESTATE DIVISION

OFFICE OF THE OMBUDSMAN FOR OWNERS IN COMMON-INTEREST COMMUNITIES AND CONDOMINIUM HOTELS

HIGHER GROUND, LLC, A Nevada limited liability company; RRR HOMES, LLC, a Nevada limited liability company; TRIPLE BRANDED CORD, LLC, Nevada limited liability company; EQUISOURCE, LLC, a Nevada limited liability company; EQUISOURCE HOLDING, LLC, a Nevada limited liability company; APPLETON PROPERTIES, LLC, a Nevada limited liability company; CBRIS, LLC, a Nevada limited liability company; MEGA, LLC, a Nevada limited liability company; SOUTHERN Nevada ACQUISITIONS, LLC, a Nevada limited liability company, VESTEDSPEC, INC., a Nevada corporation; CUSTOM ESTATES, LLC, a Nevada limited liability company; KINGFUTT'S PFM LLC; a Nevada limited liability company; THORNTON & ASSOCIATES, LLC, a Nevada limited liability company; WINGBROOK CAPITAL LLC, a Nevada limited liability company; ELSINORE, LLC, a Nevada limited liability company; MONTESA, LLC, a Nevada limited liability company; EKNV, LLC, a a Nevada limited liability company; on behalf of themselves and as representatives of the class herein defined, Claimants,	NRED Control # 10-87

v.

NEVADA ASSOCIATION SERVICES, INC, a Nevada corporation; RMI MANAGEMENT, LLC, dba RED ROCK FINANCIAL SERVICES, a Nevada limited liability company; HOMEOWNER ASSOCIATION SERVICES, INC., a Nevada Corporation; ALESSI & KOENIG, LLC, a Nevada limited liability company; HAMPTON & HAMPTON, a professional corporation; ANGIUS & TERRY COLLECTIONS, LLC, a Nevada limited liability company; SILVER STATE TRUSTEE SERVICES, LLC, a Nevada limited liability company,

Respondents.

INTERIM AWARD REGARDING ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR SUMMARY JUDGMENT ON CLAIM OF DECLARATORY RELIEF

On October 28, 2010, this arbitrator entered an Order Granting in Part and Denying in Part the Claimants' Motion for Summary Judgment on Claim of Declaratory Relief. He interpreted NRS 116.3116 and found:

1. NRS 116.3116(2) provides for a cap of 9 months on assessments for super priority lien purposes. Therefore, costs and fees related to unpaid assessments are subject to the 9-month cap. This arbitrator granted the Claimants' Motion for Summary Judgment on this issue. Thus, they are the prevailing party regarding this issue.
2. Filing a civil action is not a condition precedent for an HOA's super priority lien to exist. This arbitrator denied the Claimants' Motion for

Summary Judgment on this issue. Thus, the Respondents are the prevailing party of this issue.

There is no Nevada Supreme Court decision addressing these two issues. There are substantial properties involved in this case and the attorneys will be spending substantial time to conduct discovery, prepare the case for arbitration, and arbitration hearings. The parties will be incurring significant expenses for attorneys' fees and costs, and this arbitrator's fees. Therefore, this arbitrator is exercising his discretion under NRS 38.231(1) and pursuant to NRS 38.234 incorporates his Order Granting in Part and Denying in Part the Claimants' Motion for Summary Judgment on Claim of Declaratory Relief into an Interim Award, so that the parties may proceed to the District Court pursuant to NRS 38.234.

Dated the 21 day of March 2011.

Persi J. Mishel, Esq., Arbitrator
2340 Flower Spring St.
Las Vegas, NV 89134
(702) 255-7029

NOTICE

NRS 38.234 provides: "If an arbitrator makes a preaward ruling in favor of a party to an arbitral proceeding, the party may request the arbitrator to incorporate the ruling into an award under NRS 38.236. A prevailing party may make a motion to the court for an expedited order to confirm the award under NRS 38.239, in which case the court shall summarily decide the motion. The court shall issue an order to confirm the award unless the court vacates, modifies or corrects the award under NRS 38.241 or 38.242."

CERTIFICATE OF MAILING

I hereby certify that a copy of the forgoing Interim Award Regarding Order Granting in Part and Denying in Part Motion for Summary Judgment on Claim of Declaratory Relief placed in the United States mail, with proper postage affixed thereto, addressed as follows, on this 21 day of March 2011:

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Persi J. Mishel, Esq.

Ex. 18

Case No. NRED 10-49

BEFORE THE NEVADA REAL ESTATE COMMISSION

WELLS FARGO BANK, NATIONAL ASSOCIATION,

Claimant,

v.

THE FOOTHILLS at WINGFIELD HOMEOWNER'S ASSOCIATION; ALESSI TRUSTEE CORPORATION, a Nevada corporation; ALESSI & KOENIG, LLC, a Nevada limited-liability company;

Respondents

ARBITRATOR'S DECISION and AWARD

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RENO, NV 89511

The Arbitrator in this matter, the Honorable Steven McMorris, hereby renders the following decision in the non-binding arbitration conducted pursuant to the rules of the Nevada Real Estate Commission.

RECITALS

A. On June 7, 2010, the above named parties, by and through their respective counsel, participated in an arbitration hearing before the undersigned arbitrator. Claimant Wells Fargo Bank, National Association ("Wells Fargo") was represented by Alex Flangas of the firm of Holland & Hart LLP, Respondent The Foothills at Wingfield HOA ("Foothills HOA" or "HOA") was represented by Ryan Herrick of the firm of Jones Vargas, and Respondents Alessi Trustee Corporation and Alessi & Koenig, LLC (collectively "Alessi") were represented by Ryan Kerbow and Tom Bayard.

B. The parties presented evidence and argument on the legal points, and the matter was concluded on June 7, 2010.

C. The parties stipulated to many of the facts in the case, including the following:

1. Wells Fargo is a national banking association, duly licensed and registered to conduct business in the State of Nevada.

2. The Foothills HOA is a community association organized and operating pursuant to the provisions of Chapter 116 of the Nevada Revised Statutes.

3. ATC is a Nevada corporation, in good standing with the Secretary of State of Nevada.

4. Alessi & Koenig is a Nevada limited-liability company, operating as a law firm, with its principal place of business in Las Vegas, Nevada.

5. This case involves the property development commonly known as The Foothills at Wingfield ("The Foothills") in the City of Sparks, Nevada.

6. The developer of The Foothills, "Reynen & Bardis (The Foothills), LLC, a Nevada limited-liability company" ("Reynen & Bardis"), signed a promissory note with Wells Fargo, as lender, which was secured by a Construction Deed of Trust with Absolute Assignment of Leases and Rents, Security Agreement and Fixture Filing ("Deed of Trust") signed by Reynen & Bardis as "Trustor." The Deed of Trust was recorded in the official records of Washoe County on June 5, 2007. The Deed of Trust affected the 248 lots that are at issue in this arbitration (the "Lots").

7. At the time the Deed of Trust was recorded, Reynen & Bardis was not delinquent in the payment of the common assessments on the Lots developed by Reynen & Bardis.

8. Within days of recording the Deed of Trust, Reynen & Bardis transferred ownership of the property in The Foothills encumbered by the Deed of Trust to "Foothills Village Owner, LLC, a Delaware limited-liability company," who also executed an "Assumption and Modification Agreement and Addendum to Deed of Trust" (the "Assumption"), which was recorded on June 29, 2007. Under the Assumption, Foothills Village Owner, LLC, assumed all of the obligations of Reynen & Bardis for payment of assessments due on the Lots at The Foothills.

9. The Foothills property is subject to and governed by a recorded document entitled, "Master Declaration of Covenants, Conditions and Restrictions and Reservation of Easements for the Foothills at Wingfield" (the "CC&Rs"), which document allows for

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the creation of The Foothills HOA and its Bylaws, and establishes the right of The Foothills HOA to create and enforce rules affecting the development.

10. Pursuant to Section 6.4 of the CC&Rs, a sum sufficient to pay common expenses and to establish reserves for The Foothills was charged against the homeowners of all lots located within The Foothills. The Foothills HOA established the amount of the common expense assessments on a yearly basis, consistent with The Foothills HOA's annual budget, and billed those amounts quarterly.

11. In 2008, The Foothills HOA's budgeted assessment for common expenses based on the periodic budget adopted by the Foothills HOA pursuant to NRS 116.3115 was $147.00 per lot assessed on a quarterly basis. This equates to the sum of $49 per month for each lot.

12. As the owner of several hundred lots located within The Foothills, Foothills Village Owner, LLC was obligated to pay the assessments made against all those lots to The Foothills HOA. However, in early 2008, Foothills Village Owner, LLC became delinquent in the payment of the assessments to The Foothills HOA.

13. Alessi had previously executed a Delinquent Assessment Collection Agreement (the "Collection Agreement") with The Foothills HOA on or about May 8, 2006.

14. As a result of the failure of payment of assessments by Foothills Owner, LLC, Alessi proceeded to mail, via certified mail, notices of delinquent assessments ("NDAs") to the owner of the Lots, Reynen & Bardis, during late July and early August, 2008, and caused copies of those NDAs to be recorded in the Official Records of Washoe County.

15. A portion of the assessed amount was attributable to "Collection and/or Attorney fees" and "collection costs, late fees, service charges and interest."

16. After mailing the NDAs to the owner of the Lots, Alessi continued to process and record Notices of Default ("NODs") for the Lots.

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17. Reynen & Bardis (and Foothills Owner LLC) subsequently defaulted on the loan obligations to Wells Fargo, and Wells Fargo proceeded to foreclose on the Deed of Trust.

18. As a result of a foreclosure sale on December 17, 2008, Wells Fargo became the owner of the 248 lots located within The Foothills (previously identified as the "Lots").

19. Wells Fargo proceeded to calculate the total amount it determined was due to The Foothills HOA pursuant to NRS 116.3116(2) and Section 6.15 of the CC&Rs for the "super-priority" that the Foothills HOA had against the Lots. Wells Fargo calculated that super-priority amount by taking two quarters worth of assessments for any given Lot (i.e. $147 multiplied by 2, or 6 months of common assessments) for a total of $294, and multiplied that amount by the number of Lots subject to the Liens, 248. Thus, Wells Fargo calculated the amount of the super-priority lien of the Foothills HOA to be a total of $72,912.00 for all 248 lots combined.

20. Wells Fargo tendered that sum ($72,912) to the Foothills HOA on or about February 25, 2009, accompanied by a letter from James Follis, Vice President of the Real Estate Managed Assets Group at Wells Fargo.

21. Following the foreclosure by Wells Fargo, Alessi prepared and delivered via certified mail an additional Notice of Delinquent Assessment ("NDA") to Wells Fargo because Wells Fargo was the new owner of the Lots once the foreclosure was completed.

22. On or about June 18, 2009, David Alessi delivered to Alilda Ferraro at Wells Fargo a spreadsheet showing the "demand" of ATC, which demand listed assessments, interest, fees and expenses in a total sum exceeding $621,000.

23. About a month later, on or about July 21, 2009, Mr. Alessi sent a revised demand for payment to Alilda Ferraro at Wells Fargo. Pursuant to the revised demand, Mr. Alessi represented that his company was waiving certain fees and costs, but still claimed that the Lien on the Lots asserted on behalf of the Foothills HOA was

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$382,039.00, and that this sum would need to be paid in order to clear the HOA's liens from title on the Lots.

24. Through the date of the arbitration hearing the HOA liens are still recorded against the Lots and have not been released by the HOA or any of respondents.

NOW, THEREFORE, the undersigned arbitrator makes the following findings, conclusions, and AWARD:

A. Wells Fargo was a first security interest holder, as that status is identified in NRS 116.3116, as to the Lots. At the time that Wells Fargo obtained its secured position, there was no delinquency in the payment of common assessments by the prior owner of the property, Reynen & Bardis.

B. NRS 116.3116(2) establishes the extent or amount of the super-priority lien that the Foothills HOA and/or Alessi may assert against the Lots following the foreclosure by Wells Fargo.

C. Because the delinquent assessment was made in 2008 and the foreclosure by Wells Fargo was conducted in 2008 well prior to the modification of NRS 116.3116(2)in 2009, the 2007 version of that statute governs this matter. The 2007 version of the statute allowed a homeowners association to assert a super-priority lien to the extent of "the common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 6 months immediately preceding institution of an action to enforce the lien."

D. The extent or amount of the super-priority lien that may be asserted against the Lots in this matter and which – by operation of statute – is granted a priority ahead of the Deed of Trust held by Wells Fargo is therefore equal to the sum total of six months of the common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115.

E. Thus, the total of the super-priority lien that could be asserted by the Foothills HOA and/or Alessi against the Lots was $72,912, which is the same amount that was tendered by Wells Fargo in February 2008.

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F. The tender by Wells Fargo was in the appropriate amount and should have resulted in a release of the HOA's lien on the Lots.

G. The Foothills HOA and/or Alessi are hereby ordered to accept the amount tendered by Wells Fargo, the sum of $72,912, as and for full payment of all sums necessary to satisfy the super-priority lien asserted by the HOA and/or Alessi against the Lots, and to record a release of lien executed by both the HOA and Alessi on the Lots within 7 business days of the date of this Decision.

H. If the check previously tendered by Wells Fargo is for any reason "stale" and cannot be negotiated, Wells Fargo is hereby ordered to tender a new check to the Foothills HOA for the sum of $72,912, and the Foothills HOA and Alessi are thereafter ordered to record a release of lien executed by both the HOA and Alessi on the Lots within 7 business days of the delivery by Wells Fargo of that check to the Foothills HOA.

Dated this 8th day of June, 2010.

Steven D. McMorris, Arbitrator

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Copies of this ARBITRATOR'S DECISION and AWARD served by mail this 23rd day of June, 2010, to: Alex J. Flangas, Esq., 5441 Kietzke Lane, Second Floor, Reno, NV 89511; Ryan M. Kerbow, Esq., 9500 W. Flamingo, Ste. 100, Las Vegas, NV 89147; Ryan W. Herrick, Esq., 100 W. Liberty St., 12th Floor, Reno, NV 89504.

Ex. 19

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Symposium Issue: Uniform Real Property Acts

*353 MEANER LIENOR COMMUNITY ASSOCIATIONS: THE "SUPER PRIORITY" LIEN AND RELATED REFORMS UNDER THE UNIFORM COMMON INTEREST OWNERSHIP ACT [FNa1]

James L. Winokur[FNaa1]

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*354 INTRODUCTION

The Uniform Common Interest Ownership Act (UCIOA), promulgated in 1982 by the National Conference of Commissioners on Uniform State Laws (Uniform Laws Conference), consolidates previously promulgated uniform acts which address condominiums, [FN1] planned communities [FN2] and cooperatives. [FN3] The consolidation of acts regulating these three different ownership forms is based on the Uniform Laws Conference's accurate perception [FN4] that, substantively, all three forms share a fundamental common trait: in all these forms unit owners beneficially [FN5] own both their own units and the community's common elements, with a mandatory community association managing the common areas. Thus, common interest communities (CICs) regulated by UCIOA include all developments which have mandatory community associations responsible for managing common areas or assets, with funds assessed by the association against individual homeowners, and enforcing use restrictions throughout the *355 common interest community. [FN6] Thus, CICs include condominiums, town-houses, free-standing single-family residences, cooperatives, and other planned unit developments.

CICs were relatively novel ownership forms only twenty-five years ago. Since then, they have proliferated, and now CICs account for a substantial portion of the entire United States housing stock. CICs currently include residences of approximately 30,000,000 people or more, including 12-17% of the U.S. population. [FN7] While condominium development may have peaked temporarily in some areas, [FN8] the overall number of common interest communities is expected to grow substantially again during the 1990s. [FN9]

One factor contributing to the recent growth of CICs is the affordability of clustered housing in which the crowding of individual homes is offset by substantial common areas and facilities, developer economies in overall acreage, construction of homes and infrastructure, and in provision of public service, where streets built for private maintenance are held to less exacting standards than the local governments would require if the same streets were dedicated over to public ownership and care. Furthermore, CIC developments have been the vehicle for privatization of a range of previously public services, including not only *356 maintenance of facilities, but also services such as trash collection, snow removal, street maintenance and cleaning, [FN10] with community associations both obligated and empowered to perform them or contract for their performance. [FN11] Planned Unit Developments (PUDs) have allowed local planning commissions to save local governments money by requiring that streets, other infrastructure or mandatory amenities such as drainage basins or parks be provided by the subdivision developer rather than the municipality, and then maintained privately by an association so that the public government avoids maintenance responsibilities.

I. ASSESSMENT DELINQUENCIES AND CIC FINANCIAL WEAKNESS: THE NEED FOR REMEDIAL LEGISLATION

In carrying out their crucial responsibilities for preservation and maintenance of community infrastructure and common assets such as building exteriors, associations vary greatly as to their financial strength, [FN12] and the financial and personal management experience of their *357 elected officers. [FN13] The main source of financial and interpersonal strain on association boards is the association's inability to collect assessments. [FN14]

Contributing to many associations' financial weakness, the collection of delinquent assessments has been an extremely inefficient and often frustrating process. In hard economic times, assessment collection typically becomes both more important and less effective. Traditionally, CIC declarations, and many state statutes, [FN15] have provided that the association holds a lien against each unit to secure payment of owner assessment obligations. There is common law authority [FN16] that these assessment liens *358 have priority over all unit mortgages. [FN17] However, state statutes [FN18] and declaration provisions [FN19] have typically been effective to relegate this assessment lien to junior priority relative to at least some mortgages against the same unit. Therefore, associations typically compete unsuccessfully for foreclosure sale proceeds with lenders who hold mortgages on CIC units. Typically, the foreclosure sale bid will equal no more than the foreclosing lienor's debt, [FN20] leaving no foreclosure sale proceeds remaining to pay any of the association's lien. [FN21] In a weak market, where the unit's value would *359 be lower than the amount of the senior mortgage, the association lien's junior priority is particularly devastat-

ing. Since any assessment lien foreclosure purchaser would have to buy subject to a mortgagee lien greater than the entire current property value, foreclosure of the junior association lien becomes a worthless remedy.

In evaluating the policy of according unit mortgagees priority over association assessment liens, it would be folly to ignore the needs of mortgage lenders, whose CIC investments have from the start been crucial to the emergence of these new ownership forms. [FN22] On the other hand, the financial strength of an association often bears strongly on the value of the housing units in which both lenders and residents have invested. Indeed, as assessments on some properties in a community become uncollectible, the CIC unit lender is itself damaged by increasing assessments and decreasing values for other properties it may hold as security. [FN23]

Associations in weak financial condition cannot always justify incurring the costs involved to pursue collection efforts for unpaid assessments actively, especially when they are unsure of the ultimate results of the enforcement effort. When CIC assessments go uncollected, however, the defaulting homeowner's share of community costs to maintain common elements currently falls on those least responsible for the default--neighboring homeowners who regularly pay their assessments, remain in good standing, and constitute the community association. [FN24] As their assessments rise, these owners face greater pressure to default if they cannot afford the assessment increases, and lower valuations of their homes should they opt to sell in order to escape unanticipated assessment costs. [FN25]

Faced with this dilemma, some associations attempt to defer the *360 problem by leaving assessments artificially low for a period during which the association operates on a shoestring, cutting back on maintenance and other services. But this strategy also overburdens the owners in good standing. It hastens the decline of the common facilities and the need for major repairs or replacements of community assets. These impacts will also inexorably lower the market value of homes in the CIC.

This syndrome of disproportionately burdening owners in good standing--whose resulting assessment defaults further burden a shrinking group of owners still paying--is greatly exacerbated in hard economic times; foreclosures and abandonment of CIC units severely deplete the assessment base and property values within these communities. [FN26] As the assessment base dries up, it is difficult for association leadership to maintain common elements. As a result, CICs will face the quandary of either heavily assessing the decreasing number of remaining solvent residents, often in excessive amounts, or deferring needed maintenance facilities as basic as the roofing over individual units, only to be later forced to higher assessments as deferred maintenance takes its toll. As CICs age further and require more substantial maintenance, these problems will become more and more acute. Considering that most presently existing associations are less than 20 years old, [FN27] the worst CIC maintenance crises lie ahead. [FN28]

When a homeowner defaults on a mortgage loan outside community association developments, the lender assumes substantial financial responsibility for the property. At least pending foreclosure, the lender--who will likely own the home after foreclosure [FN29]--will typically undertake to protect its security. [FN30] The lender may often find it unfeasible to care for the property by possessing it. However, where the borrower has become irresponsible, the lender will often pay costs of casualty insurance, security, physical maintenance of the exteriors of homes and landscaping. [FN31] Prominent among these burdens is the payment of property*361 taxes. In this era of privatized public services, with private associations rather than public governments collecting trash, maintaining roads and parks, and the like, association assessment charges have become more and more analogous to property taxes, liens which receive priority over virtually all others.

This norm of lender responsibility for insurance, maintenance, and property taxation costs after default should also apply to CIC homes. Imposing lender responsibility for security preservation costs it would bear in other, non-CIC communities is appropriate because--as in those other communities--this obligation would merely call upon the lender to protect its own security, albeit partly in the form of assessment responsibility in a CIC. Furthermore, the lender is able to protect itself against losses on its loan in ways community associations cannot. [FN32] Unlike most associations, [FN33] the lender can investigate and disapprove a homebuyer borrower's credit. It can control its risk by varying the loan size relative to value of the security or by requiring the escrow of funds to cover priority claims.

Furthermore, the lender can obtain mortgage insurance. [FN34] These safeguards are not available to community associations. [FN35] As the unit owner's involuntary creditor, a community association exercises no discretion over whether to rely on a particular debtor for its income stream. [FN36]

UCIOA's provisions delineating the respective creditor rights of community associations and mortgage lenders grow out of recognition of the harsh realities of community associations' economics, the nature of mortgage lenders' risk and risk avoidance mechanisms in CICs, and the importance*362 of lenders' continued CIC investment. These realities require financially solvent community associations, which operate more efficiently in collecting and managing assessment revenues. In that sense, what is required are "meaner, leaner" economic units, which can be relied upon by both CIC investors and the community at large to effectively perform the maintenance functions they were created to undertake. [FN37] Consequently, UCIOA enables more efficient collection of common assessments from all unit residents. [FN38] Where recovery from some unit owners is thwarted, UCIOA imposes a significant but limited portion of the unpaid assessment burden on the defaulting unit owners' lenders, whose security is enhanced with those very assessment dollars. [FN39]

This article will examine and critique the assessment collection remedies created by UCIOA, focusing primarily on the super priority accorded to the new statutory assessment lien. First, the article details an association's collection remedies. It includes an analysis of the split priority whereby delinquencies up to six months of assessments take priority over first mortgages on CIC properties, with the remainder of those delinquencies taking priority over only liens and encumbrances other than first mortgages. The article next addresses troublesome questions regarding applicability of the super priority to CICs in existence before UCIOA's enactment, and the priority of the association lien relative to mechanics' liens. Then, the principles of the new lien priority concepts are applied in a sketch of foreclosure and redemption strategies. A separate section then analyzes several other UCIOA reforms aimed at regularizing financial management of community associations, and supporting UCIOA's assessment collection process. Finally, the article responds to several prophecies of doom if UCIOA becomes law, reviewing available evidence as to the actual impact of the statute where it has been in force.

*363 II. UCIOA'S RESPONSE: TOUGHENING ASSESSMENT COLLECTION REMEDIES FOR COMMUNITY ASSOCIATIONS

A. Recovery of Collection Costs

UCIOA contains several measures to strengthen association collection powers as a means to increase community associations' financial viability. UCIOA supplements existing community association rights by authorizing the association to "impose charges for late payment of assessments and, after notice and an opportunity to be heard, levy reasonable fines for violations of the declaration, bylaws, rules and regulations of the association." [FN40] This bolsters a community association's "'governmental' functions as the ruling body of the common interest community," [FN41] but it would be far more effective if it also addressed the often paralyzing specter of attorney fees for enforcement of assessment obligations. [FN42] With public hostility toward lawyers running high, attorneys fees legislation could be controversial. However, since individual delinquencies are often small components of a substantial total of assessments owed by all residents in a community, enforcement of assessment delinquencies will often not take place if the association lacks recourse to recover its expenses. The importance of enabling associations to collect attorneys fees for enforcement of assessments, whether by lien foreclosure or personal suit, cannot be overemphasized. Association fees [FN43] for late payment of assessments, as authorized by UCIOA, will cover only a small fraction of enforcement expenses.

B. Association Lien with Split Priority[FN44]

To further support collection of CIC assessments, the UCIOA creates a perpetually renewable association lien for unpaid assessments or fines, *364 "from the time the assessment or fine becomes due" or, where an assess-

ment*365 is due in installments, "from the time the first instalment [[[[sic] thereof becomes due." [FN45] Subject to any contrary language in the declaration, the "assessments" for which UCIOA's lien is provided includes not only regular monthly dues, but also fees or charges for the use of common facilities or for association services, late charges and fines, and interest. [FN46]

The UCIOA assessment lien is given statutory priority over all liens and encumbrances on each unit, with the limited exceptions of interests recorded before the declaration, liens for taxes or other public governmental charges, and first mortgages recorded before any assessment delinquency. [FN47] In its most controversial provision, UCIOA grants the *366 assessment lien a further limited priority over such first mortgages. [FN48] The lien and its statutory priority may not be waived. [FN49]

1. Super priority versus first mortgages

In its most heralded break with traditional law, [FN50] UCIOA grants the association a lien priority over first mortgages recorded before any assessment delinquency "to the extent of the common expense assessments based on the periodic budget adopted by the association pursuant to section 3-115(a) which would have become due in the absence of acceleration during the six months immediately preceding an action to enforce the lien." [FN51] Any excess of total assessment defaults, in addition to other lienable fines or costs over this six-month ceiling remains a lien on the property. The portion of the association lien securing this excess will be junior to the first mortgage on the unit, but senior to other mortgages and encumbrances not recorded before the declaration. Thus, although the association's lien is a single lien, its varying priority effectively separates the association's rights in a given unit into what may be conceived of as two liens, [FN52] which are hereinafter referred to as the "Prioritized Lien" and the *367 "Less-Prioritized Lien."

A careful reading of the quoted language reveals that the association's Prioritized Lien, like its Less-Prioritized Lien, may consist not merely of defaulted assessments, but also of fines and, where the statute so specifies, [FN53] enforcement and attorney fees. The reference in section 3-116(b) to priority "to the extent of" assessments which would have been due "during the six months immediately preceding an action to enforce the lien" [FN54] merely limits the maximum amount of all fees or charges for common facilities use or for association services, late charges and fines, and interest which can come within the Prioritized Lien. [FN55] So, for example, if a unit owner fell three months behind in assessments, the Prioritized Lien might include--in addition to the three months of arrearages--the other fees, charges, costs, etc. enforceable as assessments under UCIOA. [FN56] However, for any assessments or other charges to be included within the Prioritized Lien, there must have been a properly adopted [FN57] periodic budget promulgated "at least annually" by the association from which the appropriate six months assessment ceiling can be computed.

UCIOA's specification of "the 6 months immediately preceding an *368 action to enforce the [association's] lien" [FN58] as the Prioritized Lien's measuring stick leaves unclear the consequences of an association's non-judicial foreclosure and of a mortgagee's foreclosure to which the association lien is subject. In both these cases, it may be argued that there has been no "action to enforce the [association's] lien," [FN59] and therefore there is no prioritized lien.

A less restrictive reading of section 3-116(b) would suggest, first, that a non-judicial foreclosure is an "action" as contemplated by UCIOA. After all, if section 3-116 is adopted with its optional authorization for non-judicial foreclosure of the association lien, it would seemingly serve no purpose to deny the association super priority when the association elected the option this very statute provides. This argument is particularly strong in states where non-judicial foreclosures have mandatory judicial components, thereby more closely resembling a judicial "action." [FN60] Where the association is party to a judicial foreclosure initiated by a first mortgagee, the association can reasonably argue that the action initiated by the mortgagee has, by joinder of the association, also become an action to enforce the association's lien. [FN61]

*369 Because of lender fears that the amount of the Prioritized Lien could balloon in any given year, the Colorado version of the super priority subjects the Prioritized Lien to an additional maximum: six times 150% of the average monthly assessment during the association's immediately preceding fiscal year. [FN62] While limiting the senior lender's exposure for sudden, short-lived assessment increases, this provision still allows assessments to grow quite substantially over time.

*

2. Limits on applicability of UCIOA "super priority" for assessment liens

UCIOA's provisions on association assessment liens, including the grant of the "super priority" to a portion of that lien, are among relatively few sections [FN63] of the Uniform Act expressly singled out for application to associations existing before enactment of UCIOA. [FN64] UCIOA limits applicability of these substantive sections: "those sections apply only with respect to events and circumstances occurring after the effective date of this [[[Act] and do not invalidate existing provisions of the [declaration, bylaws, or plats or plans] of those common interest communities." [FN65] Clearly, new CICs created after enactment of UCIOA in a given state will be generally subject to UCIOA, including its lien assessment provisions. [FN66]

In communities predating enactment of UCIOA, [FN67] UCIOA's association*370 lien provisions also govern the respective priorities of an association lien and a first mortgage, but only where both the lien and the mortgage arise after UCIOA's enactment. [FN68] Applying the statute to pre-UCIOA mortgages would likely violate UCIOA's restriction on its applicability to events and circumstances occurring after the effective date of UCIOA. However, where a post-UCIOA mortgage is given on the unit in a preexisting CIC, the events and circumstances at issue--the mortgage and any assessment delinquency--will have occurred after UCIOA's effective date.

This analysis is fairly straightforward where the declaration is silent regarding lien priorities, perhaps relying on existing statutory law to resolve the priorities. Applicability of the "super priority" lien also seems appropriate where the declaration provides that priority of the assessment lien will be pursuant to priority imposed in a genenically defined, state condominium or CIC statute. [FN69] By effectively amending the statute, UCIOA would change the *substantive content of the declaration's priority provision.*

However, in the many cases where the association declaration expressly provides that first mortgages take priority over the assessment lien, [FN70] UCIOA's applicability to new financing in preexisting CICs is threatened. First, mortgagors likely will argue that conferring UCIOA's "super priority" upon the assessment lien in the face of a subordination *371 provision in the declaration "invalidates" the declaration's subordination provision in violation of UCIOA's applicability section. [FN71] Preexisting associations, on the other hand, will seek at least limited application of the new "super priority" lien over first mortgages within their communities. Applicability of the "super priority" lien to new loans in their own community may well have been the basis for CIC's initial support of UCIOA's enactment.

In constructing an argument for application of the "super priority" lien in preexisting communities with subordination provisions, the threshold issue must be interpretation of the declaration's subordination language. Associations may argue that the assessment lien referred to in this contractual subordination referred only to the assessment lien *created by* the same *declaration.* Of course, this interpretation would rely heavily on the specific subordination language. If the contractual subordination is narrowly drawn to subordinate only *"the assessment provided for herein,"* [FN72] the lien of the UCIOA statutory lien could be portrayed by the association as distinct from the contractual lien created by declaration. As a statutory lien under a statute not even in existence when the declaration was drafted, the UCIOA lien could not have been in the contemplation of the declaration's drafter. Thus, the association would argue, the UCIOA lien is unaddressed and unaffected by the declaration's assessment lien subordination. [FN73]

Among the virtues of this narrow interpretation is its faithfulness to the literal language of the declaration's subordination clause. A first mortgagee would argue that the subordination clause be read more freely, as subordinating any assessment lien--even the UCIOA assessment lien, which did not exist when the provision was drafted--to first mortgages.

*372 Even if the declaration's subordination is interpreted as intended to cover all assessment liens, contractual and statutory, the association may argue that UCIOA overrides the subordination by expressly subjecting preexisting communities to section 3-116. [FN74] The association should prevail, and the "super priority" lien provisions will govern priority of assessment liens versus new mortgages, unless application of the super priority provisions is seen as "invalidating" the preexisting CIC declaration's subordination in violation of section 1-204.

UCIOA's section 1-204 declares that, as applied to preexisting communities, the statute may "*not invalidate* existing provisions of the [[[[declaration]." [FN75] By the better view, according "super priority" to the association lien over a post-UCIOA mortgage would limit, but not "invalidate," [FN76] the declaration's subordination of the assessment lien. Far from *373 invalidated, the subordination will still apply. First of all, it will give a post-UCIOA first mortgage priority over any excess beyond the limited amount of the Prioritized Lien. Also, the subordination will remain wholly effective as against all pre-UCIOA mortgages, because such mortgages would not be "events and circumstances occurring after the effective date of [[[UCIOA]." [FN77]

This result is only fair. The priority of association liens on units in preexisting associations with declaration subordination provisions should properly depend on whether competing first mortgages were prior or subsequent to the enactment of UCIOA. Mortgagees making CIC loans after the enactment of UCIOA should reasonably be held to be on notice [FN78] that they take subject to the "super priority" lien. With such notice available to lenders, there is little reason to deprive preexisting associations of this important benefit of the new legislation which these associations particularly need. Older associations are particularly likely to encounter physical decay of common improvements. Association solvency is crucial in order to repair or replace these aging common improvements. Also, older associations formed when experience with CICs was very limited are the most likely to have relatively primitive documentation, providing inadequate collection remedies for the association, and specifying less realistic mechanisms for amendment of their documentation to add efficient remedies.

In preexisting CICs, recognizing the association's Prioritized Lien as senior to a post-UCIOA mortgage and overriding the declaration's contractual subordination should be permissible under the U.S. Constitution's contracts clause. [FN79] That clause is the principal reason UCIOA's impact was so narrowly limited in its application to preexisting common interest communities. [FN80] The only parties in preexisting contractual relationships addressed by this application of UCIOA are associations seeking *374 broader application of the UCIOA lien provisions, and the unit owners who are the declaration's constituent parties. Overall unit owner liability is unchanged by UCIOA's alteration of lien priorities. [FN81] The parties burdened by the "super priority" lien are those mortgage lenders whose mortgage contracts with unit owners were created after enactment of UCIOA. [FN82] Therefore, UCIOA's impact on these mortgage contracts is not retroactive, as required for violation of the U.S. Constitution's "contract clause." [FN83] Regardless of the lenders to which it is applied, the "super priority" lien's constitutionality is further bolstered by its relatively insubstantial, [FN84] remedial [FN85] impact requiring merely the prioritizing of six months' worth of assessments. This is a very narrowly tailored [FN86] method of addressing "a broad, generalized economic or social problem." [FN87]

3. Priority versus mechanics' liens.

In language which may prove ambiguous, UCIOA also expressly avoids changing governing state law regarding attachment and priority of mechanics' and materialmen's liens. [FN88] Under most states' mechanics' and *375 materialmen's lien statutes, certain workers and suppliers otherwise unsecured claims for work performed on real estate are accorded a statutory lien which, once perfected by proper filing, relate back for priority purposes to the commencement of work on a project or some other date preceding perfection of the lien. [FN89] Where such a mechan-

ics' or materialmen's lien is competing with an association assessment lien, the result will turn on the date as of which the association assessment lien came into existence.

By the language of section 3-116(a), the assessment "is a lien from the time the assessment or fine becomes due." The assessment due date, therefore, is likely, the critical comparison date for prioritizing the assessment lien versus a mechanics' lien under section 3-116's present language.

On the other hand, in setting priorities between the association assessment lien and first mortgages, [FN90] section 3-116(b) compares perfection (recordation) of the mortgage with the date the assessment became delinquent. [FN91] Perhaps the moment of assessment delinquency is the critical date for comparison with relation back date of mechanics' or materialmen's lien, just as with priority competition between the assessment lien and the first mortgage. [FN92] After all, regardless of UCIOA's language dating the lien from the due date, delinquency is prerequisite to having an enforceable lien.

Yet another, somewhat less likely comparison date would be the date of the declaration creating the CIC. Under the general rule of section 3-116(b), liens and encumbrances recorded before the recordation of the declaration are the only interests taking priority over the association assessment lien. However, section 3-116(b) seems clearly to except mechanics' or materialmen's liens from that general rule. [FN93] Therefore, the use of its comparison date would seem contrary to the drafters' intentions.

*376C. *Foreclosure and Redemption Options*

UCIOA provides that the association lien may be foreclosed "in like manner as a mortgage on real estate" [FN94] or, pursuant to optional language, by power of sale. [FN95] However, power of sale foreclosure is unavailable in many states. [FN96] Some others with provision for non-judicial foreclosures have nonetheless adopted UCIOA, requiring that the assessment lien can be foreclosed only by judicial foreclosure as a mortgage. [FN97]

The distinction between judicial and power of sale foreclosure, important in all foreclosure settings, [FN98] is particularly crucial in foreclosures of CIC association assessment liens, where assessment defaults continue to mount during the pendency of foreclosure proceedings. Given the relatively small dollar amount of assessment arrearages, especially those holding super priority under UCIOA, extension of foreclosure from the few months or less required for non-judicial foreclosure to the one and one-half to two years required for judicial foreclosure [FN99] can generate additional assessment defaults several times the amount of the assessment default first foreclosed upon. [FN100] The relatively small stakes in an assessment foreclosure may also generate a hostile judicial response to devoting court time to such cases. [FN101] On the other hand, a statutory grant of power of sale foreclosure authority raises several problems, [FN102] among which would be the more likely application of constitutional due process safeguards to *377 a power of sale created by statute than to one privately conferred. [FN103] On balance, however, it is excessively burdensome to restrict associations to judicial foreclosures in a state where power of sale foreclosure is permitted. [FN104] UCIOA should be adopted including the optional language of section 3-116(j)(1) and (2) permitting associations foreclosure by non-judicial foreclosure.

Whatever the foreclosure process permitted in a given UCIOA state, an association could act on its Prioritized Lien by initiating foreclosure against a unit in assessment default. Along with the unit owner, the association would join the holders of any mortgages, deeds of trust, or other interests junior to the Prioritized Lien as necessary parties to a judicial foreclosure. In non-judicial foreclosure, these same parties would be formally notified of the sale. Under either method of foreclosure, holders of junior interests would stand to receive the excess, if any, of the foreclosure sale price over the amount of the Prioritized Lien, in the order of their priorities. The association's Less-Prioritized Lien would be among those junior interests.

The process would vary considerably if, instead, the party seeking foreclosure were the holder of a first mort-

gage on a CIC unit. Regardless of whether the first mortgagee's loan is in payment default, default on the association assessment is also likely an event of default under the mortgage, allowing its holder to initiate foreclosure. If a Prioritized Lien were outstanding against the unit, the mortgage and its foreclosure would be subject to the association's Prioritized Lien. As a senior interest, the association's Prioritized Lien could probably not be forced into the mortgage foreclosure. [FN105] The Prioritized Lien can receive no portion of the foreclosure*378 sale proceeds without participating in the foreclosure. However, payment of the Prioritized Lien--which, unlike the Less-Prioritized Lien, should survive this foreclosure [FN106] as a senior interest--will be necessary to clear title for resale of the unit, or often for presentation of mortgage insurance or guaranty claims to the FHA [FN107] or VA. [FN108]

If the association wished to include its Prioritized Lien in a foreclosure initiated by the mortgagee, an additional problem might arise where the association lien must be foreclosed judicially in a state which otherwise recognizes power of sale foreclosure. [FN109] In that case, if the association is to be included in the foreclosure, the first mortgagee might instead need to yield and use judicial foreclosure. But the mortgagee would presumably resist switching from the more efficient non-judicial foreclosure to the slower, more expensive judicial proceeding.

Ironically, the burdensome requirement that the association foreclose judicially could increase the association's leverage over a first mortgagee foreclosing by power of sale. In suing to foreclose on its senior Prioritized Lien, even after a power of sale foreclosure has been commenced by the *379 mortgagee, the association will have to join as necessary parties the first mortgagee, the owner, and all other junior interests--all holders of parts of the equity of redemption vis a vis the association's lien. [FN110] With these necessary parties also standing to be extinguished in the mortgagee's power of sale foreclosure, pursuit of the association's foreclosure lawsuit should require suspension of the non-judicial foreclosure, in order to allow the judicial foreclosure to go forward with the mortgagee and all other necessary parties participating. [FN111] If the association can predictably accomplish suspension of the power of sale foreclosure, enforcement of the association's lien will threaten substantial delays to the secured lender.

Those who drafted UCIOA's "super priority" lien provisions appear to have been fixated on foreclosure. This fixation is quite understandable since a primary and favorable impact of the "super priority" lien will be to allow aggressive associations to bring units with defaulted assessments into foreclosure. Without UCIOA in effect, lenders holding defaulted mortgages on CIC property have often felt little motivation to foreclose for extended periods until they have finally worked out some disposition for the property. This delay can mean the difference between financial life and death for the many CICs in economically depressed markets, where a single lender holds defaulted mortgages on a substantial number of units which have either insolvent or abandoning owners. With UCIOA's "super priority" lien in effect, the lender is vulnerable to the association's foreclosure--which may be especially costly where the association has no access to an otherwise available non-judicial foreclosure process [FN112] and must foreclose itself by judicial process. To retain control over any foreclosure, the lender may agree to pay delinquent assessments to the association as necessary, even including new assessments pending completion of foreclosure, for which the lender is technically not liable. [FN113] But the more important goal of the association in foreclosure will be to speed the time when the unit is owned by an entity, probably the lender purchasing at foreclosure, which will pay assessments regularly in the future. If the lender holds multiple properties in a CIC, the resulting assessment income can be very substantial.

*380 Facing the threat of even a relatively efficient foreclosure, [FN114] the first mortgagee holding subject to a potential Prioritized Lien will consider paying the association the portion of the unit owner's debt secured by the Prioritized Lien. Mortgagee payment of the Prioritized Lien was the lender response envisioned by UCIOA's drafters. [FN115] Such payment might also seem attractive where an assessment default is not accompanied by a default in mortgage payments. According to provisions in most mortgages, the lender's payment to the association of its borrower's delinquent assessments can be added to the secured debt. [FN116]

By payment of the delinquent assessments, the mortgagee might be contemplating a result analogous to that triggered by the equitable redemption from mortgages generally--acquiring the senior lien by paying it off. [FN117] As a result of UCIOA's fixation on foreclosure, however, the parties' respective lien rights under section 3-116 are

less clear in pre-foreclosure settings than once foreclosure is commenced. Also, UCIOA's perpetually renewable, statutory lien works differently in several respects from a mortgage securing a fixed or decreasing debt, so that payment of the Prioritized Lien at any given moment cannot permanently eliminate the senior lien as a threat to the first mortgage, which is normally the goal of redeeming from a senior mortgage.

One difference between the UCIOA lien and an ordinary mortgage is that the Prioritized Lien and the Less-Prioritized Lien are both parts of the same lien, with varying priorities. A mortgagee seeking literally to equitably redeem the Prioritized Lien would thus face the all-or-none rule, requiring redemption of all or none of the lien, here both the Prioritized and Less-Prioritized Liens, unless the senior lien holder otherwise elects to accept a partial redemption. [FN118] On the other hand, the mortgagee seeking redemption would have no right to redeem an interest junior to its mortgage, [FN119] arguably including the Less-Prioritized Lien. The mortgagee can probably solve these problems by requesting to pay the entire assessment delinquency, as secured by both Prioritized and Less-Prioritized Lien. The association would have little motive in rejecting such an offer. However, following such payment, any new delinquency would again be secured by the UCIOA lien, with its super priority for the first dollars of *381 delinquency up to the six-month maximum. UCIOA's lien covers all assessments, with no language suggesting that payment of earlier delinquencies leaves later assessments unsecured. Nor does the super priority provision contain language suggesting any reduction of the amount prioritized based on payment of previously prioritized amounts.

A second difference between ordinary mortgagee redemption of a senior mortgage and attempting redemption of the Prioritized Lien is in computing the amount necessary to redeem. The maximum amount for Prioritized Lien is potentially changing at all times as new assessments are levied and some or all go unpaid, as is the amount of the total UCIOA lien. Each assessment default increases the overall association lien. Meanwhile, the maximum size of the Prioritized Lien, *"the common expense assessments . . . which would have become due . . . during the 6 months immediately preceding institution of an action to enforce the lien"*[FN120]--remains unknowable (except by approximation). This is true until an action to enforce the lien is instituted, pinning down which six months of assessments are to be used to compute the maximum. By floating the potential Prioritized Lien maximum by reference to changing assessment figures, UCIOA continually redefines the Prioritized and Less-Prioritized Lien, portions of the total overall assessment lien flowing into the Prioritized Lien any time the Prioritized Lien total falls below its maximum, and flowing back to the Less-Prioritized Lien any time the applicable maximum decreases. As a result, until an action to enforce the UCIOA lien is initiated, there is literally no proper amount to be paid in order for a mortgagee to redeem the lien.

Put another way, under the current language of section 3-116(b), there *is no Prioritized Lien until* the moment *foreclosure* is initiated. [FN121] So there is no lien to redeem, even though one will materialize instantaneously upon initiation of foreclosure.

Even more fundamentally, a mortgagee permanently redeeming either the Prioritized Lien or the entire association lien--so that uncured or future delinquencies could not come within protection of such lien--would be inconsistent with the perpetually renewable nature of the UCIOA lien. UCIOA accurately contemplates ongoing extensions of credit by the association to the unit owner. It also provides that unit owner's assessment obligations shall all be secured with at least some priority over competing encumbrances. Just as the association cannot really limit its own extension of credit, the statute contemplates no limit on the over-all assessment lien in dollars or time. While the super priority provision contemplates a six-month maximum at any given moment, it contemplates no limit over time. [FN122] Whatever happens to the six months of assessments prioritized by initiation of a foreclosure action in the middle of year one, a Prioritized Lien of up to six months assessments exists if another enforcement action is initiated in year three--or at *any* future *382 time. [FN123]

A first mortgagee seeking protection from the Prioritized Lien by paying off the assessments it secures (or even paying off all overdue assessments) might seek to document its payment as a purchase of association rights to foreclose on any Prioritized Lien--including one consisting of new delinquencies--for some time into the future.

[FN124] Phrased, differently, [FN125] the mortgagee could describe the deal as an assignment to the mortgagee of the association's Prioritized Lien. Under an assignment, the mortgagee/assignee would intend for the lien to remain alive and still securing the amount the mortgagee paid for it. So long as the Prioritized Lien now held by the mortgagee/assignee remained alive and unforeclosed, no additional delinquencies could gain the benefit of the super priority.

From a public policy perspective, the advantage of honoring this "assignment" approach is in creating an incentive for first mortgagees to pay the association the Prioritized Lien. [FN126] However, even if a court would seriously consider recognizing assignment of a lien which does not and may never exist, such an assignment of the Prioritized Lien should violate the UCIOA's prohibition against waiver or variation by agreement of UCIOA-created rights. [FN127] To allow the mortgagee to purchase this lien, so *383 that the association would relinquish its prioritized security for all future assessments, either permanently or for some extended period, would fly in the face of UCIOA's statutory scheme. It would be as if a governmental taxing authority were to give up its future power to attach prioritized tax liens for new defaults whenever one deficiency were cured. In levying assessments, the association is somewhat analogous to a governmental authority [FN128] levying taxes. Like the government, it must collect assessments from its residents to perform critical functions which clearly resemble governmental responsibilities. [FN129] Like the government, the association has *384 the option neither to deny extending more and more credit over time to unit owners nor to withhold performance of its responsibilities to maintain the community physically. And like government, its ability to function in socially critical arenas depends on renewable, prioritized lien protection of its assessment income.

An additional analogy supports the association's continued entitlement to perpetually renewable security for all future assessments, and priority for a substantial portion of those assessments, even after past defaults have been cured. In a very real sense, the association is like the senior lienor holding a mortgage which secures obligatory future advances. As Henry Judy and Robert Wittie have observed, the CIC is, in effect,

> an *involuntary* creditor which becomes obligated to advance services to unit owners in return for a promise of future payment. Such payments are much like the loans made by a mortgagee under an obligatory mortgage future advances clause, but with only the most rudimentary controls upon the amount and timing of loan advances, the terms of the loan, and the continuing credit worthiness of the borrower. [FN130]

Clearly, the UCIOA lien secures future advances in the sense of continually accruing assessment obligations, with the association obligated continually to pay out maintenance and operational costs for the entire community regardless of its receipt of payment. Lenders financing the purchase of CIC units can reasonably be held to realize that these costs and debts must, by their very nature, persist into the future regardless of the association's preferences, and to understand that assessments and defaults will change over time.

Like the holder of a mortgage securing obligatory future advances, [FN131] the association's priority for its lien should not be limited at some amount or point in time while the association's obligation to make advances persists. Rather, new advances, costs covered by assessments, should relate back and receive the same priority accorded to the original association lien (under UCIOA, holding a split priority) relative to intervening liens like the first mortgagee. With a senior mortgage to secure obligatory future advances, no one's payment of a past advance blocks inclusion of future obligatory advances in the priority lien. The same result should hold for community associations and their prioritized statutory*385 lien.

Despite the unavailability of protection fully analogous to that afforded by equitable redemption, first mortgagees whose own loans are not in payment default may very well elect to pay assessment defaults in order to eliminate the present threat of foreclosure by the association. [FN132] While such mortgagees will remain vulnerable to future defaults gaining priority over them, those defaults will hopefully take some time to rise to a level where association foreclosure would become worthwhile. Indeed, at least where generalized economic conditions are not severe, the first mortgagee can often persuade the unit owner to cure its assessment default and keep its assessments current in the future. [FN133] In weaker economies, however, the lender may decide to refrain from paying assess-

ment delinquencies until the lender obtains title to the unit in foreclosure, after which payment is far more likely. [FN134]

III. STREAMLINING INTERNAL ASSOCIATION FINANCIAL MANAGEMENT

The lien priority provisions of UCIOA are integrally bound up with a series of additional measures designed to strengthen associations financially, by regularizing association management not only in the collection of assessments but also in budgeting and record keeping generally. In addition to their direct impacts on availability of the UCIOA "super priority" for association liens, these provisions aim to discipline and streamline association management to create financially stronger, more decisive--"meaner, leaner"--associations.

A. Recording the Assessment Lien

First, UCIOA provides that recording the CIC declaration itself constitutes record notice and perfection of the lien for assessments. [FN135] In many states, recording of a delinquency notice has been deemed necessary to perfect any lien for unpaid assessments. [FN136] But the burden of recording individual delinquencies, unit by unit, can be overwhelming and unnecessary for associations, especially when their management consists of amateurs. Attorneys attempting perfection by recording delinquencies *386 have varied in opinion as to whether each successive default on a given unit must be recorded, or whether recording one delinquency on a unit will perfect the lien as to subsequent delinquencies as to the same unit. [FN137] In place of requiring recording of individual delinquencies, UCIOA requires recording of only the declaration [FN138] and a formalized assessment status reporting system. [FN139] Under UCIOA's language, the statutory lien is based on the association's existence and not on its declaration's content. Thus, there is no requirement in UCIOA that the declaration contain a provision creating an assessment lien. [FN140]

Desirable though it may be to require recordation of only the declaration, the present language without more may leave a community association in some states off the list of parties receiving notice of any senior mortgage foreclosure against a unit in their CICs. Some state statutes confine their list of parties to whom notice foreclosure must be provided to holders of interests "recorded subsequent to the [mortgage or] deed of trust being foreclosed and before recordation of the notice of sale." [FN141] Because the declaration was likely recorded before recordation of the mortgage or deed of trust being foreclosed upon, the association might not be entitled to notice of foreclosure of such a mortgage or deed of trust, even though its Less-Prioritized Lien would stand to be extinguished in such a sale. Recording delinquency notices could cure this problem. Preferably, UCIOA should be amended to clarify that recordation of the declaration, *387 even though predating recordation of a first mortgage or deed of trust, would entitle the association to notice of foreclosure in these cases.

B. Assessment Status Inquiries

As an efficient substitute for recording separate notices of delinquencies against each unit owing unpaid assessments, UCIOA codifies each unit owner's ability to obtain from the association verification of the status of any unpaid assessments charged against the unit. [FN142] Within ten business days after receiving the owner's written request, the association is obligated to provide a recordable assessment status certificate binding on the association, the board and all unit owners in the CIC. The statement can then be presented to other interested parties, such as a mortgagee or potential buyer. Furthermore, it can be placed on the public record.

This provision for assessment status reports codifies what had become standard practice in many communities that had no statute mandating provision of such "estoppel statements." As a precondition to some contemplated transactions, buyers, lenders and title insurers regularly insist on proof that assessment delinquencies do not encumber the unit. In expressly obligating the association to respond to these requests, however, UCIOA increases the unit owner's leverage in seeking a response from a recalcitrant board. Further, the information contained in the statement

required by UCIOA is more precise and reliable than a simple recorded notice of delinquency, which will often point to a single default, without revealing whether subsequent defaults have increased the size of the assessment lien.

Nonetheless, the UCIOA provision could be strengthened in several respects. Most importantly, the statute should ideally specify the consequences of an association's failure to respond to a request for an assessment status report. Such a non-response is a particularly troubling risk with weakly managed association boards unaware of their obligations or of how precisely to fulfill them. [FN143]

Arguably, the consequence of a non-response and a late response should be the equivalent of a response that there are no assessment delinquencies chargeable against the unit. Thus, any delinquencies outstanding at the time of an unanswered status report request would become wholly unenforceable, by either foreclosure or personal action on the assessment debt. In this same strict spirit, late responses might be treated as no response at all. A more moderate approach to the association's failure to timely respond could trigger loss of the association's entire statutory lien [FN144] for assessments then outstanding, but without affecting the *388 association's unsecured claim against the unit owner. [FN145] An even milder remedy where no timely response is forthcoming would entail merely loss of super priority for the unreported assessments then outstanding; the unreported delinquencies would remain secured by the association's Less-Prioritized Lien. [FN146] Of course, if delinquencies continue to mount, the new delinquencies would become part of a renewable [FN147] Prioritized Lien and the earlier loss priority would be nullified. In selecting from these potential sanctions, the goal should be not only to motivate a response once a request is received, but also to encourage the association more generally to undertake management practices necessary to enable prompt responses to all requests.

An ideal assessment status report statute should also clarify who can receive assessment inquiries for the association. With informal association organizations and changing citizen leadership, the inquiring unit owner could well encounter the objection of having asked the wrong party. Colorado addresses this problem by requiring that the inquiry be addressed to the association's registered agent. [FN148] Associations may wish to appoint their management company, if any, or their attorney as the appropriate agent. Designation of an association officer runs a far greater risk that the *389 individual designee will change without all members of the community realizing the change has occurred.

Finally, the statute could also specify how inquiries or responses under this section can be later proven, when one of the parties disagrees over who did what when. Thus, Colorado's provision specifies use of "certified mail, first class postage prepaid, return receipt requested," [FN149] for these inquiries and responses, so that proof of either the request or the response will be readily available.

C. Budgeting

To focus the association's internal financial planning, UCIOA also requires annual association budgeting once the first association assessment has been made. [FN150] Availability to the association of the Prioritized Lien also depends on adoption of such an annual budget, because the assessments used to measure the six-month super priority must be based on such a budget. [FN151] Once the association board adopts a proposed budget, UCIOA requires notice to the community of the budget proposal and of an opportunity to meet and review the proposal. [FN152] However, regardless of actual attendance at the announced budget meeting, the budget is considered automatically accepted unless a majority of all homeowners, or any larger percentage specified in the declaration, objects. If the budget is rejected, the previous budget in effect for the association continues until a new proposal successfully survives this process.

The UCIOA budget provision draws fire from some community association officers as generally too burdensome, and as opening the floodgates to paralyzing dissent on budget issues which must be efficiently resolved.

However, the UCIOA procedure strikes a remarkably good balance between insisting on methodical financial planning by associations [FN153] and allowing boards leeway to govern without fruitless disruption by unrepresentative, disgruntled residents. [FN154]

IV. PROPHETS OF DOOM: FEARS OF THE "SUPER PRIORITY" LIEN

In the various jurisdictions which have considered UCIOA, opposition to the legislation has focused primarily on the "super priority" lien for associations collecting defaulted assessments. In addition to lender interests, opposition has come from several other constituencies whose positions on the "super priority" lien have varied from state to state. [FN155]*390 Though the arguments over UCIOA's "super priority" lien varied from state to state, certain themes emerged--often focusing on fears that the new "super priority" lien would foul up existing real estate, lending or insurance markets. Several such prophecies of doom are recounted and addressed below.

A. Marketability of CIC Mortgages on Secondary Market

Among the arguments often made against adoption of the "super priority" lien is that this priority would impair sale of mortgages on the secondary market because of government requirements that such mortgages be first liens. [FN156] This, in turn, would dry up mortgage funds to CIC unit owners in states imposing the "super priority" lien for assessments, interfering with sales of CIC properties. However, the same Fannie Mae and Freddie Mac regulations which require lenders to receive first liens expressly contemplate acquisition of mortgages subject to the uniform acts' six month assessment lien priority on the same basis as first liens on other residential property. [FN157] Lenders' and developers' attorneys in states *391 where the uniform acts' "super priority" lien is in effect report that these provisions have in no way discouraged secondary purchase or sale of CIC mortgages subject to such priority. [FN158]

B. Escrows of Assessments

An additional argument against the "super priority" lien has been that lenders facing a loss of priority would demand that each new homebuyer escrow six months assessments to protect lenders against the risk of having to pay defaulted assessments. Since developers may be unit owners well into the life of a CIC, during which time the allocation of assessment responsibility may not discriminate in favor of the developer, the aggregate of assessment escrows faced by developers owning multiple units could become quite substantial. [FN159] By this view, such an escrow requirement would inappropriately increase development costs and home purchase costs to potential buyers already coping with high housing costs and, more recently, a troubled economy.

The drafters of the "super priority" lien shared this concern and fully expected that first mortgagees would require that unit owners establish escrows in the amount of the Prioritized Lien. [FN160] The expectation of *392 escrow requirements was one basis for limiting the Prioritized Lien to equal no more than six months assessments. [FN161] However, some experience with the super priority lien suggests that lenders may not ordinarily impose any escrow requirement on CIC unit purchasers. [FN162]

Even if escrows were routinely required, they would be forcing homeowners to pay costs which are, in any case, legitimate costs of CIC homeownership. UCIOA's correct premise is that these very real common costs must be recognized and borne by those who benefit from the maintenance and other services and the facilities generating the costs. With maintenance needs rising as the first large CIC generation ages, [FN163] we can no longer casually view community associations as a convenient place to transfer unwanted local governmental responsibilities [FN164] without also enabling associations to raise the funds necessary to meet those infrastructure responsibilities. The "super priority" lien should itself help assessment collections. If that boost is accompanied by the escrowing of a modest amount of assessments per unit, the escrowing should further help assure that CIC homeowners each pay their fair share. Furthermore, it would limit the risk faced by the most reliable homebuyers that, due to others' defaults in

the same community, their own assessments may skyrocket while their home values plummet. [FN165] This lowered risk, in turn, should help CIC properties to hold their value.

C. Title Insurance Coverage

Title insurers have expressed fears of new claims against them under the UCIOA assessment lien priority. One argument is that the structure of the "super priority" lien would place title insurers in the position of insuring against an unforeseen future event, the Prioritized Lien fueled by a default subsequent to issuance of the title policy. [FN166] Such potential liability seems very far fetched under UCIOA and the standard language of the vast majority of title policies.

*393 UCIOA clearly provides that, although filing of the declaration is prerequisite to the statutory assessment lien's existence, the lien itself dates not from filing of the declaration but only "from the time the assessment or fine becomes due." [FN167] Given this language, a subsequently arising lien, triggered only upon a default subsequent to issuance of the title policy, would clearly be within the American Land Title Association standard owner's and lender's form Exclusions from Coverage. Absent any contrary endorsement to the standard policy, these exclusions from coverage include "liens, [etc.] attaching or created subsequent to Date of Policy (except [mechanics liens for labor or materials furnished before policy issuance])." [FN168]

In condominium and planned unit development title policies, there is often added an endorsement which provides the unit owner various assurances about the legality of the condominium's or PUD's documentation, existence and operation under applicable law. [FN169] These standard endorsements have also traditionally provided coverage against priority of assessment liens over mortgage liens. Thus, the traditional condominium endorsement (ALTA Form 4) adds coverage: "against loss or damage by reason of . . . [t]he priority of any lien for charges and assessments provided for in the condominium statutes and condominium documents over the lien of any insured mortgage identified in Schedule A." [FN170] The traditional PUD endorsement (ALTA Form 5) adds coverage: "against loss or damage by reason of . . . [t]he priority of any lien for charges and assessments in favor of any association of homeowners which are provided for in any document referred to in Schedule B over the lien of any insured mortgage identified in Schedule A." [FN171]

Read literally, these traditionally standard endorsements [FN172] could conceivably be taken to insure against the super priority of a statutory assessment lien even though the lien arises subsequent to issuance of the title policy as a result of a later default. After all, UCIOA's super priority *394 is accorded literally to "a lien for charges and assessments" and is priority over a mortgage which will be listed in Schedule B. However, such a literal reading of this endorsement flies in the face of the fundamental nature of title insurance which--unlike casualty, health, fire, and other types of insurance--"insure[s] against past risks and excludes [from coverage] future risks." [FN173]

To clarify this important limitation on coverage against assessment lien priority, the standard ALTA endorsements should be refined. Gurdon Buck has proposed that the relevant paragraph of Form 4 (and presumably Form 5) be altered to limit coverage supplied by the endorsement to: "The priority of any Common Expense assessments, including special assessments, due against the Unit identified in Schedule A and unpaid as of the date of the policy." [FN174] This endorsement would leave the insurer responsible only for defaulted assessments from before issuance of the title policy. To obtain information about such past delinquencies, the insurer need only obtain the binding assessment status statement required under UCIOA. [FN175] Inquiries into assessment status have long been standard procedure for many title insurers, but without any statutory provision to back up the request with the force of law. Under the current ALTA policy, with a properly tailored CIC endorsement, title insurance coverage will not extend to a lien arising only upon a later default. If a title company wished to provide such coverage, it could of course elect to do so in its own business judgement, either as a special service to a good client or for an additional fee. [FN176]

CONCLUSION

The UCIOA "super priority" lien for assessments is a fundamentally sound response to the difficulties community associations have experienced in collecting the assessments which enable performance of association responsibilities. With these associations providing more and more critical, previously public services in our society, and housing some 15% of our population, preserving the lifeline of assessment dollars is a matter of urgent necessity. The UCIOA lien promises to at least substantially improve the financial strength of associations while leaving other secured lenders reasonably well protected and unit owners relatively unburdened by extra payments beyond those previously required. UCIOA accomplished this result by carefully compromising interests represented by associations with those of lenders and unit owners, providing a six-month assessment priority rather than the much larger priorities suggested by some advocates, or by strict adherence to analogies to public government *395 or private lenders with mortgages securing obligatory future advances.

The UCIOA lien provisions can make our sometimes enfeebled community associations "meaner" in the sense of power to be reckoned with by other foreclosure claimants. The supporting financial management provisions can also make them "leaner" by requiring that association budgeting, responsiveness to inquiries, and documentation duties become more focused and streamlined. These sections of UCIOA create some technical issues which further drafting can resolve. Nonetheless, these financial management reforms support the lien provisions, and UCIOA wisely makes them dependent on each other.

As good as the UCIOA "super priority" lien is from a policy perspective, the Uniform Act version is riddled with technical problems which will hinder its functioning. For example, why should the lien provisions focus so exclusively on foreclosure rights at a time when our society is beginning to turn away from litigation toward less adversarial resolution of conflict? Why not count the six month priority from a date other than commencement of foreclosure? Even if foreclosure must remain the focus, why phrase the statute to even possibly suggest that the only foreclosure which creates the super priority is judicial foreclosure by the association?

More difficult questions are posed by UCIOA's applicability rules as applied to the UCIOA lien. With many association declarations containing express subordination of association liens to first mortgages, associations in existence before enactment of UCIOA could arguably lose perhaps UCIOA's strongest benefit, which even UCIOA itself first purports to give to existing associations (by expressly listing section 3-116 as applicable to preexisting communities [FN177]) before arguably taking it away later in the same sentence with its unwillingness to "invalidate" provisions of existing declarations.

The Joint Editorial Board of the American Bar Association and the Uniform Laws Conference is currently considering adjustments to the Uniform Multiple Ownership Acts. With due reflection, careful tinkering, and the great imagination which has characterized their past work, we can hope for the transformation of a very good remedial innovation to a truly excellent one.

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[FN1]. UNIF. CONDOMINIUM ACT, 7 U.L.A. 421 (1980) [hereinafter UCA]. The original act was adopted by the Uniform Laws Conference in 1977.

[FN2]. UNIF. PLANNED COMMUNITY ACT, 7B U.L.A. 8 (1980).

[FN3]. MODEL REAL ESTATE COOPERATIVE ACT, 7B U.L.A. 12 (Supp. 1991).

[FN4]. A prominent community associations attorney and author, Wayne Hyatt, recently broke ranks with the many association attorneys supporting UCIOA, and questioned UCIOA's premise that all three ownership forms are so essentially similar as to be properly subject to one integrated body of legislation. He asserts that UCIOA

> does not mesh well with a large planned community built over a period of years requiring considerable developmental flexibility to meet changed circumstances and times. The legal requirements applicable to the creation of a condominium which usually comprises a single building with a shared infrastructure simply do not apply in most cases when dealing with . . . a master planned community of potentially hundreds or thousands of acres . . . .

Letter from Wayne S. Hyatt, Esq., to Cary S. Griffin, Esq., (Dec. 23, 1991) (on file with author). Hyatt concludes, however, that UCIOA could be effective if modified to provide additional developmental flexibility. Hyatt's concerns with UCIOA do not extend to the assessment lien provisions, which are drawn from the UCA, a statute he has supported. *Id.*

[FN5]. Legal ownership of units and common areas, as distinguished from beneficial ownership, varies among condominiums, planned communities and cooperatives. In the condominium form, each unit is owned outright by an owner who, by definition of the condominium, must also hold an undivided ownership interest in the common areas. In cooperatives, the cooperative corporation (i.e., per § 1-103(10), the "association" under UCIOA) typically owns both common areas and individual units, which are leased to residents who, in turn, own the corporation. A planned community is defined in UCIOA as a residual form, being any common interest community other than a condominium or cooperative. UNIF. COMMON INTEREST OWNERSHIP ACT § 1-103(23), 7 U.L.A. at 242 (1982) [hereinafter UCIOA]. Most planned communities are developed under the zoning and subdivision classification "planned unit development, with common area ownership usually held by community association in turn owned by the unit owners." PREFATORY NOTE, UNIF. COMMON INTEREST OWNERSHIP ACT 5, 7 U.L.A. 231, 231 (1982). Another type of planned community covered by UCIOA, though not addressed in its commentary, is the "reciprocal easement" form, where the entire community is divided into privately owned lots subject to mutual reciprocal easements benefitting the individual lots. This form is more often used in commercial contexts, though it also appears in some high rise planned communities and in communities where private roads cross individual lots to reach the interior lots and the highway.

[FN6]. Compare UCIOA § 1-103(7), which defines "common interest community" as "real estate with respect to which a person, by virtue of his ownership of a unit, is obligated to pay for real estate taxes, insurance premiums, maintenance or improvement of other real estate described in a declaration." UCIOA § 1-103(7), 7 U.L.A. at 240 (1985). Common interest communities are those governed by UCIOA. UCIOA §§ 1-201, 1-204, 7 U.L.A. at 266 (1982).

[FN7]. COMMUNITY ASSOCIATIONS INSTITUTE FACTBOOK, 7-9 (1988) [hereinafter CAI FACTBOOK], (estimating 29,640,000 CIC residents some four years ago, which CAI considered to be 12.1% of population). Higher estimates exist, *See* Mike Bowler & Evan McKenzie, *Invisible Kingdoms*, 5 CAL. LAW. Dec. 1985, at 55. A 1987 California study estimates there were then between 13,000 and 16,000 owners' associations in that state alone. S. BARTON AND C. SILVERMAN, COMMON INTEREST HOMEOWNERS' ASSOCIATIONS MANAGEMENT STUDY: REPORT TO THE CALIFORNIA DEPT. OF REAL ESTATE 2 (1987) [hereinafter BARTON & SILVERMAN CALIFORNIA STUDY]. For extensive review of the emergence of restrictive promissory servitudes as a judicially favored legal device, see generally James L. Winokur, *The Mixed Blessings of Promissory Servitudes: Toward Optimizing Economic Utility, Individual Liberty and Personal Identity*, 1989 WIS. L. REV. 1 (1989) [hereinafter Winokur, *Mixed Blessings*].

[FN8]. *See Apartment/Condominium Market*, 27 NAT'L REAL EST. INVESTOR, 53, 60 (1986).

[FN9]. CAI estimates new common interest associations are being created at the rate of approximately 4,000-5,000 per year. In each of the 50 largest metropolitan areas throughout the U.S., well over 50% of all new housing has for several years now been in CIC housing. CAI FACTBOOK, *supra* note 7, at inside front cover. Estimates exist for the growth of CICs nationally. *See, e.g.*, Howe, *California's Homeowner Wars*, S.F. CHRON., July 3, 1989, at C-1; Homeowners' Association Task Force Report to Montgomery County Council, Rockville, Maryland (1989) at 12 (concluding that "virtually all subdivisions of 50 units or more are being developed as common interest communities and . . . in the near future the vast majority of our citizens will live under these quasi governments"); Stephen E. Barton & Carol J. Silverman, *The Political Life of Mandatory Homeowners' Associations, in* RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM? 31, 34 (U.S. Advisory Commission on Intergovernmental Relations, 1989) (noting servitude regimes account for over 90% of all new housing in San Jose, California).

[FN10]. New Jersey State League of Municipalities v. New Jersey, No. BUR-L-790-90 (Nov. 5, 1990) (recognizing such services as essentially public services, for which CIC residents are in effect double taxed, but holding New Jersey statute mandating reimbursement unconstitutional for failing to equally protect tenant victims of similar double taxation).

[FN11]. *See, e.g.*, DOWDEN, COMMUNITY ASSOCIATIONS: A GUIDE FOR PUBLIC OFFICIALS, 7-13 (1980); Robert H. Nelson, *The Privatization of Local Government: From Zoning to RCAs, in* RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM? 9, 18, 45, 47 (U.S. Advisory Commission on Intergovernmental Relations, 1989); Brentwood Subdivision Road Ass'n, Inc. v. Cooper, 461 N.W.2d 340, 342 (Iowa Ct. App. 1990); 61 Op. Cal. Att'y Gen. 466 (1978); Kenney, *Dictators of Taste*, EASTSIDE WEEK, October 2, 1991 (Seattle).

[FN12]. Although most associations, in a recent California study, believed their reserves were adequate to avoid large special assessments, a third of them had no completed study of their reserve needs on which to base their optimism. BARTON & SILVERMAN CALIFORNIA STUDY, *supra* note 7, at 21. To similar effect, *see also* STEVEN A. WILLIAMSON AND RONALD J. ADAMS, DISPUTE RESOLUTION IN CONDOMINIUMS: AN EXPLORATORY STUDY OF CONDOMINIUM OWNERS IN THE STATE OF FLORIDA 58 (1987) [hereinafter WILLIAMSON & ADAMS FLORIDA STUDY] (reporting only two-thirds of association officers questioned as being aware of any financial reserves maintained by the board). Suggesting a possible lack of adequate reserves, 30% of all associations in the California study had called for special assessments within the past two years. BARTON & SILVERMAN CALIFORNIA STUDY, *supra* note 7, at 20. About two-thirds of residents in the Florida study had already paid at least one special assessment in an average of about four and a half years of ownership. WILLIAMSON & ADAMS FLORIDA STUDY, at 52, table 30. In California, only 28% of the associations whose responses included reserve figures reported reserves at least equaling the 75% of annual expenses recommended by some industry experts. BARTON & SILVERMAN CALIFORNIA STUDY, *supra* note 7, at 20. *Compare* COMMUNITY ASSOCIATIONS INSTITUTE RESEARCH FOUNDATION, RESERVE TO PRESERVE (1984) [hereinafter RESERVE TO PRESERVE] (declining to set forth any general numerical guidelines, and suggesting that each association's ideal reserves amount would vary with, e.g., the remaining useful life of major common assets, their replacement costs, each association's size, etc.).

From a reserves survey of CAI member associations, RESERVE TO PRESERVE also reports that 4% of surveyed associations lacked any reserves, with an additional 4% having added nothing to their reserves in the immediately prior year. These figures represented improvements from five years earlier. The report praises the average responding associations as having both increased median reserves per association by 40%, and doubling reserves per unit between 1979 and 1982. RESERVE TO PRESERVE, at 29. Figures for recent condominium conversions of older buildings were particularly troubling. Also, the report characterizes as a "serious financial management deficiency" that fewer than a third of all responding associations report having any written investment policy. Further, only 13% of volunteer self-managed associations have such a policy. *Id.* at 29. The 524 associations responding to this survey are likely unusually active in seeking training and in managing the associations, so that these results

might understate reserves inadequacies in 1982. Arguably, reserves inadequacies will have become worse during the recessionary years since RESERVE TO PRESERVE was published. For additional recent expression of concern regarding adequacy of association reserves generally, see also *RCA Characteristics and Issues, in* RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM? 9-18 (U.S. Advisory Commission on Intergovernmental Relations, 1989).

[FN13]. While some association leaders are sophisticated and dedicated volunteers, or rely upon well qualified management companies, other boards are led by amateurs ill-equipped to provide the necessary financial management. The Barton & Silverman California Management Study portrays many board members as "not thoroughly knowledgeable about their own associations," and "mistaken as to the contents of their association documents." BARTON & SILVERMAN CALIFORNIA STUDY, *supra* note 7, at 12. Barton and Silverman give examples of a board member mistakenly believing a controversial city parking rule to be an association-administered rule and an association committee chairman unaware of the committee's task. *Id. See also* WILLIAMSON & ADAMS FLORIDA STUDY, *supra* note 12, at 68 (reporting 61.7% of responding condominium residents either "strongly agreeing" or "agreeing" that "[m]ost condominium officers lack the technical training to be effective managers"). *See also* CARL NORCROSS, TOWNHOUSES & CONDOMINIUMS: RESIDENTS' LIKES AND DISLIKES 80-85 (Urban Land Institute, 1973) [[[[hereinafter NORCROSS]; Uriel Reichman, *Residential Private Governments: An Introductory Survey,* 43 U. CHI. L. REV. 253, 290 (1976-1977) [hereinafter *Residential Private Governments*] (noting resident dissatisfaction with failure of developers to train association boards).

[FN14]. *See also* BARTON & SILVERMAN CALIFORNIA STUDY, *supra* note 7, at 22.

[FN15]. *See, e.g.,* ARIZ. REV. STAT. ANN. § 33-1256 (1989); CAL. CIV. CODE § 1367 (Deering 1990); FLA. STAT. ch. 718.116 (1989); GA. CODE ANN. § 44-3-109 (Michie 1989) (requiring some perfection for the association lien to be valid); HAW. REV. STAT. § 514A-90 (1990); I.R.S. 55-1518 (1988); MICH. COMP. LAWS § 559.208 (1990); N.Y. REAL PROP. LAW § 339-z (McKinney 1989); OHIO REV. CODE ANN. § 5311.18 (Anderson 1988); OR. REV. STAT. § 94.709 (1989); VA. CODE ANN. § 55-516 (Michie 1990); WIS. STAT. § 703.16 (1987-88).

[FN16]. Assuming no applicable provisions in either CIC declarations or state CIC statutes modify the result, the association's lien for assessments would normally take priority over interests recorded subsequently to the CIC declaration under the common law and the state recording acts. *See, e.g.,* Mendrop v. Harrell, 103 So. 2d 418, 424 (Miss. 1958); Prudential Ins. Co. v. Wetzel, 248 N.W. 791, 793 (Wis. 1933). This conclusion focuses on the recorded declaration as having created the association's assessment lien at an earlier date than mortgages against individual units.

[FN17]. For convenience, discussion of issues in this article potentially relating to both mortgages and deeds of trust will be discussed in terms of mortgages alone, with the understanding that the same substantive points made about mortgages are equally applicable to deeds of trust. For an overview of similarities and differences between deeds of trust and mortgages, *see, e.g.,* GRANT S. NELSON AND DALE A. WHITMAN, REAL ESTATE FINANCE LAW, § 1.5 (2d ed. 1985) [hereinafter NELSON & WHITMAN].

[FN18]. Statutes still following § 23(a) of the Federal Housing Administration Form # 3285: Model Statute for Creation of Apartment Ownership (FHA Model Act) (reprinted with commentary in NORMAN PENNEY, RICHARD BROUDE, ROGER CUNNINGHAM, LAND FINANCING: CASES & MATERIALS, 580-592 (3d ed. 1984) [[[hereinafter PENNEY]) provide that the association lien is subordinate to any "first mortgage of record." *See, e.g.,* VA. CODE § 55-79.85 (Michie 1990) (limiting subordination to first mortgages of institutional lenders). *See generally* NELSON & WHITMAN, *supra* note 17, § 13.5 at 965. Some other statutes place all mortgages ahead of the association assessment lien. *See, e.g.,* UTAH CODE ANN. § 57-8-20 (1990); Brask v. Bank of St. Louis, 533 S.W.2d 223 (Mo. Ct. App. 1975). For a state statute subordinating association assessment liens to all mortgages recorded before a given assessment, see OKLA. STAT. ANN. tit. 60, § 524 (West 1970).

[FN19]. Having been drawn up by developers with an eye toward assuring the future availability of financing, most declarations alter the common law/recording act priority by subordinating the assessment lien to first mortgages on individual units, and sometimes to all unit mortgages. Some declarations do so by providing that the assessment lien and its priority both date from an assessment's due date or from notice of an assessment default. *See, e.g.*, St. Paul Fed. Bank for Sav. v. Wesby, 501 N.E.2d 707, 711-12 (Ill. App. Ct. 1986), *appeal denied*, 508 N.E.2d 736 (Ill. 1987). Other declarations simply state the conclusion that association assessment liens are subordinate to first mortgages, so that the timing and recordation of the competing interests is not prerequisite to the priority result. *See, e.g.*, Damen Sav. & Loan Ass'n v. Johnson, 467 N.E.2d 1139 (Ill. 1984) (construing such a declaration). *See generally* ROBERT NATELSON, LAW OF PROPERTY OWNERS ASSOCIATIONS §§ 6.3.2, 6.3.3 (1989) [hereinafter NATELSON].

[FN20]. *See* BAXTER DUNAWAY, THE LAW OF DISTRESSED REAL ESTATE 13-12 (1987); ALLAN AXELROD, CURTIS BERGER & QUENTIN JOHNSTONE, LAND TRANSFER AND FINANCE: CASES AND MATERIALS 267, 269 (3d ed. 1986).

[FN21]. The foreclosure of a lender's senior lien usually wipes out the association's assessment lien. The lender who typically purchases at the sale will have no responsibility for any assessments which accrued prior to foreclosure. *See, e.g.*, First Fed. Sav. Bank of Georgia v. Eaglewood Court Condominium Ass'n, 367 S.E.2d 876, 880 (Ga. 1988). For a discussion of the lender who typically purchases at the sale, see *infra* note 29 and accompanying text. Assessments coming due during the foreclosure are unlikely to be collected from either the owner or lender, perhaps until the new unit owner receives the sheriff's deed at the close of any statutory redemption period. *See* Newport Condominium Ass'n v. Talman Home Fed. Sav. & Loan Ass'n, 545 N.E.2d 136 (Ill. App. Ct. 1988), *app. denied* 550 N.E.2d 558 (Ill. 1990). Astonishingly, recent authority is divided on whether a purchaser who does not expressly assume the assessment obligation--such as a foreclosure sale purchaser--becomes liable for assessments by virtue of its ownership, as with covenants running with the land generally. *Compare* Chateaux Condominiums v. Daniels, 754 P.2d 425, 427 (Colo. Ct. App. 1988) (purchaser on constructive notice becomes liable) *with* Century Park Condominium Ass'n v. Norwest Bank Bismark, N.A., 420 N.W.2d 349 (N.D. 1988) (no assumption by foreclosure sale purchaser, no liability).

[FN22]. *See* Kleine, *Interagency Condominium Task Force*, 1 SYMPOSIUM ON UNIFORM MULTIPLE OWNERSHIP ACTS 10-11 (Community Ass'ns Inst. Research Found., Joint Editorial Bd. for Real Property Acts of the Am. Bar Ass'n & Uniform Laws Conference, 1991) [hereinafter MULTIPLE OWNERSHIP ACTS SYMPOSIUM] (noting Federal Housing Authority's support for condominium financing beginning in 1961; Veterans Administration's support for PUDs beginning in 1968, and for condominiums in 1974; Federal National Mortgage Association's (FNMA) and the Federal Home Loan Mortgage Corporation (Freddie Mac) support for PUDs and condominium financing markets beginning around 1975).

[FN23]. *See* Zinman, *Condominium Investments and the Institutional Lender--A ReView, Symposium on the Law of Condominiums*, 48 ST. JOHN'S L. REV. 749, 754 (1974) (commenting on extra burden mortgagees face when they acquire units in foreclosure and find themselves now bound as owners by assessments that have become excessive). *See also* NELSON & WHITMAN, *supra* note 17, at 965.

[FN24]. Henry L. Judy and Robert A. Wittie, *Uniform Condominium Act: Selected Key Issues*, 13 REAL PROP. PROB. & TR. J. 437, 481 (1978) [hereinafter Judy and Wittie]. *See also* John W. Walbran, *Condominium: Its Economic Functions*, 30 MO. L. REV. 531, 554-55 (1965); Phillip J. Gregory, *The California Condominium Bill*, 14 HASTINGS L.J. 189, 204 (1963). *See also*, Inwood N Homeowners' Ass'n v. Harris, 736 S.W.2d 632, 635 (Tex. 1987).

[FN25]. Judy and Wittie, *supra* note 24, at 482 (arguing that disproportionate burdening of a decreasing base of sol-

vent owners itself threatens ability of those owners to meet higher assessment bills, leading to increasing foreclosures).

[FN26]. *Id. See, e.g., House of Cards: The Rise and Fall of Denver's Housing Market; Recovery To Be Slow, Painful,* ROCKY MTN. NEWS, Nov. 12, 1989, at 22-23. Among the spillover consequences from the cycle of rising assessments and rising assessment defaults is the impact on public governments who have increasingly shifted their traditionally public governmental responsibilities to the community associations. Judy and Wittie, *Supra* note 24, at 483.

[FN27]. *See* CAI FACTBOOK, *supra* note 7, at 7, 9 (estimating that 500 community associations existed in 1962, 20,000 in 1975, 55,000 in 1980 and 130,000 in 1988).

[FN28]. *See* RESERVE TO PRESERVE, *supra* note 12, at 30 (reporting in 1982 that average association was seven years old and already needing to consume reserves at rate of a dollar spent for each two dollars set aside for reserves in same year). Condominium conversion projects were using reserves even earlier in their existences, perhaps foreshadowing difficulties as other common interest communities age.

[FN29]. *See, e.g.,* ROBERT LIFTON, PRACTICAL REAL ESTATE: LEGAL, TAX AND BUSINESS STRATEGIES, 262, 263 (1979) [hereinafter LIFTON]; William C. Prather, *A Realistic Approach to Foreclosure,* 14 BUS. LAW. 132, 135 (1958).

[FN30]. *See, e.g.,* MICHAEL MADISON AND ROBERT ZINMAN, MODERN REAL ESTATE FINANCING 985 (1991); LIFTON, *supra* note 29, at 257.

[FN31]. *See* BAXTER DUNAWAY, *supra* note 20, at §§ 7.01, 7.02 (1987).

[FN32]. *See* NATELSON, *supra* note 19, at § 6.3.3; Judy and Wittie, *supra* note 24, at 496.

[FN33]. Notable exceptions include cooperatives and some condominiums, where their documentation requires association pre-approval of unit purchasers. Such restraints on alienation of units based on financial and sometimes compatibility criteria are often upheld if the creating documentation of the cooperative or condominium provide for *such restraints. See, e.g.,* Weisner v. Park Ave. Corp., 160 N.E.2d 720, 723 (N.Y. 1959). For a review of authorities, and a spirited argument favoring the validity of restraints against the sale of condominium and cooperative units, see VINCENT DI LORENZO, THE LAW OF CONDOMINIUMS AND COOPERATIVES, § 6-1-30 (1990). Arguments favoring such restraints, and the likelihood of the creating documentation containing such restraints, are stronger in the cooperative setting, where financial interdependence is often even greater than in condominiums due to the cooperative corporation's blanket mortgage, and where each resident owns a leasehold rather than fee estate. *See* NATELSON, *supra* note 19, 594-608.

Restraints on alienation of unit ownership are also more readily upheld when structured as a right of first refusal than as a flat prohibition. *See, e.g.,* Aquarian Found., Inc. v. Shalom House, Inc. 448 So. 2d 1166, 1169 (Fla. Dist. Ct. App. 1984); GARY A. POLIAKOFF, THE LAW OF CONDOMINIUM OPERATIONS §§ 4-74 to -78, -81, -82 (1988). While the right of first refusal better protects the economic position of the restricted owner, exercising it can be prohibitively expensive for the association where alternate buyers are not readily available. *Aquarian Found.,* 448 So. 2d at 1169. However, some courts are willing to allow the association to screen a potential purchaser before having to purchase (or provide another purchaser) under a right of refusal. *See, e.g.,* Coquina Club, Inc. v. Mantz, 342 So. 2d 112, 115 (Fla. Dist. Ct. App. 1977).

[FN34]. Judie and Wittie, *supra* note 24, at 496.

[FN35]. *Id.* at 494.

[FN36]. *Id.* at 475-76.

[FN37]. This article's endorsement of financially stronger community associations is not intended to endorse giving additional muscle to associations in their regulatory role of enforcing use restrictions within CICs. To the contrary, this author has written extensively on the harmful effects of aggressively enforcing such CC&Rs (covenants, conditions, and restrictions) in community associations. *See generally* Winokur, *Mixed Blessings, supra* note 7, at 48-75. For a discussion of community associations as unbridled and often abusive "shadow governments," see JOEL GARREAU, EDGE CITY: LIFE ON THE NEW FRONTIER 185-208 (1991).

In addition to strengthening associations' financial management, UCIOA imposes on CICs lacking architectural review restrictions a requirement that associations approve all changes to the external appearance of any unit. UCIOA § 2-111(2), 7 U.L.A. at 297 (1982). Such a statutory imposition of association control on individual unit owners is bad public policy. Even where architectural review provisions are expressed in CIC declarations, many homebuyers purchase units unaware of this limitation on their control of their own homes. *See* Winokur, *Mixed Blessings, supra* note 7, at 59 n.246. UCIOA's provision would potentially add to the number of surprised homebuyers even the relatively small segment of homebuyers who actually read declarations before buying into a common interest community. Accordingly, the new Colorado Common Interest Ownership Act omits this provision. *Compare* COLO. REV. STAT. § 38-33.3-211(b) (Supp. 1991).

[FN38]. UCIOA § 3-115, 7 U.L.A. at 525 (1982).

[FN39]. NATELSON, *supra* note 19, at 238-39; Judy and Wittie, *supra* note 24, at 482.

[FN40]. UCIOA § 3-102(a)(11), 7 U.L.A. at 326 (1982).

[FN41]. UCIOA § 3-102 cmt. 5, 7 U.L.A. at 326 (1982).

[FN42]. *See* the Colorado Common Interest Ownership Act, which includes within the association's powers recovery "of reasonable attorneys fees and other legal costs for collection of assessments and other actions to enforce the power of the association, regardless of whether or not suit was initiated." COLO. REV. STAT. § 38-33.3-302(1)(k) (1991). More generally, the Colorado Common Interest Ownership Act provides rights to collection costs and attorneys fees caused by violation of UCIOA, or applicable declaration, bylaws, rules and regulations, with an award of collection costs and attorneys fees to the prevailing party on each such claim. COLO. REV. STAT. § 38-33.3-123 (1991).

[FN43]. Unlike fees, fines for violation of the declaration can be imposed only after notice and an opportunity to be heard. UCIOA § 3-102(11), 7 U.L.A. at 326 (1982). Therefore, associations governed by UCIOA will likely address lateness problems with standard fees rather than fines.

[FN44]. For reference, the text of UCIOA § 3-116(a) to -116(j)(4) is as follows:

Section 3-116. Lien for Assessments

(a) The association has a lien on a unit for any assessment levied against that unit or fines imposed against its unit owner from the time the assessment or fine becomes due. Unless the declaration otherwise provides, fees, charges, late charges, fines, and interest charged pursuant to Section 3-102(a)(10), (11), and (12) are enforceable as assessments under this section. If an assessment is payable in instalments, the full amount of the assessment is a lien from the time the first instalment thereof becomes due.

(b) A lien under this section is prior to all other liens and encumbrances on a unit except (i) liens and encumbrances recorded before the recordation of the declaration and, in a cooperative, liens and encumbrances

which the association creates, assumes, or takes subject to, (ii) a first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent, or, in a cooperative, the first security interest encumbering only the unit owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent, and (iii) liens for real estate taxes and other governmental assessments or charges against the unit or cooperative. The lien is also prior to all security interests described in clause (ii) above to the extent of the common expense assessments based on the periodic budget adopted by the association pursuant to Section 3-115(a) which would have become due in the absence of acceleration during the 6 months immediately preceding institution of an action to enforce the lien. This subsection does not affect the priority of mechanics' or materialmen's liens, or the priority of liens for other assessments made by the association. (The lien under this section is not subject to the provisions of [insert appropriate reference to state homestead, dower and courtesy, or other exemptions]).

(c) Unless the declaration otherwise provides, if 2 or more associations have liens for assessments created at any time on the same property, those liens have equal priority.

(d) Recording of the declaration constitutes record notice and perfection of the lien. No further recordation of any claim of lien for assessment under this section is required.

(e) A lien for unpaid assessments is extinguished unless proceedings to enforce the lien are instituted within (3) years after the full amount of the assessments becomes due.

(f) This section does not prohibit actions to recover sums for which subsection (a) creates a lien or prohibit an association from taking a deed in lieu of foreclosure.

(g) A judgment or decree in any action brought under this section must include costs and reasonable attorney's fees for the prevailing party.

(h) The association upon written request shall furnish to a unit owner a statement setting forth the amount of unpaid assessments against the unit. If the unit owner's interest is real estate, the statement must be in recordable form. The statement must be furnished within [10] business days after receipt of the request and is binding on the association, the executive board, and every unit owner.

(i) In a cooperative, upon nonpayment of an assessment on a unit, the unit owner may be evicted in the same manner as provided by law in the case of an unlawful holdover by a commercial tenant, and the lien may be foreclosed as provided by this section.

(j) The association's lien may be foreclosed as provided in this subsection:

(1) In a condominium or planned community, the association's lien must be foreclosed in like manner as a mortgage on real estate [or by power of sale under [insert appropriate state statute§];

(2) In a cooperative whose unit owners' interests in the units are real estate (Section 1-105), the association's lien must be foreclosed in like manner as a mortgage on real estate [or by power of sale under [insert appropriate state statute§ [or by power of sale under subsection (k)]; or

(3) In a cooperative whose unit owners' interests in the units are personal property (Section 1-105), the association's lien must be foreclosed in like manner as a security interest under [insert reference to Article 9, Uniform Commercial Code.]

[(4) In the case of foreclosure under [insert reference to state power of sale statute], the association shall give reasonable notice of its action to all lien holders of the unit whose interest would be affected.]

UCIOA § 3-116, 7 U.L.A. at 351-52 (1982).

[FN45]. *Id.* § 3-116(a), 7 U.L.A. at 351 (1982). In the case of assessments payable in installments subject to the su-

per priority, which will affect no more than six months of assessments and charges where only later installments are defaulted, the priority of the association lien--as distinct from the moment the lien first attaches--will focus on the timing of the assessment delinquency. Therefore, accelerated installment payments will relate back to the date of the first default on an installment, and not to the date the first assessment is due. *Id.* § 3-116(b)(ii), 7 U.L.A. at 351 (1982). *See also* 1 GURDON H. BUCK, CONDOMINIUM DEVELOPMENT § 8:66, at 8-120 (1991).

UCIOA's installment provision threatens association recovery of assessments in the case where the lien for an assessment payable in installments is extinguished by foreclosure before all of the installments become due. Suppose, for example, a first mortgagee forecloses on a unit with a hitherto good assessment record, which has just recently become subject to an installment assessment obligation stretching over the coming 12 months. There already is a lien in the amount of the full 12-month installment assessment, pursuant to § 3-116(a)'s installment language. The mortgage foreclosure can thus extinguish whatever portion of this lien is not prioritized by § 3-116(b) as it would any junior lien. If the unit owner later defaults on several installments of the installment assessment, no statutory lien would remain available to support collection. On the other hand, where an early installment is in default, acceleration of assessments can be very valuable in affording the association a worthwhile recovery for enforcing after a relatively small default. *See* COMMUNITY ASSOCIATIONS INSTITUTE, COLLECTING ASSESSMENTS: AN OPERATIONAL GUIDE 11 (GAP Report 10, 1988).

Associations governed by UCIOA's § 3-116(a) should thus weigh carefully the pros and cons of levying assessments in installments. Unfortunately, some declaration provisions eliminate the choice by mandating that general assessments be levied as annual assessments payable in equal monthly assessments. Though the UCIOA's installment language may afford the association some advantage where it accelerates an installment assessment obligation, on balance the ability to enforce short-lived delinquencies might not be worth the potential loss of lien for later missed assignments. Arguably, UCIOA might better protect association interests by dating the lien from the date assessments, including installment payments, become due. *See, e.g.*, WASH. REV. CODE § 64.34.364(1) (1990).

[FN46]. UCIOA § 3-116(a), 7 U.L.A. at 351 (1982). Some state adoptions of § 3-116(a) expressly include attorneys' fees. *See, e.g.*, COLO. REV. STAT. § 38-33.3-316 (1) (1991); CONN. GEN. STAT. § 47-258 (1991).

[FN47]. UCIOA §§ 3-116(b)(i)-(iii), 7 U.L.A. at 527 (1982).

[FN48]. *Id.*

[FN49]. *Id.* § 1-104, 7 U.L.A. at 250.(1982).

[FN50]. The "super priority" lien for assessments over first mortgages and deeds of trust has thus far been adopted as part of the UCIOA in the following states: Alaska, ALASKA STAT. § 34.08.470 (1990); Colorado, COLO. REV. STAT. § 38-33.3-316 (1991); Connecticut, CONN. GEN. STAT. § 47-258 (1989); Nevada, NEV. REV. STAT. § 116.3116 (1991); West Virginia, W. VA. CODE § 36B-3-116 (1986). Essentially the same statutory lien priority provision has been adopted as part of the Uniform Condominium Act (UCA), applicable only to condominiums, in the following states: Pennsylvania, PA. CONS. STAT. ANN. § 5-3101 to -3414 (1990), Rhode Island, R.I. GEN. LAWS § 34-36.1-1.01 to 34-36.1-4.20 (1982). *But see* Act of March 9, 1992, ch. 8, 1992 R.I PUB. LAWS 8 (recently amending R. I. GEN. LAWS §34-36.1-3.16 (1991), cutting back the super priority from five years of assessments to six months) *Compare* WASH. REV. CODE § 64.34.364(3) (1991) (providing for the limited six-month assessment lien priority, except that (1) a mortgagee may reduce the six-month priority by up to three months of delay in the association's provision of a notice of delinquency where the mortgagee has previously asked for such notice from the association); WASH. REV. CODE § 64.34.364(4) (1991); WASH. REV. CODE § 64.34.364 (1991) (providing that the super priority for any portion of the lien is waived if it is foreclosed by non-judicial foreclosure). Washington, D.C. has adopted the super priority for assessment liens as part of a sweeping revision bringing its statute fairly closely in line with the UCA. *See* D.C. CODE ANN. § 45-1853 (1991). Several states have adopted the UCA without incorporating the "super priority" lien provisions. *See, e.g.*, ARIZ. REV. STAT. ANN. § 33-1201 (1990 & Supp. 1991); ME. REV. STAT. ANN. tit. 33, §§ 1601-101 to 1604-118 (West 1988 & Supp. 1991); MO.

ANN. STAT. §§ 448.1-101 to 448.1-120 (Vernon 1986); NEB. REV. STAT. §§ 76-801, 76-874 (1990); N.M. STAT. ANN. §§ 47-7A-1 to 47-7D-20 (Michie Supp. 1991).

[FN51]. UCIOA § 3-116(b), 7 U.L.A. at 351 (1982).

[FN52]. The concept of splitting a single lien into two liens holding varying priority is not new to the law of land security. *See, e.g.*, National Bank of Washington v. Equity Investors, 506 P.2d 20, 23 (Wash. 1973), *appeal after remand*, 518 P.2d 1072, (Wash. 1974), *appeal after remand*, 546 P.2d 440 (Wash. 1976) (construction loan lien, securing future optional advances held partially senior and partially junior to intervening materialman's lien, based on which advances were made before materialman's lien attached); Middlebrook-Anderson Co. v. Southwest Sav. & Loan Ass'n, 96 Cal. Rptr. 338, 341 (Dist. Ct. App. 1971) (subordination of seller's trust deed to construction loan lien deemed conditional, so that only part of construction lien takes priority).

[FN53]. *See supra* note 46.

[FN54]. UCIOA § 3-116(b), 7 U.L.A. at 527 (1982).

[FN55]. On this point, the Colorado statute prioritizes attorneys fees and enforcement costs, keeping them separate from, and unlimited by, the six-months assessment ceiling. COLO. REV. STAT. § 38-33.3-316 2(b)(II) (1991).

[FN56]. *See supra* text accompanying note 45. An interesting issue is posed by Denis Caron, whose treatise Connecticut Foreclosures (2d ed. 1989) is quoted in Anderson, Collection of Common Charges in Connecticut Common Interest Communities: An Analysis of the Application of the Super Priority Lien and Related Collection Remedies, 6-8 (1991) (unpublished paper). Assume a mortgage foreclosure is commenced with all assessments on the subject unit current. However, during the foreclosure the owner ceases all assessment payments. Eight months of assessment defaults follow. Are any of these delinquencies within the Prioritized Lien despite the fact that they involve assessments following commencement of foreclosure, in contrast to the "six months immediately preceding an action to enforce the lien" spoken of in § 3-116(b)? Because this reference to 6 months preceding foreclosure is merely a measure of the maximum Prioritized Lien, any and all assessment delinquencies regardless of when the assessment came due qualify for inclusion in the Prioritized Lien, as do other fines, charges, etc., but all only "to the extent of . . . assessments based on the budget . . . which would have become due in the absence of acceleration during the 6 months immediately preceding an action to enforce the lien." UCIOA § 3-116, 7 U.L.A. at 351 (1982). In her paper, Anderson reports that Connecticut courts, unsympathetic with lender arguments that no super priority attaches in this situation, acknowledges the approach sketched above, and incorrectly concludes herself that the association would receive a priority equal to six months of the actual missed assessments, regardless of the timing of the filing of the actions or the assessments budgeted before that action. Anderson, Collection of Common Charges in Connecticut Common Interest Communities: An Analysis of the Application of the Super Priority Lien and Related Collection Remedies, 8 (1991) (unpublished paper).

[FN57]. The UCIOA mandates a budgeting process in § 3-103(c), UCIOA § 3-103(c), 7 U.L.A. at 304 (1982). For a discussion of the budgeting process, see *infra* notes 150-54 and accompanying text.

[FN58]. UCIOA § 3-116(b), 7 U.L.A. at 527 (1982).

[FN59]. *Id.*

[FN60]. *See, e.g.*, COLO. REV. STAT. § 838-38-105 (Supp. 1991). *But see* WASH. REV. CODE § 64.34.364 (1991) (summarized *supra* in note 50).

[FN61]. *See, e.g.*, BAXTER DUNAWAY, *supra* note 20, at 12-9 (1991). *See also* Marion A. Marquis, *Statutory*

Redemption Rights, 3 WASH. L. REV. 177, 185-86 (1928) (addressing the rule that a creditor may not exercise rights of statutory redemption after "his own" foreclosure sale)

> [W]here a plaintiff by his complaint, and defendant or intervenors by cross-complaints, in one suit, seek foreclosure and execution sale in satisfaction of their mortgages or liens, and obtain a decree adjudging the amount due each, fixing the order of priority, ordering the property sold and distribution among the parties in the order of their rank, the sale is for and on behalf of each and all . . . even though the proceeds of the sale may be insufficient to pay the full amount due some.

See id. at 187-88, *cited with approval in* Seattle Medical Ctr. Inc. v. Cameo Corp., 339 P.2d 93, 96 (Wash. 1959). By this analysis, for the mortgagee's foreclosure to become the junior lienor's, action may require the junior answering the foreclosure complaint by a cross-claim praying foreclosure of their own lien. *See id.* Focusing on the form of a junior lienor's answer to being joined in the senior's foreclosure should be irrelevant, considering that the substantive results of the foreclosure will be unchanged regardless of whether the junior lienor actively cross-claims for foreclosure or merely appears and asks for application of the sale proceeds to its lien. Rather, all junior lienors participating in senior lienor foreclosures--including community associations holding junior assessment liens--should be treated as in an action to enforce their lien. Given the cited authority, however, associations might as well honor the formal distinction in their pleadings. Rather than relying on such esoteric distinctions, however, UCIOA's § 3-116(b) should be clarified. Washington has a provision measuring the six months from the date of:

> a sheriff's sale in an action for judicial foreclosure by either the association or a mortgagee, the date of a trustee's sale in a non-judicial foreclosure by a mortgagee, or the date of recording of the declaration of forfeiture in a proceeding by the vendor under a real estate contract.

WASH. REV. CODE § 64.34.364(3) (Supp. 1991). By measuring the six months from the date of a foreclosure sale, the Washington statute has the additional advantage of including within the lien priority an important period of frequent assessment delinquency. In considering whether junior liens are being enforced in senior lienor foreclosure actions, see 4 AM. LAW OF PROP. § 16.191 (Casner ed., 1952). Here, the late Professor Osborne's treatment reflects that the purposes of including a junior lienor in a senior lienor's foreclosures include allowing such junior to realize on its security much like the senior, except with a lower priority claim to the sale proceeds.

[FN62]. COLO. REV. STAT. ANN. § 38-33.3-316 2(b)(I) (Supp. 1991).

[FN63]. Other UCIOA sections treated as automatically applicable to existing associations include Separate Titles and Taxation (§ 1-105), Applicability of Local Ordinances, etc., (§ 1-106), Eminent Domain (§ 1-107), Construction and Validity of Declaration and Bylaws (§ 2-103), Description of Units (§ 2-104), Merger or Consolidation of CICs (§ 2-121), Powers of the Unit Owner's Association (§ 3-102(a)(1)-(6), (11)-(16)), Tort and Contract Liability (§ 3-111), Association Records (§ 3-118), Resale of Units (§ 4-109) and Effect of Violations of Rights of Action (§ 4-117). The definitions section is also applicable to the extent necessary in construing the applicable substantive provisions.

[FN64]. UCIOA § 1-204, 7 U.L.A. at 266 (1982).

[FN65]. *Id.*

[FN66]. UCIOA § 1-201, 7 U.L.A. at 264 (1982).

[FN67]. UCIOA § 1-206 leaves it unclear whether a preexisting CIC can elect to be treated as fully subject to UCIOA, as if it were a new CIC. UCIOA § 1-206, 7 U.L.A. at 269 (1982). The language of § 1-206 appears to permit such an election, if only by an amendment to the declaration incorporating the full UCIOA statute into the declaration. *Id.* However, Comment 6 to § 1-206 explicitly concludes that this section does not permit a preexisting community to elect to come entirely within the provisions of the Act. UCIOA § 1-206 cmt. 6, 7 U.L.A. at 269 (1982).

The comment may be distinguishing between amendment of internal governance documents versus choice of applicable public law. However, it is unclear why an amendment incorporating the statute, or even a UCIOA variant, should not be permissible under UCIOA § 1-206. Comment 6 does suggest a daunting alternative--terminating the CIC under preexisting law and creating a new, post-UCIOA CIC. The biggest drawback to this suggestion is that, until UCIOA has become applicable, termination would require a unanimous vote of unit owners unless the declaration authorized termination of the CIC upon a lesser vote. *See* GERALD KORNGOLD, PRIVATE LAND USE ARRANGEMENTS, § 11.03 (1990). UCIOA replaces the unanimity requirement for termination with an 80% requirement. UCIOA § 2-118, 7 U.L.A. at 483 (1982).

Neither of these approaches for bringing a preexisting CIC under UCIOA triggers the rule that UCIOA's sections apply "only with respect to events and circumstances occurring after the effective date of this [Act] and do not invalidate existing provisions of the [declaration, bylaws, or plats and plans] of those common interest communities." UCIOA § 1-204, 7 U.L.A. at 266 (1982). That limiting language appears only in § 1-204 regarding applicability to preexisting CICs that have not opted in to UCIOA coverage. In these cases, UCIOA's "super priority" lien could arguably apply to preexisting loans secured by mortgages of units in CIC units which elect by amendment to be covered under UCIOA. Although application of the super priority in such circumstances might prove constitutional, the contrary argument would be far stronger where lenders unaware of UCIOA made loans in reliance on senior priority. For a discussion of the constitutionality, see *infra* notes 79-87 and accompanying text. Further, the fairness of so imposing the super priority against pre-UCIOA loans would certainly be questionable.

In Colorado, preexisting associations are afforded a statutory formula for electing treatment under the Colorado Common Interest Ownership Act. COLO. REV. STAT. § 38-33.3-118 (Supp. 1991) While the election, modelled after an analogous election in Colorado's non-profit corporation law, is far easier to accomplish than a full scale amendment of the declaration, its impact is expressly restricted. Specifically, the Colorado Act applies "only with respect to events and circumstances occurring on or after July 1, 1992, the effective date of this Act, and does not invalidate provisions of any [declaration, bylaws, or plats and plans] of those common interest communities." COLO. REV. STAT. § 38-33.3-118(5) (Supp. 1991).

[FN68]. UCIOA § 3-116(b), 7 U.L.A. at 351 (1985). For a discussion of priorities, see also *supra* note 51 and accompanying text.

[FN69]. For a discussion of priority imposed in condominium statutes, see *supra* note 50.

[FN70]. In at least some parts of the United States, these provisions appear frequently. For examples of types of such provisions, see *supra* note 18 and *infra* note 72.

[FN71]. UCIOA § 1-204, 7 U.L.A. at 266 (1982).

[FN72]. Where a subordination exists, its wording is frequently drawn from HUD-FHA Form 1400 Series, HUD-FHA Handbook 4135.1 Declaration, Article IV, Covenant for Maintenance Assessment, "Section 9. Subordination of the Lien to Mortgages" (REV 2 1981): "The lien of any assessment provided for herein shall be subordinate to the lien of any first mortgage." This language expressly limits the subordination to "the assessment provided for herein," and strengthens the argument that it would not address subordination of a UCIOA statutory assessment.

By contrast, language drawn from FHA 4150 (Rev.-1), Declaration, II (4) is more sweeping, and less helpful to the association in this context: "The lien of any assessment is subordinate to the lien of any first mortgage." Likewise, language drawn from VA Guideline 7(b) and VA Form 26-8201 contains language which likely includes the UCIOA assessment lien: "The lien of any assessment levied by the HOA must be subordinate to the lien of a first mortgage."

[FN73]. An analogous issue is created where a CIC's declaration expressly provides that notice of assessment liens shall be afforded by recording notices of default whenever a unit owner fails to pay assessments. This requirement is far more burdensome than the UCIOA requirement that "recording of the declaration constitutes record notice and perfection of the lien." UCIOA § 3-116(d), 7 U.L.A. at 351 (1982). Recording requirements applicable to the

UCIOA statutory assessment lien are discussed *infra* in text accompanying notes 135-41. As suggested by the immediately preceding discussion of the priority provision in many CIC declarations, however, it will often be arguable that the perfection requirement applied only to the lien created by the declaration, and not to the UCIOA lien.

[FN74]. UCIOA § 1-204, 7 U.L.A. at 266 (1982).

[FN75]. *Id.*

[FN76]. The Random House Dictionary of the English Language defines "invalidate" as "to render invalid; to discredit; to deprive of legal force or efficacy; nullify." RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1003 (2d ed. 1987). *But see*UCIOA § 1-204 cmt. 3, 7 U.L.A. at 266 (1982) (embodying UCIOA's drafter's conservative position on UCIOA applicability). In contrast to the more limited "invalidation" language of the statute itself, Comment 3 states, "[M]oreover, the provisions of this Act are subject to the provisions of the instruments creating the common interest community, and this Act does not invalidate those instruments." UCIOA § 1-204 cmt. 3, 7 U.L.A. at 266 (1985). Use of the ambiguous term "invalidate" is one of several weaknesses in UCIOA's scheme for applying its terms to preexisting CICs. Another interpretive problem is determining the consequence of a UCIOA section being omitted from § 1-204's listing of sections applicable to preexisting communities. Thus, for example, even where the declaration of a pre-existing CIC is silent on the subject of insurance, a possible reading of § 1-204 is that the insurance requirements of § 3-113 are inapplicable. Section 1-204, Comment 2 suggests this result: "'[O]ld' law remains applicable to previously created common interest communities where not automatically displaced by [§ 1-204 of] the Act . . . . [[U]nder § 2-106, owners of 'old' common interest communities may amend any provisions of their declaration or bylaws, even if the amendment would not be permitted by 'old' law . . . ." UCIOA § 1-204 cmt. 3, 7 U.L.A. at 266 (1982). *See also*UCIOA § 1-204, 7 U.L.A. at 266 (1985) (relocation of boundaries per § 2-112 permitted only if association so amends its declaration). But as now drafted, no UCIOA language supports UCIOA's conservative comment by clearly mandating § 3-113's inapplicability, leaving a gap likely to generate litigation. Such drafting ambiguity should be eliminated by express specification of the consequences of omission of a section from § 1-204's list.

Another fundamental issue is whether constitutional considerations on the minds of the UCIOA drafters mandate that much of UCIOA should be inapplicable to preexisting associations--even with regard to post-UCIOA events and circumstances, and even where the declaration is silent. Granted, UCIOA's example of redrawing boundaries involves so tangible a change of property rights as to raise troubling questions of unconstitutional interference with contracts or property. But applying to preexisting associations corporate-regulatory sections like those addressing insurance, supra, executive board membership (§ 3-103), and meeting quorums (§ 3-108), arguably pose few constitutional problems. Indeed, even in the face of express provisions in the declaration, one might argue the validity of applying such corporate-regulatory provisions to preexisting associations.

Though incorporated associations differ in important respects from the classic for-profit corporation, *see, e.g.*, NATELSON, *supra* note 19, at 66-67, the validity of applying corporate-regulatory provisions of UCIOA to incorporated associations can be reinforced by reference to reserved corporate power provisions in state constitutions and statutes, which allow future changes in corporate regulations as part of the contract creating the corporation. *See, e.g.*, Brundage v. New Jersey Zinc Co., 226 A.2d 585 (N.J. 1967); McNulty v. W. & J. Sloane, 54 N.Y.S.2d 253 (N.Y. Sup. Ct. 1945). *See generally* HARRY G. HENN & JOHN R. ALEXANDER, LAW OF CORPORATIONS, 953-55 (1983). Therefore, in considering adoption or amendment of the statute, section-by-section review of the applicability provisions will likely generate several candidates for broader applicability than now provided in UCIOA.

For discussion of the constitutionality of applying § 3-116 to "new" mortgage loans in "old" common interest communities, see *infra* notes 79-87 and accompanying text.

[FN77]. UCIOA § 1-204, 7 U.L.A. at 250 (1982).

[FN78]. Formally, notice to lenders derives from the new statute plus recorded declarations which UCIOA gives greater effect as imparting notice. As a practical matter, the lending and title communities will very likely become

actually aware of UCIOA's lien priority provisions--including the new import of recorded declarations, and the lack of necessity for recorded delinquencies-- during the legislative process. At the latest, lenders will learn of the new provisions when they begin transacting under the new statute. On the other hand, notice to new mortgagees of properties in preexisting CICs could be further clarified by use of more precise language for resolving differences between UCIOA's provisions and those of declarations in communities where new loans are made.

[FN79]. The contracts clause states: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. CONST. art. I, § 10.

[FN80]. *See*UCIOA § 1-204, cmt. 3, 7 U.L.A. at 250 (1982).

[FN81]. It has been argued in other contexts that enactment of UCIOA's "super priority" lien would prejudice unit owners' ability to obtain financing. This argument appears to be without merit. *See infra* text accompanying note 155. It might also be asserted that unit owners' relationships with their mortgage lenders are of greater personal importance to the owners because such lenders influence availability of future credit. Therefore, the unit owners might have an interest in their mortgage lender holding top priority so that they are most likely to be paid in hard times. This interest seems far too tenuous and subjective to render application of the UCIOA lien priority scheme unconstitutional. *Id.*

[FN82]. As noted above, mortgage lenders whose loans precede the enactment of UCIOA will not be subject to the "super priority" lien under the conservative applicability provisions of § 1-204. If UCIOA's drafters had attempted to bind such pre-UCIOA lenders, they might well have been successful. Granted, in that case, the pre-UCIOA lenders could have a somewhat stronger claim for invalidating application to them of UCIOA's "super priority" lein. Arguably, CIC declaration provisions addressing lender rights (to priority; to notice of delinquency; to notice of proposed declaration amendments, etc.) create third party beneficiary rights, vested in each mortgagee from the moment it takes CIC property as security in reliance on the declaration. *See generally* E.A. FARNSWORTH, CONTRACTS 709-44 (1982). However, even with retroactivity established, it is questionable whether UCIOA's "super priority" lien's impact would be deemed sufficiently substantial to violate the U.S. Constitution's contracts clause. *See supra* notes 79-80 and accompanying text.

[FN83]. *See, e.g.*, JOHN NOWAK AND RONALD ROTUNDA, CONSTITUTIONAL LAW 404 (4th ed. 1991).

[FN84]. *See*Texaco, Inc. v. Short, 454 U.S. 516, 529 (1982); Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 244-45,*reh'g denied*,439 U.S. 886 (1978).

[FN85]. *See, e.g.*,W. B. Worthen Co. v. Kavanaugh, 295 U.S. 56, 59 (1935). *See also* NOWAK AND ROTUNDA, *supra* note 83, at 405-06.

[FN86]. *See*Keystone Bituminous Coal Assoc. v. DeBenedictus, 480 U.S. 470, 503 (1987).

[FN87]. *See*Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 250,*reh'g denied*,439 U.S. 886 (1978). The broad, generalized economic or social problem requiring a remedial approach such as UCIOA's "super priority" lien are addressed *supra* at notes 22-37.

[FN88]. Useful discussion of these priority questions in the context of the Uniform Condominium Act appears in Judy and Wittie, *supra* note 24, at 501. *See also* the FHA Model Act, *supra* note 18, on which many state statutes were based, providing the association lien priority over all liens but first liens, presumably including mechanics' liens. These generalized condominium statutes may be expressly superseded in the adoption of UCIOA. This might be less likely with respect to those state statutes specifically according mechanics' liens priority over assessment liens. *See*IDAHO CODE § 55-1518 (1989); N.C. GEN. STAT. § 47A-22(a) (1991); WIS. STAT. ANN. §

703.23(1)(a) (1991).

[FN89]. Useful general discussion of attachment and priority of mechanics' liens appears in NELSON & WHITMAN, *supra* note 17, at § 12.4.

[FN90]. The priority setting discussed here is for the Less-Prioritized Lien, and not for the Prioritized Lien.

[FN91]. The due date and delinquency date will often be virtually the same date, as where an assessment due on the first of each month becomes delinquent that night at midnight. However, some declarations contain provisions postponing delinquency until later in the month when payment was first due.

[FN92]. Like a first mortgage, a mechanics' or materialmen's lien also is excepted from the general rule of assessment lien priority relating back to filing of the declaration. So, analyzing assessment lien priority similarly as against both mechanics' liens and first mortgages echoes a theme already sounded in § 3-116.

[FN93]. *See* NELSON & WHITMAN, *supra* note 17, at 955 n.50, for the contrary view that, under UCIOA, a mechanics' lien's priority would depend on comparison of the relation-back date of the mechanics' lien with the date the declaration was recorded.

[FN94]. UCIOA § 3-116(j), 7 U.L.A. at 352 (1982).

[FN95]. UCIOA § 3-116 (j)(1) (2), 7 U.L.A. at 352 (1982). Excepted from this treatment are cooperatives where the unit owners' interests are personalty. UCIOA § 1-105, 7 U.L.A. at 253 (1982). As to such cooperatives, foreclosure is governed by Article 9 of the Uniform Commercial Code. For cooperatives treated as real estate under UCIOA § 1-105, optional UCIOA § 3-116(k) sets forth a speedier foreclosure method, patterned after the Uniform Land Transactions Act, available as an alternative to each state's power of sale statute. *See*UCIOA § 3-116, cmt 4, 7 U.L.A. at 354 (1982).

[FN96]. Perhaps slightly more than half the states have statutes permitting foreclosure by power or, in a few cases, even statutorily creating the power of sale. Jack Jones and J. Michael Ivens, *Power of Sale Foreclosure in Tennessee: A Section 1983 Trap*, 51 TENN. L. REV. 279, 293-94 (1984). However, the power of sale foreclosure predominates only in about 18 states. *See* LIFTON, *supra* note 29, at 263; PENNEY, *supra* note 18, at 413. Though few state statutes actually prohibit the power of sale foreclosure, this more efficient method appears only to be used where a regulatory statute is applicable to legitimate the process, and the resulting title. *Id.*

[FN97]. *See, e.g.*, COLO. REV. STAT. § 38-33.3-316(11)(a) (Supp. 1991); COLO. REV. STAT. § 38-39-101 (1982 & Supp. 1991).

[FN98]. Power of sale foreclosure has been shown to cost substantially less in time and money than judicial foreclosure. *See, e.g.*, Josephine McElhone & Randall P. Cramer, *Loan Foreclosure Costs Affected by Varied State Regulations*, MORTGAGE BANKER, Dec. 1975, at 41; *The Costs of Mortgage Loan Foreclosure: Some Recent Findings*, 8 FED. HOME LOAN BANK BD. J. No. 6, at 7 (June, 1975).

[FN99]. *See* Judy and Wittie, *supra* note 24, at 516.

[FN100]. *Id.* at 515.

[FN101]. *See* Anderson, *supra* note 56, at 5.

[FN102]. Power of sale foreclosures tend to produce less stable titles. *Compare* NELSON & WHITMAN, *supra* note 17, at §§ 7.18, 7.20. For an example, in the context of CICs, of title uncertainties leading to unavailability of title insurance, see Jackson, *Homeowners Associations: Remedies to Enforce Assessment Collections*, L.A. BAR J. 423, 434 (1976).

[FN103]. *See, e.g.*, Northrip v. Federal Nat'l Mortgage Ass'n, 527 F.2d 23, 24 (6th Cir. 1975).

[FN104]. Wittie, *Origins of the Community Association's Special Lien Priority for Unpaid Assessments Under the Uniform Acts*, MULTIPLE OWNERSHIP ACTS SYMPOSIUM, *supra* note 22, at 171, 174 (noting importance of supporting association's lien priority by "an effective, low cost remedy," and calling right to enforce its lien through power of sale "potentially the most important remedy for the association"). *See also*, Judy and Wittie, *supra* note 24, at 516.

[FN105]. One conceptual difficulty in forcing the Prioritized Lien into the first mortgagee's sale would be that, technically, there is no way to calculate the amount of the Prioritized Lien until an action to enforce the assessment lien has been commenced. *See infra* text at note 120. Though UCIOA's language is less than clear on this point, the first mortgagee's foreclosure should also be considered an action to enforce the assessment lien, once any portion of the assessment lien (here, the Less-Prioritized Lien) has been included in the foreclosure. *See supra* text at note 61.

Even assuming that the Prioritized Lien is in existence for a sum certain, foreclosing junior liens generally have no power to force foreclosure upon holders of senior liens. *See generally* NELSON & WHITMAN, *supra* note 17, at § 7.14. An exception to the senior's right to stay out of the junior's foreclosure permits joinder of the senior for the informational purposes of determining the amount and priority of his lien. *Id.* Where, as here, the debt secured by the senior lien is already due and payable, some authority would allow the junior lienor to force the senior lienor in on the theory that the foreclosure will effect a redemption of the senior lien from the proceeds of the junior lienor's foreclosure sale. *Id.* at 516. However, the better view is that the senior "should be allowed to exercise his own judgment as to the time to foreclose." EDGAR DURFEE, CASES ON SECURITY 204 (1951). *Compare* NELSON & WHITMAN, *supra* note 17, *with* GRANT NELSON & DALE WHITMAN, REAL ESTATE TRANSFER, FINANCE & DEVELOPMENT: CASES & MATERIALS (3d ed. 1987) (the casebook suggesting weaker authority for the view that the senior can be forced in). For a recent argument that the junior should be permitted to force in senior interests, see David G. Carlson, *Simultaneous Attachment of Liens on After-Acquired Property*, 6 CARDOZO L. REV. 505, 530-34 (1985).

[FN106]. "Survival" of the Prioritized Lien assumes it has come into existence by inclusion of the Less-Prioritized Lien in the first mortgagee's foreclosure, arguably an "action to enforce" the association's lien. UCIOA § 3-116(b), 7 U.L.A. at 3512 (1982). *See supra* notes 61, 105, and *infra* text at note 120. If the Prioritized Lien is interpreted as not having come into existence at the time of the foreclosure, all assessment delinquencies would fall into the Less-Prioritized Lien, which is not limited to any period before commencement of any assessment lien foreclosure. *See* UCIOA § 3-116, 7 U.L.A. at 351-54 (1982).

Just in case its Prioritized Lien did not come into existence by virtue of the junior mortgagee's foreclosure, the association can be sure it has a Prioritized Lien to be paid off upon resale by triggering a Prioritized Lien, initiating its own foreclosure action even after the first mortgagee's foreclosure extinguishing the Less-Prioritized Lien. Since UCIOA does not limit the Prioritized Lien securing delinquent assessments except by the six-month measurement, delinquencies secured by the Less-Prioritized Lien extinguished in the earlier foreclosure and left unpaid by that foreclosure would be eligible for inclusion on the Prioritized Lien activated by the association's action to enforce its lien. *See* UCIOA § 3-116, 7 U.L.A. at 351-54 (1982). Despite initial appearances, this would not give the association too many chances to realize on security for its assessments. Because of statutory technicalities in defining the Prioritized Lien, the super priority rendered artificially unavailable at the first mortgagee's foreclosure finally would be recognized as available at the subsequent association foreclosure.

[FN107]. *See* 24 C.F.R. § 200.155 (1991).

[FN108]. *See* 38 C.F.R. § 36.4320 (h)(5) (1991).

[FN109]. It generally causes no problem if the foreclosing lienor wishes to include in the foreclosure a *junior* lien which would normally be required to foreclose under a different method. *See, e.g.*, COLO. REV. STAT. ANN. § 38-38-103 (Supp. 1991) (permitting joinder of mortgages in foreclosure of senior deeds of trust despite the fact that, per COLO. REV. STAT. ANN. § 38-39-101 (Supp. 1991), mortgages in Colorado can otherwise only be foreclosed judicially). However, such statutes typically make no provision for participation by *senior* lienor in a junior lienor's foreclosure.

[FN110]. *See, e.g.*, NELSON & WHITMAN, *supra* note 17, § 7.12.

[FN111]. *See, e.g.*, Boulder Lumber Co. v. Alpine of Nederland, Inc., 626 P.2d 724, 728 (Colo. Ct. App. 1981) (affirming injunction prohibiting public trustee from proceeding with deed of trust foreclosure where mechanics' lien holder was seeking judicially to foreclose against same security, and where priority disputes among lienors left respective parties' rights particularly unclear).

Even where priorities are clear, however, the simultaneous pursuit of a judicial and a non-judicial foreclosure against the same land will produce confusing results, considering the overlap of parties with interests standing to be extinguished in both proceedings. For an example of the type of confusion resulting from dual foreclosures, see the classic decision in Murphy v. Farwell, 9 Wis. 102 (1859).

[FN112]. For a discussion of a foreclosing junior mortgagee's vulnerability to a senior lienor's judicial foreclosure, see *supra* note 111 and accompanying text.

[FN113]. For the lender's position, see *supra* note 21 and accompanying text.

[FN114]. The threat of judicial foreclosure in states making nonjudicial foreclosure unavailable to the association would be particularly worrisome to a mortgagee. *See supra* note 96.

[FN115]. Comment 1 to UCIOA § 3-116 predicted: "As a practical matter, secured lenders will most likely pay the 6 months' assessments demanded by the association rather than having the association foreclose on the unit." *See also* Judy and Wittie, *supra* note 24, at 484.

[FN116]. *See, e.g.*, Judy and Wittie, *supra* note 24, at 481.

[FN117]. *See, e.g.*, Shipp Corp. v. Charpilloz, 414 So. 2d 1122, 1123 (Fla. Dist. Ct. App. 1982), where the court explained: "When the phrase ['right of redemption'] is used with reference to a junior mortgagee, it refers to his right to satisfy a prior mortgage by payment of the debt it secures and thereby become equitably subrogated to all rights of the prior mortgagee."

[FN118]. *See* NELSON & WHITMAN, *supra* note 17, § 7.3.

[FN119]. *Id.* § 7.2.

[FN120]. UCIOA § 3-116(b), 7 U.L.A. at 351 (1982).

[FN121]. *Id.*

[FN122]. *Id.*

[FN123]. *Id.* § 3-116(e), 7 U.L.A. at 351 (1985).

[FN124]. A puzzling problem for this strategy is to determine how long the agreement not to foreclosure the Prioritized Lien should last. Any finite time shorter than the remaining term of the first mortgage would leave that mortgage potentially susceptible to future foreclosure by the senior Prioritized Lien. A duration running until foreclosure of the first mortgage could leave the association without a crucial assessment remedy for a very long time, assuming there was still a substantial term remaining on the first mortgage.

[FN125]. The "assignment" characterization, with the notion of thereby keeping the Prioritized Lien alive, is the suggestion of Professor Dale Whitman. *See* Letter from Professor Dale A. Whitman (Feb. 5, 1992) (on file with author).

[FN126]. On the other hand, non-recognition of such an assignment might well create a more desirable incentive for the lender to pay off the entire assessment lien.

[FN127]. UCIOA § 1-104, 7 U.L.A. at 250 (1982). In so broadly prohibiting waiver or variation by agreement, § 1-104 stands in contrast to many statutes governing commercial transactions, where waiver is often expressly permitted at least under circumstances suggesting legitimate bargaining between the parties. *Compare, e.g.*, UNIF. LAND TRANSACTIONS ACT, § 1-103 (1977), and UNIF. COM. CODE, § 1-102(3) (1991) (allowing variation by agreement of the parties from the UCC's terms, except where specifically prohibitted, so long as duties of good faith, diligence, reasonableness and care are not disclaimed). *See also*RESTATEMENT (SECOND) OF PROPERTY, § 5.6 (1977) (permitting variation even of lessor's habitability obligations, depending on both procedural and substantive fairness, and consistency with applicable statute's underlying public policy). Considering the regularity with which legislatures, the Uniform Laws Conference and Restatements permit variation by agreement, UCIOA's contrasting provision in § 1-104, once adopted legislatively, should be strictly interpreted as consciously intended to prohibit variation of UCIOA rights, thereby to protect the fundamental policies underlying UCIOA.

In the case of an attempted purchase of the Prioritized Lien, the mortgagee could argue that the variation in rights under § 3-116 was valid because it had been purchased for adequate consideration. However, the term "agreement" itself, describing a prohibitted transaction under § 1-104, seems to contemplate consideration paid and that such payment would not validate a waiver or variation of UCIOA's terms. *Compare*Shearson American Express, Inc. v. McMahon, 482 U.S. 220, 230 (1987) (interpreting in dictum the anti-waiver provisions in § 29(a) of Federal Securities and Exchange Act to prohibit negotiation of commission reduction for waiver of disclosure protection of Exchange Act even when customer does so voluntarily and knowingly, and emphasizing irrelevance of evenness of such bargain). A variant of the mortgagee's adequate consideration argument would be that no UCIOA right had been varied; rather a right, the Prioritized Lien, had been purchased. As noted in the text, however, the Prioritized Lien would technically not yet exist at the time the mortgagee purported to purchase it. Practically speaking, what would be purchased under such an assignment arrangement would be not only the association's ability to collect on delinquencies currently secured by the Prioritized Lien, but also its right to future lien priority for assessments on into the future. Taking that right from the association, even for substantial consideration, could vary UCIOA's basic assessment collection mechanism on a semi-permanent basis. UCIOA § 1-104 could not have meant to permit such disruption of the statutory scheme.

Purchase of an assignment of the perpetually renewable Prioritized Lien also raises very difficult problems of valuing the lien for purposes of determining adequacy of consideration. After all, such valuation would come at a time when the immediate amount of Prioritized Lien is unknown. Likewise, because the assignment of lien would run over time, during which the lien in the association's hands would have been renewable, a valuation would need to take into account what would have been changing amounts for the Prioritized Lien, and the possibility of the Prioritized Lien being used to recover varying sums in forclosure several different times. Even if value could be determined, these elements of value would clearly total a sum well in excess of the approximate amount of the Prioritized Lien at the one time the mortgagee was seeking to acquire an assignment.

[FN128]. The analogy made here between community associations and public governments in the limited realm of

assessment collection is not intended to suggest a broader analogy between associations and public governments in general. One consequence of such a general analogy would be application of the Constitution to the actions of community associations. While the application of some constitutional safeguards to associations might be wise, such as protection of free speech from association interference, others such as one person one vote, would upset the fundamental structure of community associations as we know them. At best, such changes would require very careful consideration, and would generate very substantial difficulties in determining new association governance rules and in protecting owners' reliance interests. Accordingly, my recommendation has been for states to select the constitutional protections they consider appropriate to apply in community associations, and to provide for such protections statutorily. For further discussion, see Winokur, *Mixed Blessings, supra* note 7, at 65 n.271, 88.

[FN129]. *See supra* notes 10-11 and accompanying text. Community association's expenses are often even more varied than those of public municipalities, including not only municipal-type expenses (like private road maintenance) and otherwise essential expenses (like casualty insurance premiums), but also expenses which seem neither municipal-like nor essential (such as some recreational expenses)--nor necessarily entitled to priority over all other liens. However, these classifications are fraught with definitional ambiguity, as in the case of expenses to maintain a swimming pool, which is arguably both recreational and municipal-like. Because of the definitional complexities in distinguishing between more crucial and less crucial expenses, the drafters of UCIOA opted to include all duly levied CIC assessments, regardless of purpose, within the limited lien priority afforded to assessment liens by § 3-116. *See generally* Judy and Wittie, *supra* note 24, at 484-88. Similarly, the assessment and lien provisions do not inquire beyond the general budgeting process into the details of association governance or possibly poor association judgment in levying a particular judgment. Rather than examine each of these subtle variables in each case, § 3-116 begins with the fundamental compromise of limiting the association's priority to six months worth of assessments rather than giving the association first priority for all its assessments as municipal taxes receive.

[FN130]. Judy and Wittie, *supra* note 24, at 475.

[FN131]. *See* NELSON & WHITMAN, *supra* note 17, § 12.7.

[FN132]. For a discussion of first mortgagees paying assessment defaults, see *supra* notes 112-17 and accompanying text.

[FN133]. Buck, *Super Priority Liens for Community Associations,* 1 SYMPOSIUM ON UNIFORM MULTIPLE OWNERSHIP ACTS, *supra* note 22, at 153, 155: "From our own practical experience in dealing with the "super priority" lien in Connecticut, collections have indeed been much easier. Lenders have paid the assessments. More often, lenders have made the delinquent owner pay the assessments." Mr. Buck also notes that the onset of economic depression in the northeast U.S. has left lenders more reluctant to pay the Prioritized Lien. *Id.*

[FN134]. *See supra* text accompanying *supra* note 107.

[FN135]. UCIOA § 3-116(d), 7 U.L.A. at 351 (1982).

[FN136]. In some states, the perfection requirement is expressed statutorily. *See, e.g.,* N.C. GEN. STAT. § 47C-3-116(a) (1984). *See also* GARY POLIAKOFF, LAW OF CONDOMINIUM OPERATIONS ASSOCIATIONS § 5.26 (1988). Elsewhere, perfection has evolved as a rule of practice, with trial courts occasionally insisting upon it.

[FN137]. This issue becomes even more slippery where a recorded delinquency is cured, but the unit owner becomes delinquent again. Will the first notice perfect the lien as to the later delinquency which should, in fairness, have been cancelled on the record but which may not have been?

[FN138]. Declarations sometimes supplement their assessment lien provisions with language requiring perfection of

the assessment lien by filing individual unit delinquencies. In the case of associations in existence before enactment of UCIOA, conservative association counsel may elect to follow the dictates of the declaration regardless of the liberating provisions of UCIOA. However, it is at least arguable that such provisions in the declaration would be inapplicable to control UCIOA's statutory lien. *See supra* note 73 and accompanying text.

[FN139]. This assessment status reporting system is described and critiqued *infra* notes 142-49.

[FN140]. The required contents of a declaration are set forth in UCIOA § 2-105, which does not require any provision for either assessments or assessment liens. UCIOA § 2-105, 7 U.L.A. at 280 (1982). Assessments are restricted by UCIOA § 3-115. UCIOA § 3-115, 7 U.L.A. at 349 (1982). Many pre-UCIOA association declarations do contain express association lien provisions, which may subordinate the association lien's priority to one or more mortgages, and which may specify perfection of the association lien by recording unit delinquencies. For a discussion of the consequences of these provisions in jurisdictions enacting the UCIOA, see *supra* notes 71-74 and accompanying text.

[FN141]. WASH. REV. CODE ANN. § 61.24.040(1)(a)(ii) (1990). *Compare* COLO. REV. STAT. 38-38-101(7)(a) (Supp. 1991) (similar notice requirements). Beyond the notice of foreclosure provided for in COLO. REV. STAT. § 38-38-101, however, the Colorado statutory scheme also provides for an additional notice of right to cure and right to redeem to all parties holding such rights. COLO. REV. STAT. § 38-38-103 (1990). The right to cure extends to parties such as "any holder of an interest junior to the lien being foreclosed by virtue of being a lienor . . . under a recorded instrument." COLO. REV. STAT. § 38-38-104 (1990). The Washington deed of trust foreclosure scheme apparently contains no analogous provision.

[FN142]. UCIOA § 3-116(h), 7 U.L.A. at 352 (1982).

[FN143]. For a discussion of management problems, particularly with amateur association boards lacking financial and business expertise, see *supra* note 13 and accompanying text.

[FN144]. This would include both the Prioritized and the Less-Prioritized Lien.

[FN145]. A unit owner's personal liability for unpaid assessments due during that owner's ownership of a unit is well established. *See* NATELSON, *supra* note 19, at 222. It is also implicitly recognized in UCIOA's grant of power to the association "to collect assessments . . . from unit owners." UCIOA § 3-102(2), 7 U.L.A. at 326 (1982). *See also* THE HOMES ASSOCIATION HANDBOOK, TECH. BULL. 50, 324-27 (Urban Land Institute, 1964) (extensive though inconclusive argument that personal assessments should be available); PENNEY, *supra* note 18, at 541; FHA Form 1401 (VA Form 26-8201), HUD-FHA Handbook 4135.1 § 1; COLO. REV. STAT. § 38-33.3-315(6) (Supp. 1991) (clarifying that unit owner's liability for payment of assessments persists despite any waiver of use of common elements or abandonment of unit). *But see* Century Park Condominium Ass'n v. Norwest Bank Bismark, 620 N.W.2d 349, 352 (N.D. 1988) (no personal liability or assumption of assessment obligations by foreclosure sale purchaser). Generally, liability of a unit owner should not extend to assessments coming due after a unit owner transfers title to the unit to a successor. *But see* NATELSON, *supra* note 19, at 222; RESTATEMENT OF PROPERTY, § 538 (1944) (continuing obligation of promisor after parting with land ownership depends on intention manifested in making covenant); Korngold, *supra* note 67, at 331.

[FN146]. Compare Colorado's recently adopted version, which provides vaguely that, when the association fails to respond to a proper request for an assessment status report, "it shall have no right to assert a priority lien upon the unit for unpaid assessments which were due as of the date of the request." COLO. REV. STAT. § 38-33.3-316(8) (1991) (emphasis added). The term "priority lien" leaves unclear whether it is merely the Prioritized Lien which no longer secures the unreported assessments, or whether these assessments have also lost the security of the Less-Prioritized Lien. Since even the Less-Prioritized Lien does have statutory priority under UCIOA over mortgages

junior to the first mortgage but filed after the declaration, this Less-Prioritized Lien could conceivably be within the term "priority lien." This unfortunate language was the product of last-minute, political compromise.

[FN147]. For a discussion of the perpetually renewable Prioritized Lien, see *supra* text following note 117.

[FN148]. *Id.* To assure that each association has a registered agent, and to encourage what many practitioners consider good practice, Colorado's entire lien for assessments provision is conditioned on the association being incorporated. COLO. REV. STAT. § 38-33.3-316(1) (Supp. 1991).

[FN149]. COLO. REV. STAT. § 38-33.3-316(8) (Supp. 1991).

[FN150]. UCIOA § 3-115(a), 7 U.L.A. at 349 (1982).

[FN151]. UCIOA § 3-116(b), 7 U.L.A. at 351 (1982).

[FN152]. UCIOA § 3-103(c), 7 U.L.A. at 328 (1982).

[FN153]. Regarding the need for better financial planning by many community associations, see *supra* note 12 and accompanying text.

[FN154]. For authorities reporting outrageous and disruptive behavior by community association members, *see, e.g.*, Winokur, *Mixed Blessings, supra* note 7, at 63 n.263.

[FN155]. For example, in Colorado the realtors and developers supported enactment of the statute, including the "super priority" lien while title insurers and the Real Estate and Titles Section of the Colorado Bar Association opposed its enactment. In Connecticut and Washington, the Bar supported the legislation. Realtors in Colorado and Alaska supported enactment of UCIOA, but Realtors opposed enactment in Connecticut. Lenders were part of the coalition which supported enactment in Connecticut, as indeed the Federal Home Loan Mortgage Corporation had helped sponsor development of the UCIOA "super priority" lien in the first place. Note, for example, that Henry Judy (whose article so strongly supporting "super priority" lien is cited throughout this Article) was and remains Freddie Mac General Counsel and was Advisor to the Special Committee drafting the UCIOA. However, lenders specifically opposed the "super priority" lien in Colorado, even succeeding in having it temporarily removed from the bill before the Colorado Senate voted to specifically add the lien provisions back into the bill.

[FN156]. FEDERAL NATIONAL MORTGAGE ASSOC. SELLING GUIDE, Part VIII, ch. 6, § 608.02 (Rev. June, 1990); 1 FEDERAL HOME LOAN MORTGAGE CORP. SELLERS SERVICERS' GUIDE, § 2003(c), 2005(c). As noted in Comment 1 to UCIOA § 3-116, there has also been some concern that the "super priority" lien would run afoul of state regulations restricting lending institutions to mortgages which are "first" liens. *See, e.g.*, CAL. FIN. CODE § 7102 (Deering 1989); N.Y. BANKING LAW § 380(4) (Consol. 1990); TEX. REV. CIV. STAT. ANN., art. 852(a), § 5.05 (West 1964 & Supp. 1992). *See also* Alfred V. Contarino & Richard O. Kiner, *Control and Management of Common Elements by Covenant*, 14 HASTINGS L.J. 309, 314 (1963); Russell R. Pike, *The Condominium as a Mortgage Investment*, 14 HASTINGS L.J. 282, 286 (1963). To date, such statutes have not been asserted to inhibit mortgage loans secured by CIC units--perhaps following the lead of federal regulators and recognizing how widespread the market is in which the six-month super priority is recognized.

[FN157]. The FNMA provision is limited to situations where the declaration requires that assessments be paid monthly. FEDERAL NATIONAL MORTGAGE ASSOC. SELLING GUIDE, Part VIII, ch. 6, § 608.02 (Rev. June, 1990). The Freddie Mac provision contemplates that a mortgagee who obtains title to a unit will be liable for up to 6 months of assessments. 1 FEDERAL HOME LOAN MORTGAGE CORP. SELLERS SERVICERS' GUIDE, §§ 2003(c), 2005(c). As discussed in *supra* notes 107-10 and accompanying text, mortgagee payment of the six-month

delinquency is likely at this stage anyway.

The contrast between the Fannie Mae and Freddie Mac provisions on acceptability of mortgages subject to the "super priority" lien echoes the contrasting positions of the Department of Housing and Urban Development and the Veterans Administration on whether mortgagee payment of the six-month delinquency will be covered under claims under HUD mortgage insurance or the VA. While HUD has taken the position that such payments are covered, the VA contends that they are not, citing its statutory restriction of VA loans to first liens only. *See* FEDERAL NATIONAL MORTGAGE ASSOCIATION MEMORANDUM TO ALL FHA/VA SELLER/SERVICERS (West Va.) (Nov. 18, 1980). FNMA, however, assures that VA guaranteed mortgages may be subject to the "super priority" lien provided adequate assurance is provided to FNMA that it will be held harmless with respect to prioritized assessments. *Id.*

There is some current concern regarding whether these various agencies might change their view on the acceptability of first mortgages subject to the "super priority" assessment lien. *See, e.g.*, Buck, *Super Priority Liens for Community Associations,* 1 MULTIPLE OWNERSHIP ACTS SYMPOSIUM, *supra* note 22, at 153, 157; Buck, *1991-92 Legislative Update, in* 13TH ANNUAL COMMUNITY ASSOCIATION LAW SEMINAR MATERIALS, 384, 395 (CAI, 1992). However, the number and size of jurisdictions with versions of the "super priority" lien now in effect may, as a practical matter, effectively mandate continuation of the agencies' present acceptance of this limited super priority.

[FN158]. *See* Buck, *Super Priority Liens for Community Associations,* 1 MULTIPLE OWNERSHIP ACTS SYMPOSIUM, *supra* note 22, at 153, 156 (developers' and association attorney addressing experience both in Connecticut and nationally); Letter from Norman H. Roos, Connecticut Mortgage Bankers Association counsel to Charles H. Rhyne (regarding Connecticut experience) (on file with author); Letter from Robert M. Diamond, Esq., Virginia developers' counsel to Gurdon H. Buck (Feb. 26, 1991) (regarding Virginia experience); Telephone Interview with Mary Burt, Manager of State Relations, Government & Industry Relations, Federal Home Loan Mortgage Corporation (March 16, 1992). *See also* letter from Mary Burt, Manager of State Relations, Government & Industry Relations, Federal Home Loan Mortgage Corporation, to Hon. Bruce G. Sundlun, Governor of Rhode Island (Oct. 18, 1991) (arguing for repeal of Rhode Island's 1991 passage of a five-year super priority for association liens, and impliedly accepting and advocating the six-month super priority provisions of the Uniform Acts as in keeping with Freddie Mac's nationwide uniform standards) (on file with author).

[FN159]. UCIOA § 2-107(b), 7 U.L.A. at 466 (1985); *See also* UCIOA § 3-115(a), 7 U.L.A. at 525-27 (1982).

[FN160]. Wittie, *Origins of the Community Association's Special Lien Priority for Unpaid Assessments Under the Uniform Acts,* MULTIPLE OWNERSHIP ACTS SYMPOSIUM, *supra* note 22, at 171, 173. *See also*UCIOA § 3-116 cmt. 1, 7 U.L.A. at 529 (1982).

[FN161]. Wittie, *supra* note 160, at 173.

[FN162]. Buck, *Super Priority Liens for Community Associations,* MULTIPLE OWNERSHIP ACTS SYMPOSIUM, *supra* note 22, at 153, 155. In Connecticut, where UCIOA became effective January 1, 1984, Mr. Buck reports that escrows have been required only after the lender has already once been forced to pay off delinquent assessments in an enforcement action. *Id. See also* NELSON & WHITMAN, *supra* note 17, at 965-66 (suggesting as an explanation for their non-use that administration costs for assessment escrows are particularly high due to more frequent payouts than assessments for taxes and insurance, but nonetheless favoring their use). *Compare* THE HOMES ASSOC. HANDBOOK, *supra* note 145, at 232 (reporting long before Uniform Laws Conference promulgation of UCIOA or UCA that 21 of 71 associations questioned maintained assessment escrows).

[FN163]. For estimates of the age of community associations, see *supra* note 27.

[FN164]. For a discussion of the transfer of governmental responsibilities to community associations, see *supra*

notes 11-12 and accompanying text.

[FN165]. For a discussion of the impact on neighboring CIC units of unpaid assessments, see *supra* notes 24-26 and accompanying text.

[FN166]. *See* Letter from Harry L. Paulsen, Exec. Dir. Land Title Assoc. of Colorado, to Senator Bill Schroeder (March 7, 1991) (on file with author).

[FN167]. UCIOA § 3-116(a), 7 U.L.A. at 351-52 (1985).

[FN168]. *See* American Land Title Association (A.L.T.A.) Residential Owners Policy, Form B (1970), Exclusion 3 (D); A.L.T.A. Loan Policy, Form 1970, Exclusion 3 (D). The same exclusion in Plain Language Form P-1979 makes clear the title insurance company's liability for mechanics' liens for work and materials prior to issuance of the policy. When addressing individual cases in Connecticut (a UCIOA state), and not the merits of UCIOA as legislation, title companies have themselves asserted this same argument: "that creation of the lien is a post-policy occurrence and not covered." *See* letter from Gurdon H. Buck, Esq., to James L. Winokur (Jan. 3, 1992) (on file with author). Though Mr. Buck does not consider this conclusion to be "self-evident," he reports title companies generally succeed in so denying liability for assessment defaults occurring after issuance of a title policy. *Id.* Mr. Buck's concern is apparently based in the Form 4 (and Form 5) endorsements. *Id.*

[FN169]. A.L.T.A. Condominium Endorsement Form 4; A.L.T.A. PUD Endorsement Form 5.

[FN170]. A.L.T.A. Condominium Endorsement Form 4.

[FN171]. A.L.T.A. PUD Endorsement Form 5.

[FN172]. The PUD endorsement is a bit less susceptible to this reading because, unlike the condominium endorsement, it does not expressly include within its coverage an assessment lien created by statute.

[FN173]. D. BARLOW BURKE, LAW OF TITLE INSURANCE 83 (1986). "[T]he insurer will indemnify the policy holder only if the title is otherwise than as stated as of the date of issuance. Both on-record and off-record risks arising after that date are not covered by the policy." *Id.*

[FN174]. 1 GURDON BUCK, CONDOMINIUM DEVELOPMENT § 8:66, at 8-117 (1991).

[FN175]. *See supra* text at notes 142-49.

[FN176]. *Cf.* 1 GURDON BUCK, CONDOMINIUM DEVELOPMENT § 8:66, at 8-121 (1991).

[FN177]. UCIOA § 1-204, 7 U.L.A. at 266 (1985).

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IN THE SUPREME COURT OF THE STATE OF NEVADA

HORIZONS AT SEVEN HILLS HOMEOWNERS ASSOCIATION,

Appellant,

v.

IKON HOLDINGS, LLC, a Nevada limited liability company,

Respondent.

Supreme Court No. 63178

District Court Case No. A-11-647850-B

APPELLANT'S APPENDIX

VOLUME 2 OF 11

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7	Business Court Order	12/8/2011	IV	0781-0785
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49	Correspondence dated 3/28/13 re: Proposed Final Judgment	4/10/2013	X	2114-2140
10	Court Minutes: Decision re: Plaintiff's Motion for Partial Summary Judgment & Defendant's Countermotion	12/16/2011	IV	0833-0834
9	Court Minutes: All Pending Motions	12/12/2011	IV	0831-0832
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44	Order re: Plaintiff's Motion for Summary Judgment on Declaratory Relief and Defendant's Counter-Motion for Summary Judgment	7/20/2012	IX	2083-2094
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Phone: (702) 669-4600 ♦ Fax: (702) 669-4650

	Judgment/Defendant's Opposition to Plaintiff's Motion for Summary Judgment and Countermotion for Summary Judgment			
6	Reply to Opposition to Motion for Partial Summary Judgment on Issue of Declaratory Relief & Opposition to Counter Motion for Summary Judgment	12/7/2011	III-IV	0757-0780
21	Scheduling Memo	2/28/2012	VII	1476
20	Scheduling Order	2/28/2012	VII	1473-1475
8	Transcript of Proceedings: Motions	12/12/2011	IV	0786-0830

Holland & Hart LLP
9555 Hillwood Drive, Second Floor
Las Vegas, Nevada 89134
Phone: (702) 669-4600 ♦ Fax: (702) 669-4650

1-4 FAMILY RIDER
(Assignment of Rents)

LOAN NO.: 0508168244

MIN: 100141500000139326
MERS Phone: 1-888-679-6377

THIS 1-4 FAMILY RIDER is made this 8th day of SEPTEMBER, 2005, and is incorporated into and shall be deemed to amend and supplement the Mortgage, Deed of Trust, or Security Deed (the "Security Instrument") of the same date given by the undersigned (the "Borrower") to secure Borrower's Note to

THE MORTGAGE STORE FINANCIAL, INC., A CALIFORNIA CORPORATION

(the "Lender") of the same date and covering the Property described in the Security Instrument and located at:

950 SEVEN HILLS DRIVE, UNIT 1411, HENDERSON, NV 89052
[Property Address]

1-4 FAMILY COVENANTS. In addition to the covenants and agreements made in the Security Instrument, Borrower and Lender further covenant and agree as follows:

A. ADDITIONAL PROPERTY SUBJECT TO THE SECURITY INSTRUMENT. In addition to the Property described in the Security Instrument, the following items now or hereafter attached to the Property to the extent they are fixtures are added to the Property description, and shall also constitute the Property covered by the Security Instrument: building materials, appliances and goods of every nature whatsoever now or hereafter located in, on, or used, or intended to be used in connection with the Property, including, but not limited to, those for the purposes of supplying or distributing heating, cooling, electricity, gas, water, air and light, fire prevention and extinguishing apparatus, security and access control apparatus, plumbing, bath tubs, water heaters, water closets, sinks, ranges, stoves, refrigerators, dishwashers, disposals, washers, dryers, awnings, storm windows, storm doors, screens, blinds, shades, curtains and curtain rods, attached mirrors, cabinets, paneling and attached floor coverings, all of which, including replacements and additions thereto, shall be deemed to be and remain a part of the Property covered by the Security Instrument. All of the foregoing together with the Property described in the Security Instrument (or the leasehold estate if the Security Instrument is on a leasehold) are referred to in this 1-4 Family Rider and the Security Instrument as the "Property."

Initials: _____

B. USE OF PROPERTY; COMPLIANCE WITH LAW. Borrower shall not seek, agree to or make a change in the use of the Property or its zoning classification, unless Lender has agreed in writing to the change. Borrower shall comply with all laws, ordinances, regulations and requirements of any governmental body applicable to the Property.

C. SUBORDINATE LIENS. Except as permitted by federal law, Borrower shall not allow any lien inferior to the Security Instrument to be perfected against the Property without Lender's prior written permission.

D. RENT LOSS INSURANCE. Borrower shall maintain insurance against rent loss in addition to the other hazards for which insurance is required by Section 5.

E. "BORROWER'S RIGHT TO REINSTATE" DELETED. Section 19 is deleted.

F. BORROWER'S OCCUPANCY. Unless Lender and Borrower otherwise agree in writing, Section 6 concerning Borrower's occupancy of the Property is deleted.

G. ASSIGNMENT OF LEASES. Upon Lender's request after default, Borrower shall assign to Lender all leases of the Property and all security deposits made in connection with leases of the Property. Upon the assignment, Lender shall have the right to modify, extend or terminate the existing leases and to execute new leases, in Lender's sole discretion. As used in this paragraph G, the word "lease" shall mean "sublease" if the Security Instrument is on a leasehold.

H. ASSIGNMENT OF RENTS; APPOINTMENT OF RECEIVER; LENDER IN POSSESSION. Borrower absolutely and unconditionally assigns and transfers to Lender all the rents and revenues ("Rents") of the Property, regardless of to whom the Rents of the Property are payable. Borrower authorizes Lender or Lender's agents to collect the Rents, and agrees that each tenant of the Property shall pay the Rents to Lender or Lender's agents. However, Borrower shall receive the Rents until: (i) Lender has given Borrower notice of default pursuant to Section 22 of the Security Instrument, and (ii) Lender has given notice to the tenant(s) that the Rents are to be paid to Lender or Lender's agent. This assignment of Rents constitutes an absolute assignment and not an assignment for additional security only.

If Lender gives notice of default to Borrower: (i) all Rents received by Borrower shall be held by Borrower as trustee for the benefit of Lender only, to be applied to the sums secured by the Security Instrument; (ii) Lender shall be entitled to collect and receive all of the Rents of the Property; (iii) Borrower agrees that each tenant of the Property shall pay all Rents due and unpaid to Lender or Lender's agents upon Lender's written demand to the tenant; (iv) unless applicable law provides otherwise, all Rents collected by Lender or Lender's agents shall be applied first to the costs of taking control of and managing the Property and collecting the Rents, including, but not limited to, attorney's fees, receiver's fees, premiums on receiver's bonds, repair and maintenance costs, insurance premiums, taxes, assessments and other charges on the Property, and then to the sums secured by the Security Instrument; (v) Lender, Lender's agents or any judicially appointed receiver shall be liable to account for only those Rents actually received; and (vi) Lender shall be entitled to have a receiver appointed to take possession of and manage the Property and collect the Rents and profits derived from the Property without any showing as to the inadequacy of the Property as security.

If the Rents of the Property are not sufficient to cover the costs of taking control of and managing the Property and of collecting the Rents any funds expended by Lender for such purposes shall become indebtedness of Borrower to Lender secured by the Security Instrument pursuant to Section 9.

Borrower represents and warrants that Borrower has not executed any prior assignment of the Rents and has not performed, and will not perform, any act that would prevent Lender from exercising its rights under this paragraph.

Lender, or Lender's agents or a judicially appointed receiver, shall not be required to enter upon, take control of or maintain the Property before or after giving notice of default to Borrower. However, Lender, or Lender's agents or a judicially appointed receiver, may do so at any time when a default occurs. Any application of Rents shall not cure or waive any default or invalidate any other right or remedy of Lender. This assignment of Rents of the Property shall terminate when all the sums secured by the Security Instrument are paid in full.

I. **CROSS-DEFAULT PROVISION.** Borrower's default or breach under any note or agreement in which Lender has an interest shall be a breach under the Security Instrument and Lender may invoke any of the remedies permitted by the Security Instrument.

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this 1-4 Family Rider.

HAWLEY MCINTOSH _____(Seal) -Borrower

_____(Seal) -Borrower

_____(Seal) -Borrower

_____(Seal) -Borrower

_____(Seal) -Borrower

_____(Seal) -Borrower

_____(Seal) -Borrower

_____(Seal) -Borrower

PREPAYMENT RIDER

LOAN NO.: 0508168244

MIN: 100141500000139326
MERS Phone: 1-888-679-6377

This "PREPAYMENT RIDER" (hereinafter "Rider") is made this 8th day of SEPTEMBER, 2005 , and is incorporated into and shall be deemed to amend and supplement the Mortgage, Deed of Trust, or Security Deed (the "Security Instrument") of the same date made by the undersigned (the "Borrower") to secure Borrower's Note (the Note") to
THE MORTGAGE STORE FINANCIAL, INC., A CALIFORNIA CORPORATION

(the "Lender") which is secured by the Security Instrument on real property located at:

950 SEVEN HILLS DRIVE, UNIT 1411, HENDERSON, NV 89052
(Property Address)

ADDITIONAL COVENANTS. In addition to the covenants and agreements made in the Note or Security Instrument, Borrower and Lender further covenant and agree as follows:

I have the right to make payments of Principal at any time before they are due. A prepayment of all of the unpaid principal is known as a "Full Prepayment." A prepayment of only part of the unpaid principal is known as a "Partial Prepayment."

Except as provided below, I may make a Full or Partial Prepayment at any time. If I make a Partial Prepayment equal to one or more of my monthly payments, my due date may be advanced no more than one month. If I make any other Partial Prepayment, I must still make each later payment as it becomes due and in the same amount. I may make a Full Prepayment at any time. However, if within the first TWENTY FOUR (24) months after the execution of the Deed of Trust, I make any prepayment(s) within any 12-month period the total amount of which exceeds TWENTY percent (20.00 %) of the original Principal amount of this loan, I will pay a prepayment charge in an amount equal to the payment of SIX (6) months' advance interest on the amount by which the total of my prepayment(s) within that 12-month period exceeds TWENTY percent (20.00 %) of the original Principal amount of the loan.

Initials: HM

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Prepayment Rider.

HAWLEY MCINTOSH _____(Seal) -Borrower

_____(Seal) -Borrower

_____(Seal) -Borrower

_____(Seal) -Borrower

_____(Seal) -Borrower

_____(Seal) -Borrower

_____(Seal) -Borrower

_____(Seal) -Borrower

INTEREST-ONLY ADDENDUM TO ADJUSTABLE RATE RIDER

LOAN NO.: 0508168244

MIN: 100141500000139326
MERS Phone: 1-888-679-6377

PROPERTY ADDRESS: 950 SEVEN HILLS DRIVE, UNIT 1411, HENDERSON, NV 89052

THIS ADDENDUM is made this 8th day of SEPTEMBER, 2005 , and is incorporated into and intended to form a part of the Adjustable Rate Rider (the "Rider") dated the same date as this Addendum executed by the undersigned and payable to
THE MORTGAGE STORE FINANCIAL, INC., A CALIFORNIA CORPORATION

(the "Lender").

THIS ADDENDUM supersedes Section 4(C) of the Rider. None of the other provisions of the Note are changed by this Addendum.

4. INTEREST RATE AND MONTHLY PAYMENT CHANGES

(C) Calculation of Changes

Before each Change Date, the Note Holder will calculate my new interest rate by adding FIVE AND 000/1000THS percentage point(s) (5.000 %) to the Current Index for such Change Date. The Note Holder will then round the result of this addition to the nearest one-eighth of one percentage point (0.125%). Subject to the limits stated in Section 4(D) below, this rounded amount will be my new interest rate until the next Change Date.

During the Interest-Only Period, the Note Holder will then determine the amount of the monthly payment that would be sufficient to repay accrued interest. This will be the amount of my monthly payment until the earlier of the next Change Date or the end of the Interest-Only Period unless I make a voluntary prepayment of principal during such period. If I make a voluntary prepayment of principal during the Interest-Only Period, my payment amount for subsequent payments will be reduced to the amount necessary to pay interest at the then current interest rate on the lower principal balance. At the end of the Interest-Only Period and on each Change Date thereafter, the Note Holder will determine the amount of the monthly payment that would be sufficient to repay in full the unpaid principal that I am expected to owe at the end of the Interest-Only Period or Change Date, as applicable, in equal monthly payments over the remaining term of the Note. The result of this calculation will be the new amount of my monthly payment. After the end of the Interest-Only Period, my payment will not be reduced due to voluntary prepayments.

Initials: HM

HAWLEY MCINTOSH _____(Seal)
-Borrower

_____(Seal)
-Borrower

_____(Seal)
-Borrower

_____(Seal)
-Borrower

_____(Seal)
-Borrower

_____(Seal)
-Borrower

_____(Seal)
-Borrower

_____(Seal)
-Borrower

Ex. 4

20090603-0001992
Fee: $15.00 RPTT: $0.00
N/C Fee: $0.00
06/03/2009 10:24:54
T20090193865
Requestor:
FIDELITY NATIONAL DEFAULT SO
Debbie Conway GWC
Clark County Recorder Pgs: 2

APN NO. 177-35-610-137
RECORDING REQUESTED BY

WHEN RECORDED MAIL TO

REGIONAL TRUSTEE SERVICES CORPORATION
616 1st Avenue, Suite 500
Seattle, WA 98104

Trustee's Sale No: 07-FMB-74757

0903/8116

FMB747570342000000

NOTICE OF DEFAULT AND ELECTION TO SELL UNDER DEED OF TRUST

NOTICE IS HEREBY GIVEN that REGIONAL SERVICE CORPORATION, is either the duly appointed Trustee, the substitute Trustee or acting as agent for the Beneficiary under a Deed of Trust dated 9/8/2005, executed by HAWLEY MCINTOSH, A MARRIED MAN AS HIS SOLE AND SEPARATE PROPERTY, as Trustor, to secure obligations in favor of MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. AS NOMINEE FOR ITS SUCCESSORS AND ASSIGNS, as Beneficiary, recorded 9/15/2005 , as Instrument No. 20050915-0004492, and rerecorded as Instrument No. 20090601-0007303, of Official Records in the office of the Recorder of CLARK County, NEVADA. There is now owing upon the note secured by said Deed of Trust the sum of $136,453.63 principal, with interest thereon from 12/1/2008. That a breach of, and default in, the obligations for which such Deed of Trust is security has occurred as follows:

FAILURE TO PAY INSTALLMENTS OF PRINCIPAL, INTEREST, IMPOUNDS AND LATE CHARGES WHICH BECAME DUE 1/1/2009 TOGETHER WITH ALL SUBSEQUENT INSTALLMENTS OF PRINCIPAL, INTEREST, IMPOUNDS, LATE CHARGES, FORECLOSURE FEES AND EXPENSES; ANY ADVANCES WHICH MAY HEREAFTER BE MADE; ALL OBLIGATIONS AND INDEBTEDNESSES AS THEY BECOME DUE; AND ANY INSTALLMENTS ALREADY MADE, THAT AT A LATER DATE PROVE TO BE INVALID.

That by reason thereof, ONEWEST BANK FSB, the present beneficiary under such Deed of Trust, has executed and delivered to said Trustee, a written Declaration and Demand for Sale, and has deposited with said Trustee, such Deed of Trust and all the documents evidencing obligations secured thereby, and has declared and does hereby declare all sums secured thereby immediately due and payable and has elected and does hereby elect to cause the trust property to be sold to satisfy the obligations secured thereby.

N.R.S. 107.080 permits certain defaults to be cured upon the payment of the amounts required by that statutory section without requiring payment of that portion of the principal and interest which would not be due had no default occurred. Where reinstatement is possible, if the default is not cured within 35 days following recording and mailing of this Notice to Trustor or Trustor's successor in interest, the right of reinstatement will terminate and the property may thereafter be sold.

To find out the amount you must pay, or to arrange for payment to stop the foreclosure or if your property is in foreclosure for any other reason, contact:

STATE OF CA

COUNTY OF ORANGE

On 6/3/09 before me, DAVID MATHIAS, Notary Public, personally appeared E Sheppard who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

David Mathias

DAVID MATHIAS

DAVID MATHIAS
Commission # 1769151
Notary Public - California
Orange County
My Comm. Expires Sep 18, 2011

Ex. 5

Inst #: 200908040003419
Fees: $15.00
N/C Fee: $0.00
08/04/2009 10:22:10 AM
Receipt #: 2550
Requestor:
NORTH AMERICAN TITLE COMPAN
Recorded By: MSH Pgs: 2
DEBBIE CONWAY
CLARK COUNTY RECORDER

APN # 177-35-610-137
Trustee's Sale # N47664
North American Title # 17927
PropertyAddress: 950 Seven Hills Drive #1411

NOTICE OF DEFAULT AND ELECTION TO SELL UNDER HOMEOWNERS ASSOCIATION LIEN

IMPORTANT NOTICE

WARNING! IF YOU FAIL TO PAY THE AMOUNT SPECIFIED IN THIS NOTICE, YOU COULD LOSE YOUR HOME, EVEN IF THE AMOUNT IS IN DISPUTE!

IF YOUR PROPERTY IS IN FORECLOSURE BECAUSE YOU ARE BEHIND IN YOUR PAYMENTS IT MAY BE SOLD WITHOUT ANY COURT ACTION and you may have the legal right to bring your account in good standing by paying all your past due payments plus permitted costs and expenses within the time permitted by law for reinstatement of your account. No sale date may be set until ninety (90) days from the date this notice of default was mailed to you. The date this document was mailed to you appears on this notice.

This amount is $4,289.50 as of July 28, 2009 and will increase until your account becomes current.

While your property is in foreclosure, you still must pay other obligations (such as insurance and taxes) required by your note and deed of trust or mortgage, or as required under your Covenants Conditions and Restrictions. If you fail to make future payments on the loan, pay taxes on the property, provide insurance on the property or pay other obligations as required by your note and deed of trust or mortgage, or as required under your Covenants Conditions and Restrictions, the Horizons at Seven Hills (the Association) may insist that you do so in order to reinstate your account in good standing. In addition, the Association may require as a condition to reinstatement that you provide reliable written evidence that you paid all senior liens, property taxes and hazard insurance premiums.

Upon your request, this office will mail you a written itemization of the entire amount you must pay. You may not have to pay the entire unpaid portion of your account, even though full payment was demanded, but you must pay all amounts in default at the time payment is made. However, you and your Association may mutually agree in writing prior to the foreclosure sale to, among other things, 1) provide additional time in which to cure the default by transfer of the property or otherwise; 2) establish a schedule of payments in order to cure your default; or both (1) and (2).

Following the expiration of the time period referred to in the first paragraph of this notice, unless the obligation being foreclosed upon or a separate written agreement between you and your Association permits a longer period, you have only the legal right to stop the sale of your property by paying the entire amount demanded by your Association.

To find out about the amount you must pay, or arrange for payment to stop the foreclosure, or if your property is in foreclosure for any other reason, contact: Nevada Association Services, Inc. on behalf of Horizons at Seven Hills, 6224 W. Desert Inn Road, Suite A, Las Vegas, NV 89146. The phone number is (702) 804-8885 or toll free at (888) 627-5544.

If you have any questions, you should contact a lawyer or the Association which maintains the right of assessment on your property.

Trustee's Sale # N47664

Notwithstanding the fact that your property is in foreclosure, you may offer your property for sale, provided the sale is concluded prior to the conclusion of the foreclosure.

REMEMBER, YOU MAY LOSE LEGAL RIGHTS IF YOU DO NOT TAKE PROMPT ACTION.

NOTICE IS HEREBY GIVEN THAT NEVADA ASSOCIATION SERVICES, INC.

is the duly appointed agent under the previously mentioned Notice of Delinquent Assessment Lien, with the owner(s) as reflected on said lien being Hawley McIntosh, dated June 15, 2009, and recorded on June 17, 2009 as instrument number 0001827 Book 20090617 in the official records of Clark County, Nevada, executed by Horizons at Seven Hills, hereby declares that a breach of the obligation for which the Covenants Conditions and Restrictions, recorded on July 06, 2005, as instrument number 0003420 Book 20050706, as security has occurred in that the payments have not been made of homeowner's assessments due from September 01, 2008 and all subsequent homeowner's assessments, monthly or otherwise, less credits and offsets, plus late charges, interest, trustee's fees and costs, attorney's fees and costs and Association fees and costs.

That by reason thereof, the Association has executed and delivered to said agent a written authorization and has deposited with said agent such documents as the Covenants Conditions and Restrictions and documents evidencing the obligations secured thereby, and declares all sums secured thereby immediately due and payable and elects to cause the property to be sold to satisfy the obligations.

Nevada Association Services, Inc. is a debt collector. Nevada Association Services, Inc. is attempting to collect a debt. Any information obtained will be used for that purpose.

Nevada Associations Services, Inc., whose address is 6224 W. Desert Inn Road, Suite A, Las Vegas, NV 89146 is authorized by the association to enforce the lien by sale.

Legal_Description: Horizons At Seven Hills Ranch, Plat Book 125, Page 58, Unit 1411, Bldg 14 in the County of Clark

Dated: July 28, 2009

N Collins

By: Natasha Collins, of Nevada Association Services, Inc.
on behalf of Horizons at Seven Hills

When Recorded Mail To:
Nevada Association Services, Inc.
6224 W. Desert Inn Road, Suite A
Las Vegas, NV 89146
(702) 804-8885
(888) 627-5544

Ex. 6

(5-1)

Inst #: 201007210001842
Fees: $17.00 N/C Fee: $0.00
RPTT: $186.15 Ex: #
07/21/2010 12:07:20 PM
Receipt #: 434089
Requestor:
SCOT LUDWIG
Recorded By: TAH Pgs: 5
DEBBIE CONWAY
CLARK COUNTY RECORDER

RECORDING REQUESTED BY

WHEN RECORDED MAIL TO
And SEND TAX STATEMENT TO:

SCOT M. LUDWIG
900 S 4TH ST #207
LAS VEGAS, NV 89101

Trustee's Sale No: 07-FMB-74757

APN NO. 177-35-610-137

TRUSTEE'S DEED UPON SALE

The undersigned grantor declares:

1. **The Grantee herein was not the foreclosing beneficiary.**
1. **The amount of the unpaid debt together with costs was $156,956.95.**
2. **The amount paid by the Grantee at the Trustee's Sale was $36,000.01.**
3. **The documentary transfer tax is:$186.15.**

THIS INDENTURE made June 28, 2010, between REGIONAL SERVICE CORPORATION, a California corporation, hereinafter called Trustee and SCOT M. LUDWIG, hereinafter called Grantee, **WITNESSETH:**

WHEREAS, HAWLEY MCINTOSH, A MARRIED MAN AS HIS SOLE AND SEPARATE PROPERTY, by a Deed of Trust dated 9/8/2005, and recorded 9/15/2005, as Instrument No. 20050915-0004492, and rerecorded as Instrument No. 20090601-0007303, of Official Records in the office of the Recorder of CLARK County, NEVADA, did grant and convey to said Trustee, upon the trusts therein expressed, the property hereinafter described, among other uses and purposes to secure the payment of a certain promissory note and interest, according to the terms thereof, and other sums of money advanced, with interest thereon, to which reference is hereby made, and,

WHEREAS, breach and default was made under the terms of said Deed of Trust in the particulars set forth in the Notice of said Beach and Default, to which reference is hereby made; and,

WHEREAS, on 5/2/2009, the then Beneficiary, or holder of said note did execute and deliver to the Trustee written declaration of default and demand for sale and thereafter there was filed

for record on 6/3/2009, in the office of the County Recorder of CLARK County, NEVADA, a Notice of such breach and default and of election to cause the Trustee to sell said property to satisfy the obligation secured by said Deed of Trust, which Notice was recorded in Instrument No. 20090603-0001992, of Official Records of said County and,

WHEREAS, Trustee, in consequence of said election, declaration of default, and demand for sale, and in compliance with said Deed of Trust and with the Statutes in such cases made and provided, made and published for more than twenty (20) days before the date of sale therein fixed in a newspaper of general circulation printed and in each county in which the property or any part thereof is situated, Notice of Sale as required by law, containing a correct description of the property to be sold and stating that the Trustee would under the provisions of said Deed of Trust, sell the property therein and herein described at public auction to the highest bidder for cash in lawful money of the United States of America on June 28, 2010, at 10:00 AM, of said day, **THE FRONT ENTRANCE TO NEVADA LEGAL NEWS, 930 SOUTH FOURTH STREET, in the City of LAS VEGAS, County of CLARK, State of NEVADA,** and

WHEREAS, three true and correct copies of said Notice were posted in three of the most public places in the County of CLARK, State of NEVADA, in which said sale was noticed to take place, and where the property was to be sold for not less than twenty days before the date of sale therein fixed, and,

WHEREAS compliance having been made with all the statutory provisions of the State of NEVADA and with all of the provisions of said Deed of Trust as to the acts to be performed and notices to be given, and in particular, full compliance having been made with all requirements of law regarding the service of notices required by statute, and with the Soldiers' and Sailors' Relief Act of 1940, said Trustee, at the time and place aforesaid did then and there at public auction sell the property hereinafter described to the said Grantee for the sum of $36,000.01, said Grantee being the highest and best bidder therefore.

NOW, THEREFORE, Trustee, in consideration of the premises recited and the sum of the above mentioned bid paid by the Grantee, the receipt whereof is hereby acknowledged, and by virtue of these premises, does **GRANT AND CONVEY,** but without warranty or covenants. expressed or implied, unto the said Grantee, SCOT M. LUDWIG, all that certain property situate in the County of CLARK, State of NEVADA, described as follows:

ATTACHED HERETO AS EXHIBIT 'A' AND INCORPORATED HEREIN AS THOUGH FULLY SET FORTH.

Tax Parcel No: 177-35-610-137

IN WITNESS WHEREOF, the said REGIONAL SERVICE CORPORATION, as Trustee has this day caused it corporate name to be hereunto affixed by its AUTHORIZED AGENT thereunto duly authorized by resolution of its Board of Directors.

Dated: 7/6/2010

REGIONAL SERVICE CORPORATION,
Trustee

By _____
JEAN GREAGOR, AUTHORIZED AGENT

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

On 7/6/2010, before me, the undersigned, a Notary Public in and for said state, duly commissioned and sworn, personally appeared JEAN GREAGOR, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person who executed the within instrument, as AUTHORIZED AGENT, on behalf of the corporation therein named and acknowledged to me that he/she executed the same in his/her authorized capacity, and that by his/her signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

WITNESS my hand and official seal.

_____
NOTARY PUBLIC in and for the State of WA, residing at: Seattle.
My commission expires: 01-20-14

MATTHEW J. NYCE
NOTARY PUBLIC
COMMISSION EXPIRES
01-20-14
STATE OF WASHINGTON

EXHIBIT FOR LEGAL DESCRIPTION

Trustee's Sale 07-FMB-74757

EXHIBIT 'A'

PARCEL I:

UNIT 1411 ("UNIT") IN BUILDING 14 ("BUILDING") AND GARAGE NO. G4 ("GARAGE") AND GARAGE BUILDING NO. G1 AS SHOWN ON THE FINAL PLAT OF HORIZONS AT SEVEN HILLS RANCH, FILED IN BOOK 125 OF PLATS, PAGE 58, IN THE OFFICIAL RECORDS OF THE COUNTY RECORDER, CLARK COUNTY, NEVADA ("PLAT"), AND AS DEFINED AND SET FORTH IN AND SUBJECT TO THAT CERTAIN DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS FOR HORIZONS AT SEVEN HILLS RANCH, RECORDED JULY 6, 2005 AS INSTRUMENT NO. 0003420 IN BOOK 20050706, OFFICIAL RECORDS, CLARK COUNTY, NEVADA ("HORIZONS AT SEVEN HILLS RANCH DECLARATION").

PARCEL II:

TOGETHER WITH AN UNDIVIDED ALLOCATED FRACTIONAL INTEREST IN AND TO THE GENERAL COMMON ELEMENTS, AS SET FORTH IN, AND SUBJECT TO, THE PLAT AND THE HORIZONS AT SEVEN HILLS RANCH DECLARATION.

PARCEL III:

TOGETHER WITH AN EXCLUSIVE INTEREST IN AND TO THOSE LIMITED COMMON ELEMENTS, IF ANY, APPURTENANT TO THE UNIT, AS SET FORTH IN, AND SUBJECT TO, THE PLAT AND THE HORIZONS AT SEVEN HILLS RANCH DECLARATION.

PARCEL IV:

TOGETHER WITH A NON-EXCLUSIVE EASEMENT OF REASONABLE INGRESS TO AND EGRESS FROM THE UNIT, AND OF ENJOYMENT OF THE GENERAL COMMON ELEMENTS, AS SET FORTH IN, AND SUBJECT TO, THE PLAT AND THE HORIZONS AT SEVEN HILLS RANCH DECLARATION.

STATE OF NEVADA
DECLARATION OF VALUE FORM

1. Assessor Parcel Number(s)
   a. 177-35-610-137
   b. _____
   c. _____
   d. _____
2. Type of Property:
   a. ☐ Vacant Land b. ☑ Single Fam. Res.
   c. ☐ Condo/Twnhse d. ☐ 2-4 Plex
   e. ☐ Apt. Bldg f. ☐ Comm'l/Ind'l
   g. ☐ Agricultural h. ☐ Mobile Home
   ☐ Other _____

FOR RECORDER'S OPTIONAL USE ONLY
Book: _____ Page: _____
Date of Recording: _____
Notes:

3. a. Total Value/Sales Price of Property $ 36,000.01
   b. Deed in Lieu of Foreclosure Only (value of property) (_____)
   c. Transfer Tax Value: $ 36,000.01
   d. Real Property Transfer Tax Due $ 186.15
4. **If Exemption Claimed:**
   a. Transfer Tax Exemption per NRS 375.090, Section N/A
   b. Explain Reason for Exemption: N/A
5. Partial Interest: Percentage being transferred: 100.00 %

The undersigned declares and acknowledges, under penalty of perjury, pursuant to NRS 375.060 and NRS 375.110, that the information provided is correct to the best of their information and belief, and can be supported by documentation if called upon to substantiate the information provided herein. Furthermore, the parties agree that disallowance of any claimed exemption, or other determination of additional tax due, may result in a penalty of 10% of the tax due plus interest at 1% per month. Pursuant to NRS 375.030, the Buyer and Seller shall be jointly and severally liable for any additional amount owed.

Signature _____ Capacity Grantor

Signature _____ Capacity _____

SELLER (GRANTOR) INFORMATION (REQUIRED)	**BUYER (GRANTEE) INFORMATION (REQUIRED)**
Print Name: Regional Services Corporation	Print Name: SCOT M. LUDWIG
Address: 616 1st Avenue #500	Address: 900 S 4TH ST #207
City: Seattle	City: LAS VEGAS
State: WA Zip: 98104	State: NV Zip: 89101

COMPANY/PERSON REQUESTING RECORDING (required if not seller or buyer)

Print Name: Kennel Peterson Escrow #: _____
Address: 209 S Stephanie, Ste B123
City: Henderson State: NV Zip: 89012

AS A PUBLIC RECORD THIS FORM MAY BE RECORDED/MICROFILMED

Ex. 7

C (41)

Inst #: 201007210001843
Fees: $16.00 N/C Fee: $25.00
RPTT: $186.15 Ex: #
07/21/2010 12:07:20 PM
Receipt #: 434089
Requestor:
SCOT LUDWIG
Recorded By: TAH Pgs: 4
DEBBIE CONWAY
CLARK COUNTY RECORDER

APN# 177-35-610-137

11-digit Assessor's Parcel Number may be obtained at:
http://redrock.co.clark.nv.us/assrrealprop/ownr.aspx

Quit Claim Deed

Type of Document
(Example: Declaration of Homestead, Quit Claim Deed, etc.)

Recording Requested By:
Konnel Peterson

Return Documents To: and Tax Statements
Name IKon Holdings, LLC
Address 209 S Stephanie, Ste B123
City/State/Zip Henderson NV 89012

This page added to provide additional information required by NRS 111.312 Section 1-2

(An additional recording fee of $1.00 will apply)

This cover page must be typed or printed clearly in black ink only.

CCOR_Coversheet.pdf ~ 06/06/07

QUITCLAIM DEED

FOR VALUE RECEIVED, **SCOT M. LUDWIG** does hereby convey, release, remise and forever quitclaim unto **IKON Holdings, LLC**, as its sole and separate property, whose address is 209 South Stephanie Street, Suite B-123, Henderson, Nevada 89102, all of his right, title and interest in the following described premises, to-wit:

Please see Exhibit "A" attached hereto.

together with their appurtenances, this property is located in Clark County, also known as 950 Seven Hills Drive, Unit 1411, Henderson, Nevada 89052

DATED this 14th day of July, 2010.

SCOT M. LUDWIG

STATE OF IDAHO)
)ss
County of Ada)

On this 14 day of July, 2010, before me, the undersigned, personally appeared **SCOT M. LUDWIG**, known or identified to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal in said County the day and year first above written.

NICOLE LETTUNICH BIELLE NOTARY PUBLIC STATE OF IDAHO

Notary Public
Residing at: Meridian, ID
Comm. Expires: 11/9/11

EXHIBIT 'A'

PARCEL I:

UNIT 1411 ("UNIT") IN BUILDING 14 ("BUILDING") AND GARAGE NO. G4 ("GARAGE") AND GARAGE BUILDING NO. G1 AS SHOWN ON THE FINAL PLAT OF HORIZONS AT SEVEN HILLS RANCH, FILED IN BOOK 125 OF PLATS, PAGE 58, IN THE OFFICIAL RECORDS OF THE COUNTY RECORDER, CLARK COUNTY, NEVADA ("PLAT"), AND AS DEFINED AND SET FORTH IN AND SUBJECT TO THAT CERTAIN DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS FOR HORIZONS AT SEVEN HILLS RANCH, RECORDED JULY 6, 2005 AS INSTRUMENT NO. 0003420 IN BOOK 20050706, OFFICIAL RECORDS, CLARK COUNTY, NEVADA ("HORIZONS AT SEVEN HILLS RANCH DECLARATION").

PARCEL II:

TOGETHER WITH AN UNDIVIDED ALLOCATED FRACTIONAL INTEREST IN AND TO THE GENERAL COMMON ELEMENTS, AS SET FORTH IN, AND SUBJECT TO, THE PLAT AND THE HORIZONS AT SEVEN HILLS RANCH DECLARATION.

PARCEL III:

TOGETHER WITH AN EXCLUSIVE INTEREST IN AND TO THOSE LIMITED COMMON ELEMENTS, IF ANY, APPURTENANT TO THE UNIT, AS SET FORTH IN, AND SUBJECT TO, THE PLAT AND THE HORIZONS AT SEVEN HILLS RANCH DECLARATION.

PARCEL IV:

TOGETHER WITH A NON-EXCLUSIVE EASEMENT OF REASONABLE INGRESS TO AND EGRESS FROM THE UNIT, AND OF ENJOYMENT OF THE GENERAL COMMON ELEMENTS, AS SET FORTH IN, AND SUBJECT TO, THE PLAT AND THE HORIZONS AT SEVEN HILLS RANCH DECLARATION.

STATE OF NEVADA
DECLARATION OF VALUE FORM

1. Assessor Parcel Number(s)
   a. 177-35-610-137
   b. _____
   c. _____
   d. _____
2. Type of Property:
   a. ☐ Vacant Land b. ☒ Single Fam. Res.
   c. ☐ Condo/Twnhse d. ☐ 2-4 Plex
   e. ☐ Apt. Bldg f. ☐ Comm'l/Ind'l
   g. ☐ Agricultural h. ☐ Mobile Home
   ☐ Other _____

FOR RECORDER'S OPTIONAL USE ONLY
Book: _____ Page: _____
Date of Recording: _____
Notes:

3. a. Total Value/Sales Price of Property $ 36,000.01
   b. Deed in Lieu of Foreclosure Only (value of property) (_____)
   c. Transfer Tax Value: $ 36,000.01
   d. Real Property Transfer Tax Due $ 186.15
4. **If Exemption Claimed:**
   a. Transfer Tax Exemption per NRS 375.090, Section N/A
   b. Explain Reason for Exemption: N/A
5. Partial Interest: Percentage being transferred: 100 %

The undersigned declares and acknowledges, under penalty of perjury, pursuant to NRS 375.060 and NRS 375.110, that the information provided is correct to the best of their information and belief, and can be supported by documentation if called upon to substantiate the information provided herein. Furthermore, the parties agree that disallowance of any claimed exemption, or other determination of additional tax due, may result in a penalty of 10% of the tax due plus interest at 1% per month. Pursuant to NRS 375.030, the Buyer and Seller shall be jointly and severally liable for any additional amount owed.

Signature _____ Capacity Grantee

Signature _____ Capacity _____

SELLER (GRANTOR) INFORMATION (REQUIRED)	BUYER (GRANTEE) INFORMATION (REQUIRED)
Print Name: Scot M. Ludwig	Print Name: IKon Holdings, LLC
Address: 900 S 4th #207	Address: 209 S Stephanie, Ste B123
City: Las Vegas	City: Henderson
State: NV Zip: 89101	State: NV Zip: 89012

COMPANY/PERSON REQUESTING RECORDING (required if not seller or buyer)

Print Name: Konnel Peterson
Address: 209 S Stephanie, Ste B123
City: Henderson
Escrow #: _____
State: NV Zip: 89012

AS A PUBLIC RECORD THIS FORM MAY BE RECORDED/MICROFILMED

CCOR_DV_Form.pdf ~ 01/12/09

Ex. 8

APN # 177-35-610-137
N47664

Recorded On: 09/30/2010
Book/Instr: 0002154 Book 20100930
County Of: Clark

NOTICE OF DELINQUENT ASSESSMENT LIEN

In accordance with Nevada Revised Statutes and the Association's declaration of Covenants Conditions and Restrictions (CC&Rs), recorded on July 06, 2005, as instrument number 0003420 Book 20050706, of the official records of Clark County, Nevada, the Horizons at Seven Hills has a lien on the following legally described property.

The property against which the lien is imposed is commonly referred to as 950 Seven Hills Drive #1411 Henderson, NV 89052 and more particularly legally described as: Horizons At Seven Hills Ranch, Plat Book 125, Page 58, Unit 1411, Bldg 14 in the County of Clark.

The owner(s) of record as reflected on the public record as of today's date is (are):
Ikon Holdings LLC

Mailing address(es):
209 S. Stephanie Ste B123, Henderson, NV 890112

*Total amount due through today's date is $6,050.14.

This amount includes late fees, collection fees and interest in the amount of $2,692.64.

* Additional monies will accrue under this claim at the rate of the claimant's regular assessments or special assessments, plus permissible late charges, costs of collection and interest, accruing after the date of the notice.

Nevada Association Services, Inc. is a debt collector. Nevada Association Services, Inc. is attempting to collect a debt. Any information obtained will be used for that purpose.

Dated: September 28, 2010

Winter Henrie

By: Winter Henrie, of Nevada Association Services, Inc., as agent for Horizons at Seven Hills.

When Recorded Mail To:
Nevada Association Services, Inc.
TS #N47664
6224 W. Desert Inn Road, Suite A
Las Vegas, NV 89146
Phone: (702) 804-8885 Toll Free: (888) 627-554

Ex. 9

NEVADA ASSOCIATION SERVICES, INC.

Nevada Association Services
6224 W. Desert Inn Road, Suite A
Las Vegas, NV 89146
Phone: (702) 804-8885
Fax: (702) 804-8887
Toll Free: (888) 627-5544

October 18, 2010

Ikon Holdings LLC
209 S. Stephanie Ste B123
Henderson NV 890112

RE: 950 Seven Hills Drive #1411 / N47664
Horizons at Seven Hills / Ikon Holdings LLC

Dear Sir/Madam:

Per your request the current balance for the above property is $6287.94. If you wish to resolve this matter, please remit payment in full of $6287.94 in the form of a cashier's check or money order on or before 10/28/10.This amount includes October's assessment. Enclosed is an itemized breakdown for your review. If you are unable to remit payment in full, you may wish to fill out and return the enclosed Request for a Payment Plan Form which will be forwarded to the Management Company for approval. If you choose not to reinstate the account, collection proceedings will continue as indicated in previous correspondence.

Sincerely,

Veronica Meraz

Veronica Meraz
Nevada Association Services, Inc.

AR

McIntosh, Ikon Holdings LLC
950 Seven Hills #1411

Horizons @ Seven Hills
Account No: t0016551
TS# N 47664

Assessments, Late Fees, Interest, Attorneys Fees & Collection Costs *Dates of Delinquency: 06/28/2010-10/10*	**Amount** Present rate 07/10-Current	**Amount** Prior rate 01/10-06/10	**Amount** Prior rate 10/09-12/09	**Amount** Water 10/09-12/09	**Amount** Prior rate
Balance forward	0.00	0.00	0.00	0.00	0.00
No. of Months Subject to Interest	0	0	0	0	0
Interest due on Balance Forward	0.00	0.00	0.00	0.00	0.00
Monthly Assessment Amount	190.00	190.00	172.50	25.00	0.00
No. of Months Delinquent	4	6	3	3	0
No. of Months Subject to Interest	0	0	0	0	0
Total Monthly Assessments due	760.00	1,140.00	517.50	75.00	0.00
Late Fee	10.00	10.00	10.00	0.00	0.00
No. of Months Late Fees Incurred	4	6	3	0	0
Total Late Fees due	40.00	60.00	30.00	0.00	0.00
Interest Rate	0.12	0.12	0.12	0.12	0.12
Interest due	53.42	60.02	0.00	0.00	0.00
Special Assessment Due	0.00	0.00	0.00	0.00	0.00
Special Assessment Late Fee	0.00	0.00	0.00	0.00	0.00
Special Assessment Months Late	0	0	0	0	0
Legal Fees	235.00	0.00	0.00	0.00	0.00
Capital Contribution	380.00	0.00	0.00	0.00	0.00
Mgmt Co. Intent to Lien	75.00	0.00	0.00	0.00	0.00
Transfer Fee	300.00	300.00	0.00	0.00	0.00
Management Co. Fee	210.00	0.00	0.00	0.00	0.00
Demand Letter	135.00	135.00	0.00	0.00	0.00
Lien Fees	325.00	325.00	0.00	0.00	0.00
Prepare Lien Release	30.00	30.00	0.00	0.00	0.00
Certified Mailing	32.00	80.00	0.00	0.00	0.00
Recording Costs	28.00	57.00	0.00	0.00	0.00
Pre NOD Ltr	0.00	75.00	0.00	0.00	0.00
Payment Plan Fee	0.00	0.00	0.00	0.00	0.00
Breach letters	0.00	0.00	0.00	0.00	0.00
Personal check returns	0.00	0.00	0.00	0.00	0.00
Statutory Filing Fee	0.00	0.00	0.00	0.00	0.00
Collection Costs on Violations	**0.00**	0.00	0.00	0.00	0.00
Subtotals	$2,603.42	$2,262.02	$547.50	$75.00	$0.00

Credit	**Date**	
		(0.00)
		(0.00)
		(0.00)
		(0.00)
		(0.00)
		(0.00)
		(0.00)
		(0.00)
		(0.00)
		(0.00)
		(0.00)
NAS Fees & Cost		(0.00)
HOA TOTAL		**$6,287.94**

COPY

Foreclosure Fees & Costs	Amount		Attorneys Cre	Date	
					(0.00)
Foreclosure Fees	400.00				(0.00)
Title Report	400.00		Collection Cre	Date	
Posting/Publication	0.00				(0.00)
Courier	0.00				(0.00)
Postponement of Sale	0.00				(0.00)
Conduct Sale	0.00				(0.00)
Prepare/Record Deed	0.00				(0.00)
(other)	0.00				(0.00)
(other)	0.00				(0.00)
(other)	0.00				(0.00)
					(0.00)
SUBTOTAL	$800.00				(0.00)
					(0.00)
					(0.00)
		$6,287.94			
FORECLOSURE TOTAL			Collection Credits SubTotal		$0.00

COPY

Ex. 10

Inst #: 201011180001634
Fees: $15.00
N/C Fee: $0.00
11/18/2010 09:23:54 AM
Receipt #: 582598
Requestor:
FIRST AMERICAN NATIONAL DEF
Recorded By: BRT Pgs: 2
DEBBIE CONWAY
CLARK COUNTY RECORDER

APN # 177-35-610-137
NAS # N47664
First American Title Nevada/NDTS # 4787654AS
PropertyAddress: 950 Seven Hills Drive #1411

NOTICE OF DEFAULT AND ELECTION TO SELL UNDER HOMEOWNERS ASSOCIATION LIEN

IMPORTANT NOTICE

WARNING! IF YOU FAIL TO PAY THE AMOUNT SPECIFIED IN THIS NOTICE, YOU COULD LOSE YOUR HOME, EVEN IF THE AMOUNT IS IN DISPUTE!

IF YOUR PROPERTY IS IN FORECLOSURE BECAUSE YOU ARE BEHIND IN YOUR PAYMENTS IT MAY BE SOLD WITHOUT ANY COURT ACTION and you may have the legal right to bring your account in good standing by paying all your past due payments plus permitted costs and expenses within the time permitted by law for reinstatement of your account. No sale date may be set until ninety (90) days from the date this notice of default was mailed to you. The date this document was mailed to you appears on this notice.

This amount is $7,349.50 as of November 16, 2010 and will increase until your account becomes current.

While your property is in foreclosure, you still must pay other obligations (such as insurance and taxes) required by your note and deed of trust or mortgage, or as required under your Covenants Conditions and Restrictions. If you fail to make future payments on the loan, pay taxes on the property, provide insurance on the property or pay other obligations as required by your note and deed of trust or mortgage, or as required under your Covenants Conditions and Restrictions, the Horizons at Seven Hills (the Association) may insist that you do so in order to reinstate your account in good standing. In addition, the Association may require as a condition to reinstatement that you provide reliable written evidence that you paid all senior liens, property taxes and hazard insurance premiums.

Upon your request, this office will mail you a written itemization of the entire amount you must pay. You may not have to pay the entire unpaid portion of your account, even though full payment was demanded, but you must pay all amounts in default at the time payment is made. However, you and your Association may mutually agree in writing prior to the foreclosure sale to, among other things, 1) provide additional time in which to cure the default by transfer of the property or otherwise; 2) establish a schedule of payments in order to cure your default; or both (1) and (2).

Following the expiration of the time period referred to in the first paragraph of this notice, unless the obligation being foreclosed upon or a separate written agreement between you and your Association permits a longer period, you have only the legal right to stop the sale of your property by paying the entire amount demanded by your Association.

To find out about the amount you must pay, or arrange for payment to stop the foreclosure, or if your property is in foreclosure for any other reason, contact: Nevada Association Services, Inc. on behalf of Horizons at Seven Hills, 6224 W. Desert Inn Road, Suite A, Las Vegas, NV 89146. The phone number is (702) 804-8885 or toll free at (888) 627-5544.

If you have any questions, you should contact a lawyer or the Association which maintains the right of assessment on your property.

NAS # N47664

Notwithstanding the fact that your property is in foreclosure, you may offer your property for sale, provided the sale is concluded prior to the conclusion of the foreclosure.

REMEMBER, YOU MAY LOSE LEGAL RIGHTS IF YOU DO NOT TAKE PROMPT ACTION.

NOTICE IS HEREBY GIVEN THAT NEVADA ASSOCIATION SERVICES, INC.

is the duly appointed agent under the previously mentioned Notice of Delinquent Assessment Lien, with the owner(s) as reflected on said lien being Ikon Holdings LLC, dated September 28, 2010, and recorded on September 30, 2010 as instrument number 0002154 Book 20100930 in the official records of Clark County, Nevada, executed by Horizons at Seven Hills, hereby declares that a breach of the obligation for which the Covenants Conditions and Restrictions, recorded on July 06, 2005, as instrument number 0003420 Book 20050706, as security has occurred in that the payments have not been made of homeowner's assessments due from and all subsequent homeowner's assessments, monthly or otherwise, less credits and offsets, plus late charges, interest, trustee's fees and costs, attorney's fees and costs and Association fees and costs.

That by reason thereof, the Association has deposited with said agent such documents as the Covenants Conditions and Restrictions and documents evidencing the obligations secured thereby, and declares all sums secured thereby due and payable and elects to cause the property to be sold to satisfy the obligations.

Nevada Association Services, Inc. is a debt collector. Nevada Association Services, Inc. is attempting to collect a debt. Any information obtained will be used for that purpose.

Nevada Associations Services, Inc., whose address is 6224 W. Desert Inn Road, Suite A, Las Vegas, NV 89146 is authorized by the association to enforce the lien by sale.

Legal_Description: Horizons At Seven Hills Ranch, Plat Book 125, Page 58, Unit 1411, Bldg 14 in the County of Clark

Dated: November 16, 2010

Autumn Fesel

By: Autumn Fesel, of Nevada Association Services, Inc.
on behalf of Horizons at Seven Hills

When Recorded Mail To:
Nevada Association Services, Inc.
6224 W. Desert Inn Road, Suite A
Las Vegas, NV 89146
(702) 804-8885
(888) 627-5544

Ex. 11

C

Uniform Laws Annotated Currentness
Uniform Common Interest Ownership Act (1982) 1982 (Refs & Annos)
Article 3. Management of the Common Interest Community
→ **§ 3-116. Lien for Assessments.**

(a) The association has a lien on a unit for any assessment levied against that unit or fines imposed against its unit owner from the time the assessment or fine becomes due. Unless the declaration otherwise provides, fees, charges, late charges, fines, and interest charged pursuant to Section 3-102(a)(10), (11), and (12) are enforceable as assessments under this section. If an assessment is payable in instalments, the full amount of the assessment is a lien from the time the first instalment thereof becomes due.

(b) A lien under this section is prior to all other liens and encumbrances on a unit except (i) liens and encumbrances recorded before the recordation of the declaration and, in a cooperative, liens and encumbrances which the association creates, assumes, or takes subject to, (ii) a first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent, or, in a cooperative, the first security interest encumbering only the unit owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent, and (iii) liens for real estate taxes and other governmental assessments or charges against the unit or cooperative. The lien is also prior to all security interests described in clause (ii) above to the extent of the common expense assessments based on the periodic budget adopted by the association pursuant to Section 3-115(a) which would have become due in the absence of acceleration during the 6 months immediately preceding institution of an action to enforce the lien. This subsection does not affect the priority of mechanics' or materialmen's liens, or the priority of liens for other assessments made by the association. [The lien under this section is not subject to the provisions of [insert appropriate reference to state homestead, dower and curtesy, or other exemptions].]

(c) Unless the declaration otherwise provides, if 2 or more associations have liens for assessments created at any time on the same property, those liens have equal priority.

(d) Recording of the declaration constitutes record notice and perfection of the lien. No further recordation of any claim of lien for assessment under this section is required.

(e) A lien for unpaid assessments is extinguished unless proceedings to enforce the lien are instituted within [3] years after the full amount of the assessments becomes due.

(f) This section does not prohibit actions to recover sums for which subsection (a) creates a lien or prohibit an association from taking a deed in lieu of foreclosure.

(g) A judgment or decree in any action brought under this section must include costs and reasonable attorney's fees for the prevailing party.

(h) The association upon written request shall furnish to a unit owner a statement setting forth the amount of unpaid assessments against the unit. If the unit owner's interest is real estate, the statement must be in recordable form. The statement must be furnished within [10] business days after receipt of the request and is binding on the association, the executive board, and every unit owner.

(i) In a cooperative, upon nonpayment of an assessment on a unit, the unit owner may be evicted in the same manner as provided by law in the case of an unlawful holdover by a commercial tenant, and the lien may be foreclosed as provided by this section.

(j) The association's lien may be foreclosed as provided in this subsection:

(1) In a condominium or planned community, the association's lien must be foreclosed in like manner as a mortgage on real estate [or by power of sale under [insert appropriate state statute]];

(2) In a cooperative whose unit owners' interests in the units are real estate (Section 1-105), the association's lien must be foreclosed in like manner as a mortgage on real estate [or by power of sale under [insert appropriate state statute]] [or by power of sale under subsection (k)]; or

(3) In a cooperative whose unit owners' interests in the units are personal property (Section 1-105), the association's lien must be foreclosed in like manner as a security interest under [insert reference to Article 9, Uniform Commercial Code.]

[(4) In the case of foreclosure under [insert reference to state power of sale statute], the association shall give reasonable notice of its action to all lien holders of the unit whose interest would be affected.]

[(k) In a cooperative, if the unit owner's interest in a unit is real estate (Section 1-105):

(1) The association, upon non-payment of assessments and compliance with this subsection, may sell that unit at a public sale or by private negotiation, and at any time and place. Every aspect of the sale, including the method, advertising, time, place, and terms must be reasonable. The association shall give to the unit owner and any lessees of the unit owner reasonable written notice of the time and place of any public sale or, if a private sale is intended, or the intention of entering into a contract to sell and of the time after which a private disposition may be made. The same notice must also be sent to any other person who has a recorded interest in the unit which would be cut off by the sale, but only if the recorded interest was on record 7 weeks before the date specified in the notice as the date of any public sale or 7 weeks before the date specified in the notice as the date after which a private sale may be made. The notices required by this subsection may be sent to any address reasonable in the circumstances. Sale may not be held until 5 weeks after the sending of the notice. The association may buy at any public sale and, if the sale is conducted by a fiduciary or other person not related to the association, at a private sale.

(2) Unless otherwise agreed, the debtor is liable for any deficiency in a foreclosure sale.

(3) The proceeds of a foreclosure sale must be applied in the following order:

(i) the reasonable expenses of sale;

(ii) the reasonable expenses of securing possession before sale; holding, maintaining, and preparing the unit for sale, including payment of taxes and other governmental charges, premiums on hazard and liability insurance, and, to the extent provided for by agreement between the association and the unit owner, reasonable attorney's fees and other legal expenses incurred by the association;

(iii) satisfaction of the association's lien;

(iv) satisfaction in the order of priority of any subordinate claim of record; and

(v) remittance of any excess to the unit owner.

(4) A good faith purchaser for value acquires the unit free of the association's debt that gave rise to the lien under which the foreclosure sale occurred and any subordinate interest, even though the association or other person conducting the sale failed to comply with the requirements of this section. The person conducting the sale shall execute a conveyance to the purchaser sufficient to convey the unit and stating that it is executed by him after a foreclosure of the association's lien by power of sale and that he was empowered to make the sale. Signature and title or authority of the person signing the conveyance as grantor and a recital of the facts of non-payment of the assessment and of the giving of the notices required by this subsection are sufficient proof of the facts recited and of his authority to sign. Further proof of authority is not required even though the association is named as grantee in the conveyance.

(5) At any time before the association has disposed of a unit in a cooperative or entered into a contract for its disposition under the power of sale, the unit owners or the holder of any subordinate security interest may cure the unit owner's default and prevent sale or other disposition by tendering the performance due under the security agreement, including any amounts due because of exercise of a right to accelerate, plus the reasonable expenses of proceeding to foreclosure incurred to the time of tender, including reasonable attorney's fees of the creditor.]

COMMENT

2009 Main Volume

1. To ensure prompt and efficient enforcement of the association's lien for unpaid assessments, such liens should enjoy statutory priority over most other liens. Accordingly, subsection (b) provides that the association's lien takes priority over all other liens and encumbrances except those recorded prior to the recordation of the declaration, those imposed for real estate taxes or other governmental assessments or charges against the unit, and first security interests recorded before the date the assessment became delinquent. However, as to prior first security interests the association's lien does have priority for 6 months' assessments based on the periodic budget. A significant departure from existing practice, the 6 months' priority for the assessment lien strikes an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of lenders. As a practical matter, secured lenders will most likely pay the 6 months' assessments demanded by the association rather than having the association foreclose on the unit. If the lender wishes, an escrow for assessments can be required. Since this provision may conflict with the provisions of some state statutes which forbid some

lending institutions from making loans not secured by first priority liens, the law of each state should be reviewed and amended when necessary.

In cooperatives, the association has legal title to the units and depending on the election made in the declaration pursuant to Section 2-118(i) may have power to create, assume, or take subject to security interests in the units which have priority over the interest of unit owners. Obviously, the cooperative association's lien should not have priority over an interest which the association itself has given, assumed, or taken subject to and subsection (b) expressly so provides.

The special reference to cooperatives in subsection (b)(ii) merely recognizes that in a cooperative both the association and the unit owner have an interest in a unit.

2. Units may be part of two common interest communities. For example, a large real estate development may consist of one or more condominiums which are also part of a larger planned community. In that case, the planned community association might assess the condominium units for the general maintenance expenses of the planned community and the condominium association would assess for the direct maintenance expenses of the building itself. In such a situation, subsection (c) provides that unpaid liens of the two associations have equal priority regardless of the relative time of creation of the two regimes and regardless of the time the assessments were made or became delinquent.

3. Subsection (f) makes clear that the association may have remedies short of foreclosure of its lien that can be used to collect unpaid assessments. The association, for example, might bring an action in debt or breach of contract against a recalcitrant unit owner rather than resorting to foreclosure.

4. The rights of the association against a unit upon nonpayment of an assessment on that unit depends on whether the common interest community is a condominium or planned community on the one hand, or a cooperative on the other.

In the typical cooperative the association will have a substantial underlying mortgage on all or a substantial portion of the real estate in the cooperative and a large part of each unit owner's periodic assessment will go toward payment of that particular unit's proportionate share of the mortgage. If the unit owner fails to pay his assessment on time, the association may be forced into default on its own mortgage payments with consequent possible foreclosure of the underlying mortgage and loss by all unit owners of their interests in the cooperative. Therefore, in the cooperative context it is essential that the cooperative association have a fast and effective remedy for failure of a unit owner to pay his assessment. The act provides in Subsection (i) that upon nonpayment the cooperative unit owner may be evicted in the same manner as an unlawfully holding over commercial tenant. Those rules will ordinarily be the most rapid and efficient rules in the state as to eviction of tenants.

If the unit owner's interest is real estate, subsection (j)(2) then offers the state two alternatives as to nonjudicial foreclosure of a cooperative association's lien. The first alternative is power of sale under any existing state statute authorizing power of sale under mortgages. If there is no power of sale statute or if the legislature chooses to adopt a special power of sale provision for foreclosure of the lien on cooperative units, the state can choose the 2d alternative: power of sale under subsection (k) of this section.

Subsection (k), which is patterned after the power of sale foreclosure provisions of the Uniform Land Transactions Act, is a modern power of sale provision which frees private power of sale foreclosure from many of the costly, time

consuming, and inefficiency producing strictures of most existing private power of sale statutes. At the same time, it provides reasonable protection to the unit owner and junior interests.

If the unit owners' interest in a cooperative is personal property, the association's lien is foreclosed as if it were a security interest under Article 9 of the Uniform Commercial Code. Article 9 foreclosure is generally less expensive and faster than either judicial or power of sale real estate foreclosure. This difference in cost and speed of foreclosure, both for association liens and security interests, is one of the major factors to be considered in choosing whether, under Section 1-105, the unit owner's interest in a cooperative will be real property or personal property. Article 9 foreclosure is currently used in foreclosing security interests in mobile homes, and has been accepted in the various states as a permissible method of foreclosure in that housing area without serious challenge.

In a condominium or planned community, there is not likely to be a substantial underlying mortgage for which unit owners are assessed. Therefore, failure to pay assessments on time will have less serious consequences for the association than in the case of cooperatives. The section provides that the association lien in a condominium or planned community is to be foreclosed according to the rules generally applicable to real estate mortgages in the state rather than setting out a special faster method of foreclosure in the statute.

ACTION IN ADOPTING JURISDICTIONS

2009 Main Volume

Variations from Official Text:

WEST VIRGINIA

Section provides:

"(a) The association has a lien on a unit for any assessment levied against that unit or fines imposed against its unit owner from the time the assessment or fine becomes due. Unless the declaration otherwise provides, fees, charges, late charges, fines and interest charged pursuant to section 3-102(a)(10), (11) and (12) are enforceable as assessments under this section. If an assessment is payable in installments, the full amount of the assessment is a lien from the time the first installment thereof becomes due.

"(b) A lien under this section is prior to all other liens and encumbrances on a unit except (i) liens and encumbrances recorded before the recordation of the declaration and, in a cooperative, liens and encumbrances which the association creates, assumes, or takes subject to, (ii) a first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent, or, in a cooperative, the first security interest encumbering only the unit owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent, and (iii) liens for real estate taxes and other governmental assessments or charges against the unit or cooperative. The lien is also prior to all security interests described in clause (ii) above to the extent of the common expense assessments based on the periodic budget adopted by the association pursuant to section 3-115(a) which would have become due in the absence of acceleration during the six months immediately preceding institution of an action to enforce the lien. This subsection does not affect the priority of mechanics' or materialmen's liens, or the priority of liens for other assessments made by the association. (The lien under this

section is not subject to the provisions of (insert appropriate reference to state homestead, dower and curtesy, or other exemptions).)

"(c) Unless the declaration otherwise provides, if two or more associations have liens for assessments created at any time on the same property, those liens have equal priority.

"(d) A lien for unpaid assessments is extinguished unless proceedings to enforce the lien are instituted within three years after the full amount of the assessments becomes due.

"(e) This section does not prohibit actions to recover sums for which subsection (a) creates a lien or prohibit an association from taking a deed in lieu of foreclosure.

"(f) A judgment or decree in any action brought under this section must include costs and reasonable attorney's fees for the prevailing party.

"(g) The association upon written request shall furnish to a unit owner a statement setting forth the amount of unpaid assessments against the unit. If the unit owner's interest is real estate, the statement must be in recordable form. The statement must be furnished within ten business days after receipt of the request and is binding on the association, the executive board, and every unit owner.

"(h) For the purpose of perfecting and preserving its lien, the association shall give notice to the unit owner in the manner set forth in section one, article two, chapter fifty-six of this code, or by registered or certified mail, return receipt requested, and in a form reasonably calculated to inform the owner of his liability for payment of the assessment. The lien shall be discharged as to subsequent purchasers for value without notice unless the association shall cause to be recorded a notice of the lien in the office of the clerk of the county commission of any county wherein any part of the condominium is located. The notice shall contain:

"(1) A legally sufficient description of the unit;

"(2) The name or names of the owners of the unit;

"(3) The amount of unpaid assessments due together with the date when each fell due; and

"(4) The date of recordation.

"The clerk of the county commission in whose office the notice is recorded shall index the notice in the appropriate deed books and lien books in the name of the unit owners and of the association. The cost of recordation shall be assessed against any unit owner found to be delinquent in a subsequent proceeding to enforce the lien.

"Upon payment of the assessment, the association shall execute a written release of the lien in the manner set forth in section one, article twelve, chapter thirty-eight of this code. This release shall be recorded, at the expense of the

association, in the office of the clerk of the county commission wherein the notice of the lien was filed.

"(i) At any time before the association has disposed of a unit in a cooperative or entered into a contract for its disposition under the power of sale, the unit owners or the holder of any subordinate security interest may cure the unit owner's default and prevent sale or other disposition by tendering the performance due under the security agreement, including any amounts due because of exercise of a right to accelerate, plus the reasonable expenses of proceeding to foreclosure incurred to the time of tender, including reasonable attorney's fees of the creditor."

LIBRARY REFERENCES

2009 Main Volume

Associations ⇦12.
Condominium ⇦12.
Estates in Property ⇦1.
Landlord and Tenant ⇦356.
Westlaw Topic Nos. 41, 89A, 154, 233.
C.J.S. Associations §§ 38, 62 to 65.
C.J.S. Estates §§ 1, 4 to 9, 16 to 26, 139 to 152, 164, 181 to 183, 188, 239 to 241, 264 to 265, 268 to 270, 301 to 302, 304.
C.J.S. Landlord and Tenant § 1437.

NOTES OF DECISIONS

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1. Construction and application

Condominium association which acquired lien on condominium due to unpaid assessments and other charges was entitled under the Minnesota Common Interest Ownership Act (MCIOA) to rely on priority of mortgages as recorded in order to determine which mortgage was the first mortgage with priority over association's lien; association foreclosed its lien and later sought to redeem its interest based not only upon a reliance on the recorded priority, but also on an understanding that it occupied a secondary position to home equity lender's first recorded mortgage, which was actually junior to bank's mortgage, and a superior position to bank's mortgage by virtue of the MCIOA, and association sought to redeem as a bona fide purchaser from home equity lender, as that was the only party with the apparent ability to extinguish the interest of the association. Washington Mutual Bank, F.A. v. Elfelt, Minn.App.2008, 756 N.W.2d 501, review denied. Condominium ⇦12

2. Generally

Condominium association which acquired lien on condominium due to unpaid assessments and other charges was a purchaser in reliance on information in the public record, even though lien came into existence by operation of

condominium declaration, where association clearly foreclosed upon the lien based upon the priority reflected in the county recorder's office, which at that time mistakenly showed that condominium occupied second position after home equity mortgagee but in front of bank which actually held first mortgage position, and association became a purchaser by tendering the highest bid at its foreclosure sale. Washington Mutual Bank, F.A. v. Elfelt, Minn.App.2008, 756 N.W.2d 501, review denied. Condominium ⇐12

Unif. Common Interest Ownership Act (1982) § 3-116, ULA COM INTEREST § 3-116

END OF DOCUMENT

Ex. 12

UNIFORM COMMON INTEREST OWNERSHIP ACT (1994)

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-THIRD YEAR
IN CHICAGO, ILLINOIS
JULY 29 - AUGUST 5, 1994

WITH PREFATORY NOTE AND COMMENTS

Approved by the American Bar Association
Miami, Florida, February 14, 1995

UNIFORM COMMON INTEREST OWNERSHIP ACT (1994)

The Committee that acted for the National Conference of Commissioners on Uniform State Laws in preparing the Uniform Common Interest Ownership Act (1994) was as follows:

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Copies of this Act may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS
676 North St. Clair Street, Suite 1700
Chicago, Illinois 60611
312/915-0195

UNIFORM COMMON INTEREST OWNERSHIP ACT (1994)

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ARTICLE 4. PROTECTION OF PURCHASERS

[OPTIONAL]
ARTICLE 5. ADMINISTRATION AND REGISTRATION
OF COMMON INTEREST COMMUNITIES

individually. Such a situation might arise, for example, where a declarant owns most of the units in the project and wishes to avoid building the costs of each unit separately and crediting payment to each unit. It might also arise in the case of a declarant who, although willing to assume all expenses of the common interest community, is unwilling to make payments for replacement reserves or for other expenses which he expects will ultimately be part of the association's budget. Subsection (a) grants the declarant such flexibility while at the same time providing that once an assessment is made against any unit, all units, including those owned by the declarant, must be assessed for their full portion of the common expense liability.

2. Under subsection (c), the declaration may provide for assessment on a basis other than the allocation made in Section 2-107 as to limited common elements, other expenses benefiting less than all units, insurance costs, and utility costs.

3. If additional units are added to a common interest community after a judgment has been entered against the association, the new units are not assessed any part of the judgment debt. Since unit owners will know the assessment, and since such unpaid judgment assessments would affect the price paid by purchasers of units, it would be complicated and unnecessary to fairness to reallocate judgment assessments when new units are added.

4. Subsection (f) refers to those instances in which various provisions of this Act require that common expense liabilities be reallocated among the units of a common interest community by amendment to the declaration. These provisions include Section 1-107 (Eminent Domain), Section 2-106(d) (expiration of certain leases), Section 2-110 (Exercise of Development Rights), and Section 2-113(b) (subdivision of units).

SECTION 3-116. LIEN FOR ASSESSMENTS.

(a) The association has a statutory lien on a unit for any assessment levied against that unit or fines imposed against its unit owner. Unless the declaration otherwise provides, fees, charges, late charges, fines, and interest charged pursuant to Section 3-102(a)(10), (11), and (12) are enforceable as assessments under this section. If an assessment is payable in installments, the lien is for the full amount of the assessment from the time the first installment thereof becomes due.

(b) A lien under this section is prior to all other liens and encumbrances on a unit except (i) liens and encumbrances recorded before the recordation of the declaration and, in a cooperative, liens and encumbrances which the association

creates, assumes, or takes subject to, (ii) a first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent, or, in a cooperative, the first security interest encumbering only the unit owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent, and (iii) liens for real estate taxes and other governmental assessments or charges against the unit or cooperative. The lien is also prior to all security interests described in clause (ii) above to the extent of the common expense assessments based on the periodic budget adopted by the association pursuant to Section 3-115(a) which would have become due in the absence of acceleration during the six months immediately preceding institution of an action to enforce the lien. This subsection does not affect the priority of mechanics' or materialmen's liens, or the priority of liens for other assessments made by the association. [The lien under this section is not subject to the provisions of [insert appropriate reference to state homestead, dower and curtesy, or other exemptions].]

(c) Unless the declaration otherwise provides, if two or more associations have liens for assessments created at any time on the same property, those liens have equal priority.

(d) Recording of the declaration constitutes record notice and perfection of the lien. No further recordation of any claim of lien for assessment under this section is required.

(e) A lien for unpaid assessments is extinguished unless proceedings to enforce the lien are instituted within [3] years after the full amount of the assessments becomes due.

(f) This section does not prohibit actions to recover sums for which subsection (a) creates a lien or prohibit an association from taking a deed in lieu of foreclosure.

(g) A judgment or decree in any action brought under this section must include costs and reasonable attorney's fees for the prevailing party.

(h) The association upon written request shall furnish to a unit owner a statement setting forth the amount of unpaid assessments against the unit. If the unit owner's interest is real estate, the statement must be in recordable form. The statement must be furnished within [10] business days after receipt of the request and is binding on the association, the executive board, and every unit owner.

(i) In a cooperative, upon nonpayment of an assessment on a unit, the unit owner may be evicted in the same manner as provided by law in the case of an

unlawful holdover by a commercial tenant, and the lien may be foreclosed as provided by this section.

(j) The association's lien may be foreclosed as provided in this subsection:

(1) In a condominium or planned community, the association's lien must be foreclosed in like manner as a mortgage on real estate [or by power of sale under [insert appropriate state statute]];

(2) In a cooperative whose unit owners' interests in the units are real estate (Section 1-105), the association's lien must be foreclosed in like manner as a mortgage on real estate [or by power of sale under [insert appropriate state statute]] [or by power of sale under subsection (k)]; or

(3) In a cooperative whose unit owners' interests in the units are personal property (Section 1-105), the association's lien must be foreclosed in like manner as a security interest under [insert reference to Article 9, Uniform Commercial Code.]

[(4) In the case of foreclosure under [insert reference to state power of sale statute], the association shall give reasonable notice of its action to all lien holders of the unit whose interest would be affected.]

[(k) In a cooperative, if the unit owner's interest in a unit is real estate (Section 1-105):

(1) The association, upon non-payment of assessments and compliance with this subsection, may sell that unit at a public sale or by private negotiation, and at any time and place. Every aspect of the sale, including the method, advertising, time, place, and terms must be reasonable. The association shall give to the unit owner and any lessees of the unit owner reasonable written notice of the time and place of any public sale or, if a private sale is intended, or the intention of entering into a contract to sell and of the time after which a private disposition may be made. The same notice must also be sent to any other person who has a recorded interest in the unit which would be cut off by the sale, but only if the recorded interest was on record seven weeks before the date specified in the notice as the date of any public sale or seven weeks before the date specified in the notice as the date after which a private sale may be made. The notices required by this subsection may be sent to any address reasonable in the circumstances. Sale may not be held until five weeks after the sending of the notice. The association may buy at any public sale and, if the sale is conducted by a fiduciary or other person not related to the association, at a private sale.

(2) Unless otherwise agreed, the debtor is liable for any deficiency in a foreclosure sale.

(3) The proceeds of a foreclosure sale must be applied in the following order:

(i) the reasonable expenses of sale;

(ii) the reasonable expenses of securing possession before sale; holding, maintaining, and preparing the unit for sale, including payment of taxes and other governmental charges, premiums on hazard and liability insurance, and, to the extent provided for by agreement between the association and the unit owner, reasonable attorney's fees and other legal expenses incurred by the association;

(iii) satisfaction of the association's lien;

(iv) satisfaction in the order of priority of any subordinate claim of record; and

(v) remittance of any excess to the unit owner.

(4) A good faith purchaser for value acquires the unit free of the association's debt that gave rise to the lien under which the foreclosure sale occurred and any subordinate interest, even though the association or other person conducting the sale failed to comply with the requirements of this section. The person conducting the sale shall execute a conveyance to the purchaser sufficient to convey the unit and stating that it is executed by him after a foreclosure of the association's lien by power of sale and that he was empowered to make the sale. Signature and title or authority of the person signing the conveyance as grantor and a recital of the facts of non-payment of the assessment and of the giving of the notices required by this subsection are sufficient proof of the facts recited and of his authority to sign. Further proof of authority is not required even though the association is named as grantee in the conveyance.

(5) At any time before the association has disposed of a unit in a cooperative or entered into a contract for its disposition under the power of sale, the unit owners or the holder of any subordinate security interest may cure the unit owner's default and prevent sale or other disposition by tendering the performance due under the security agreement, including any amounts due because of exercise of a right to accelerate, plus the reasonable expenses of proceeding to foreclosure incurred to the time of tender, including reasonable attorney's fees of the creditor.]

(l) In an action by an association to collect assessments or to foreclose a lien for unpaid assessments, the court may appoint a receiver to collect all sums alleged to be due and owing to a unit owner before commencement or during pendency of the action. The receivership is governed by [insert state law generally applicable to receiverships]. The court may order the receiver to pay any sums held by the receiver to the association during pendency of the action to the extent of the association's common expense assessments based on a periodic budget adopted by the association pursuant to Section 3-115.

Comment

1. Section 3-116(a) was amended in 1994 to delete the language "from the time the assessment or fine becomes due." The deleted clause was intended to make clear that the lien was enforceable at the time the assessment became due. Commentators have observed, however, that the language caused confusion with respect to priority issues. The intention of the statute, as demonstrated by the Comments, was that the inchoate statutory lien was the functional equivalent of real estate taxes except with respect to the special priorities identified in subsection (b) of the section. The deletion of the language as suggested makes clear that the lien arises immediately upon the effective date of the statute for old common interest communities and upon recording of the declaration for new common interest communities.

As a result of this deletion, it is clear that in the absence of an exception in a title insurance policy for common charges, a title insurer would be liable for post-insurance obligations which have a priority established prior to the time the policy was issued. This, however, is no different than in other inchoate liens such as real estate taxes and mechanics liens, all of which have become standard exceptions in the title industry.

2. To ensure prompt and efficient enforcement of the association's lien for unpaid assessments, such liens should enjoy statutory priority over most other liens. Accordingly, subsection (b) provides that the association's lien takes priority over all other liens and encumbrances except those recorded prior to the recordation of the declaration, those imposed for real estate taxes or other governmental assessments or charges against the unit, and first security interests recorded before the date the assessment became delinquent. However, as to prior first security interests the association's lien does have priority for six months' assessments based on the periodic budget. A significant departure from existing practice, the six months' priority for the assessment lien strikes an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of lenders. As a practical matter, secured lenders will most likely pay the six months' assessments demanded by the

association rather than having the association foreclose on the unit. If the lender wishes, an escrow for assessments can be required. Since this provision may conflict with the provisions of some state statutes which forbid some lending institutions from making loans not secured by first priority liens, the law of each State should be reviewed and amended when necessary.

In cooperatives, the association has legal title to the units and depending on the election made in the declaration pursuant to Section 2-118(i) may have power to create, assume, or take subject to security interests in the units which have priority over the interest of unit owners. Obviously, the cooperative association's lien should not have priority over an interest which the association itself has given, assumed, or taken subject to and subsection (b) expressly so provides.

The special reference to cooperatives in subsection (b)(ii) merely recognizes that in a cooperative both the association and the unit owner have an interest in a unit.

3. Units may be part of two common interest communities. For example, a large real estate development may consist of one or more condominiums which are also part of a larger planned community. In that case, the planned community association might assess the condominium units for the general maintenance expenses of the planned community and the condominium association would assess for the direct maintenance expenses of the building itself. In such a situation, subsection (c) provides that unpaid liens of the two associations have equal priority regardless of the relative time of creation of the two regimes and regardless of the time the assessments were made or became delinquent.

4. Subsection (f) makes clear that the association may have remedies short of foreclosure of its lien that can be used to collect unpaid assessments. The association, for example, might bring an action in debt or breach of contract against a recalcitrant unit owner rather than resorting to foreclosure.

5. The rights of the association against a unit upon nonpayment of an assessment on that unit depends on whether the common interest community is a condominium or planned community on the one hand, or a cooperative on the other.

In the typical cooperative the association will have a substantial underlying mortgage on all or a substantial portion of the real estate in the cooperative and a large part of each unit owner's periodic assessment will go toward payment of that particular unit's proportionate share of the mortgage. If the unit owner fails to pay his assessment on time, the association may be forced into default on its own mortgage payments with consequent possible foreclosure of the underlying

mortgage and loss by all unit owners of their interests in the cooperative. Therefore, in the cooperative context it is essential that the cooperative association have a fast and effective remedy for failure of a unit owner to pay his assessment. The act provides in subsection (i) that upon nonpayment the cooperative unit owner may be evicted in the same manner as an unlawfully holding over commercial tenant. Those rules will ordinarily be the most rapid and efficient rules in the State as to eviction of tenants.

If the unit owner's interest is real estate, subsection (j)(2) then offers the State two alternatives as to nonjudicial foreclosure of a cooperative association's lien. The first alternative is power of sale under any existing state statute authorizing power of sale under mortgages. If there is no power of sale statute or if the legislature chooses to adopt a special power of sale provision for foreclosure of the lien on cooperative units, the State can choose the 2d alternative: power of sale under subsection (k) of this section.

Subsection (k), which is patterned after the power of sale foreclosure provisions of the Uniform Land Transactions Act, is a modern power of sale provision which frees private power of sale foreclosure from many of the costly, time consuming, and inefficiency producing strictures of most existing private power of sale statutes. At the same time, it provides reasonable protection to the unit owner and junior interests.

If the unit owners' interest in a cooperative is personal property, the association's lien is foreclosed as if it were a security interest under Article 9 of the Uniform Commercial Code. Article 9 foreclosure is generally less expensive and faster than either judicial or power of sale real estate foreclosure. This difference in cost and speed of foreclosure, both for association liens and security interests, is one of the major factors to be considered in choosing whether, under Section 1-105, the unit owner's interest in a cooperative will be real property or personal property. Article 9 foreclosure is currently used in foreclosing security interests in mobile homes, and has been accepted in the various States as a permissible method of foreclosure in that housing area without serious challenge.

In a condominium or planned community, there is not likely to be a substantial underlying mortgage for which unit owners are assessed. Therefore, failure to pay assessments on time will have less serious consequences for the association than in the case of cooperatives. The section provides that the association lien in a condominium or planned community is to be foreclosed according to the rules generally applicable to real estate mortgages in the State rather than setting out a special faster method of foreclosure in the statute.

6. New subsection (l) makes clear that the courts have authority to appoint receivers upon request by associations to aid in collection of common charges.

SECTION 3-117. OTHER LIENS.

(a) In a condominium or planned community:

(1) Except as provided in paragraph (2), a judgment for money against the association [if recorded] [if docketed] [if [insert other procedures required under state law to perfect a lien on real estate as a result of a judgment]], is not a lien on the common elements, but is a lien in favor of the judgment lien holder against all of the units in the common interest community at the time the judgment was entered. No other property of a unit owner is subject to the claims of creditors of the association.

(2) If the association has granted a security interest in the common elements to a creditor of the association pursuant to Section 3-112, the holder of that security interest shall exercise its right against the common elements before its judgment lien on any unit may be enforced.

(3) Whether perfected before or after the creation of the common interest community, if a lien, other than a deed of trust or mortgage (including a judgment lien or lien attributable to work performed or materials supplied before creation of the common interest community), becomes effective against two or more units, the unit owner of an affected unit may pay to the lien holder the amount of the lien attributable to his unit, and the lien holder, upon receipt of payment, promptly shall deliver a release of the lien covering that unit. The amount of the payment must be proportionate to the ratio which that unit owner's common expense liability bears to the common expense liabilities of all unit owners whose units are subject to the lien. After payment, the association may not assess or have a lien against that unit owner's unit for any portion of the common expenses incurred in connection with that lien.

(4) A judgment against the association must be indexed in the name of the common interest community and the association and, when so indexed, is notice of the lien against the units.

(b) In a cooperative:

(1) If the association receives notice of an impending foreclosure on all or any portion of the association's real estate, the association shall promptly transmit a copy of that notice to each unit owner of a unit located within the real

Ex. 13

EXEMPT

(Reprinted with amendments adopted on April 26, 2011)

FIRST REPRINT **S.B. 174**

SENATE BILL NO. 174–SENATOR COPENING

FEBRUARY 17, 2011

Referred to Committee on Judiciary

SUMMARY—Revises provisions relating to common-interest communities. (BDR 10-105)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State: No.

EXPLANATION – Matter in *bolded italics* is new; matter between brackets [~~omitted material~~] is material to be omitted.

AN ACT relating to common-interest communities; revising provisions concerning the removal or abatement of a public nuisance on the exterior of a unit under certain circumstances; revising provisions relating to elections for members of an executive board; revising provisions concerning the removal of members of an executive board; revising provisions governing meetings of units' owners and meetings of an executive board; revising provisions governing the maintenance and repair of walls within a common-interest community; revising insurance and bond requirements for unit-owners' associations and community managers; revising provisions relating to the maintenance and investment of association funds; revising provisions concerning the assessment of certain common expenses against a unit's owner; revising provisions governing the withdrawal of money from the operating account of an association; revising provisions concerning liens on a unit for certain assessments, charges and fees; prohibiting a unit's owner from engaging in certain threatening conduct or retaliatory actions; revising provisions governing the award of punitive damages in certain circumstances; revising provisions governing management agreements and community managers; exempting certain associations from the requirement to obtain a state business license; making various other changes relating to common-interest communities;

requiring the Legislative Commission to appoint a subcommittee to study the laws and regulations governing common-interest communities; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Section 3 of this bill revises the circumstances under which the employees or agents of a unit-owners' association may enter the grounds of a unit which is being foreclosed to abate a nuisance.

Section 4 revises the procedures for the election of members of the executive board when the number of nominations for such membership is equal to or less than the number of members to be elected.

Under existing law, a member of the executive board may be removed from the executive board if the number of votes cast equals at least 35 percent of the total number of voting members of the association and the majority of all votes cast are cast in favor of removal. (NRS 116.31036) **Section 5** of this bill requires the number of votes cast in favor of removal to be at least 35 percent of the total number of voting members of the association and a majority of the votes cast.

Section 6 of this bill revises provisions governing the responsibility to maintain or repair walls within a common-interest community.

Existing law requires notice of a meeting of the executive board to be provided to the units' owners, except in an emergency. (NRS 116.31083) Under **section 8** of this bill, if a meeting of the executive board will consist only of an executive session, the association is not required to provide notice of the meeting to the units' owners. Such a meeting is subject to existing law governing executive sessions and, at its next regular meeting, the executive board must disclose that it met in executive session and must state the general subject matter of the meeting. **Section 8** also authorizes an association to comply with the requirement to include an agenda with a notice of an executive board meeting by stating on the notice that the agenda will be sent at the request of a unit's owner to the electronic mail address of the unit's owner.

Existing law requires the minutes of meetings of the units' owners and the executive board to be provided to any unit's owner upon request and at no charge if those minutes are provided in electronic format. **Sections 7 and 8** of this bill require those minutes to be provided at no charge if provided by electronic mail.

Section 9 of this bill authorizes an executive board to meet in executive session: (1) to discuss the alleged misconduct or professional competence of an association vendor; and (2) to discuss with the vendor the vendor's alleged misconduct, professional competence or failure to perform under a contract.

Existing law requires an applicant for a certificate as a community manager, or the employer of that applicant, to post a bond in a certain form and amount. (NRS 116A.410) **Sections 10 and 19** of this bill remove this requirement and require an association to provide crime insurance that includes coverage for dishonest acts by certain persons.

Section 11 of this bill: (1) revises provisions governing the deposit, maintenance and investment of association funds; and (2) exempts petty cash and change funds from the requirement to deposit all association funds in certain financial institutions. **Section 13** of this bill requires the executive board to make available to each unit's owner the policy for the investment of association funds at the same time and in the same manner as the budget is made available to the units' owners.

Section 12 of this bill amends provisions concerning the imposition of interest charges on late assessments to provide that: (1) interest may, but is not required to, accrue; and (2) interest may accrue at a rate less than the rate specified in statute.

Section 14 of this bill authorizes money in the operating account of an association to be withdrawn without the required signatures to make certain electronic transfers of money.

Existing law provides that an association has a lien on a unit for certain charges imposed against a unit's owner. (NRS 116.3116) **Section 15** of this bill revises provisions governing the amount of the association's lien which is entitled to priority over the first security interest on the unit.

Existing law prohibits a member of the executive board of an association, a community manager and officers, employees and agents of an association from taking, or directing or encouraging, retaliatory action against a unit's owner under certain circumstances. (NRS 116.31183) **Section 16** of this bill prohibits a unit's owner from taking, or directing or encouraging, retaliatory action against a member of the executive board, an officer, employee or agent of an association, or another unit's owner under certain circumstances. **Section 16** also prohibits a unit's owner from making certain threats against a member of the executive board, an officer, agent or employee of the association or another unit's owner.

Section 18 of this bill adds community managers to a prohibition against punitive damages being awarded in certain circumstances.

Section 20 of this bill revises the requirements for management agreements entered into between an association and a community manager, including, without limitation, removing the requirement that the management agreement include provisions for dispute resolution. **Section 20** also requires a community manager to transfer the electronic books, records and papers of a client in a certain manner.

Section 21 of this bill revises the duty of a community manager to deposit, maintain and invest association funds so that such activities must be performed at the client's direction.

Existing law exempts nonprofit corporations from the requirement to obtain a state business license. (NRS 76.020, 76.100) **Sections 22 and 23** of this bill exempt from this requirement associations which are organized as certain other types of nonprofit or cooperative organizations.

Section 24 of this bill requires the Legislative Commission to appoint a subcommittee consisting of three members of the Senate and three members of the Assembly to conduct a study during the 2011-2013 interim concerning the laws and regulations governing common-interest communities.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. (Deleted by amendment.)

Sec. 2. (Deleted by amendment.)

Sec. 3. NRS 116.310312 is hereby amended to read as follows:

116.310312 1. A person who holds a security interest in a unit must provide the association with the person's contact information as soon as reasonably practicable, but not later than 30 days after the person:

(a) Files an action for recovery of a debt or enforcement of any right secured by the unit pursuant to NRS 40.430; or

(b) Records or has recorded on his or her behalf a notice of a breach of obligation secured by the unit and the election to sell or have the unit sold pursuant to NRS 107.080.

2. If an action or notice described in subsection 1 has been filed or recorded regarding a unit and the association has provided the unit's owner with notice and an opportunity for a hearing in the manner provided in NRS 116.31031, the association, including its employees, agents and community manager, may, but is not required to, enter the grounds of the unit, whether or not the unit is vacant, to take any of the following actions if the unit's owner refuses or fails to take any action or comply with any requirement imposed on the unit's owner within the time specified by the association as a result of the hearing:

(a) Maintain the exterior of the unit in accordance with the standards set forth in the governing documents, including, without limitation, any provisions governing maintenance, standing water or snow removal.

(b) Remove or abate a public nuisance on the exterior of the unit which ~~[:]~~ ***adversely affects the use and enjoyment of any nearby unit and:***

(1) Is visible from any common area of the community or public streets;

(2) Threatens the health or safety of the residents of the common-interest community; ***or***

(3) Results in blighting or deterioration of the unit or surrounding area . ~~[; and~~

~~(4) Adversely affects the use and enjoyment of nearby units.]~~

3. If a unit is vacant and the association has provided the unit's owner with notice and an opportunity for a hearing in the manner provided in NRS 116.31031, the association, including its employees, agents and community manager, may enter the grounds of the unit to maintain the exterior of the unit or abate a public nuisance as described in subsection 2 if the unit's owner refuses or fails to do so.

4. The association may order that the costs of any maintenance or abatement conducted pursuant to subsection 2 or 3, including, without limitation, reasonable inspection fees, notification and collection costs and interest, be charged against the unit. The association shall keep a record of such costs and interest charged against the unit and has a lien on the unit for any unpaid amount of the charges. The lien may be foreclosed under NRS 116.31162 to 116.31168, inclusive.

5. A lien described in subsection 4 bears interest from the date that the charges become due at a rate determined pursuant to NRS 17.130 until the charges, including all interest due, are paid.

6. Except as otherwise provided in this subsection, a lien described in subsection 4 is prior and superior to all liens, claims, encumbrances and titles other than the liens described in paragraphs (a) and (c) of subsection 2 of NRS 116.3116. If the federal regulations of the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien, the period during which the lien is prior and superior to other security interests shall be determined in accordance with those federal regulations. Notwithstanding the federal regulations, the period of priority of the lien must not be less than the 6 months immediately preceding the institution of an action to enforce the lien.

7. A person who purchases or acquires a unit at a foreclosure sale pursuant to NRS 40.430 or a trustee's sale pursuant to NRS 107.080 is bound by the governing documents of the association and shall maintain the exterior of the unit in accordance with the governing documents of the association. Such a unit may only be removed from a common-interest community in accordance with the governing documents pursuant to this chapter.

8. Notwithstanding any other provision of law, an association, its directors or members of the executive board, employees, agents or community manager who enter the grounds of a unit pursuant to this section are not liable for trespass.

9. As used in this section:

(a) "Exterior of the unit" includes, without limitation, all landscaping outside of a unit and the exterior of all property exclusively owned by the unit owner.

(b) "Vacant" means a unit:

(1) Which reasonably appears to be unoccupied;

(2) On which the owner has failed to maintain the exterior to the standards set forth in the governing documents the association; and

(3) On which the owner has failed to pay assessments for more than 60 days.

Sec. 4. NRS 116.31034 is hereby amended to read as follows:

116.31034 1. Except as otherwise provided in subsection 5 of NRS 116.212, not later than the termination of any period of declarant's control, the units' owners shall elect an executive board of at least three members, all of whom must be units' owners. The executive board shall elect the officers of the association. Unless the governing documents provide otherwise, the officers of the association are not required to be units' owners. The members of the executive board and the officers of the association shall take office upon election.

2. The term of office of a member of the executive board may not exceed 3 years, except for members who are appointed by the declarant. Unless the governing documents provide otherwise, there is no limitation on the number of terms that a person may serve as a member of the executive board.

3. The governing documents of the association must provide for terms of office that are staggered in such a manner that, to the extent possible, an equal number of members of the executive board are elected at each election. The provisions of this subsection do not apply to:

(a) Members of the executive board who are appointed by the declarant; and

(b) Members of the executive board who serve a term of 1 year or less.

4. Not less than 30 days before the preparation of a ballot for the election of members of the executive board, the secretary or other officer specified in the bylaws of the association shall cause notice to be given to each unit's owner of the unit's owner's eligibility to serve as a member of the executive board. Each unit's owner who is qualified to serve as a member of the executive board may have his or her name placed on the ballot along with the names of the nominees selected by the members of the executive board or a nominating committee established by the association.

5. ~~[Before the secretary or other officer specified in the bylaws of the association causes notice to be given to each unit's owner of his or her eligibility to serve as a member of the executive board pursuant to subsection 4,]~~ ***Unless*** the executive board ~~[may determine that]~~ ***determines otherwise,*** if, at the closing of the prescribed period for nominations for membership on the executive board, the number of candidates nominated for membership on the executive board is equal to or less than the number of members to be elected to the executive board at the election ***:*** ~~[, then the secretary or other officer specified in the bylaws of the association will cause notice to be given to each unit's owner informing each unit's owner that:]~~

(a) The association ~~[will not]~~ ***may*** prepare or mail ~~[any]~~ ballots to units' owners pursuant to this section ~~[and the]~~ ***;***

(b) The nominated candidates shall be deemed to be duly elected to the executive board ~~[unless:~~

~~(1) A unit's owner who is qualified to serve on the executive board nominates himself or herself for membership on the executive board by submitting a nomination to the executive board within 30 days after the notice provided by this subsection; and~~

~~(2) The number of units' owners who submit such a nomination causes the number of candidates nominated for~~

~~membership on the executive board to be greater than the number of members to be elected to the executive board.~~

~~(b) Each unit's owner who is qualified to serve as a member of the executive board may nominate himself or herself for membership on the executive board by submitting a nomination to the executive board within 30 days after the notice provided by this subsection.~~] *effective at the beginning of the next regularly scheduled meeting of the executive board following the expiration of the terms of the previous members of the executive board;*

(c) The disclosures of the nominated candidates required by subsection 7 must be made available to a unit's owner upon his or her request at no charge; and

(d) Not less than 10 days before the next regularly scheduled meeting of the executive board, the association must send to each unit's owner notification that the candidates nominated have been elected to the executive board.

6. ~~[If the notice described in subsection 5 is given and if, at the closing of the prescribed period for nominations for membership on the executive board described in subsection 5, the number of candidates nominated for membership on the executive board is equal to or less than the number of members to be elected to the executive board, then:~~

~~(a) The association will not prepare or mail any ballots to units' owners pursuant to this section;~~

~~(b) The nominated candidates shall be deemed to be duly elected to the executive board not later than 30 days after the date of the closing of the period for nominations described in subsection 5; and~~

~~(c) The association shall send to each unit's owner notification that the candidates nominated have been elected to the executive board.~~

~~7.~~] If , ~~[the notice described in subsection 5 is given and if,]~~ at the closing of the prescribed period for nominations for membership on the executive board , ~~[described in subsection 5,]~~ the number of candidates nominated for membership on the executive board is greater than the number of members to be elected to the executive board, then the association ~~[shall:]~~ *must:*

(a) Prepare and mail ballots to the units' owners pursuant to this section; and

(b) Conduct an election for membership on the executive board pursuant to this section.

~~[8.]~~ *7.* Each person who is nominated as a candidate for a member of the executive board pursuant to subsection 4 ~~[or 5]~~ must:

(a) Make a good faith effort to disclose any financial, business, professional or personal relationship or interest that would result or would appear to a reasonable person to result in a potential conflict

of interest for the candidate if the candidate were to be elected to serve as a member of the executive board; and

(b) Disclose whether the candidate is a member in good standing. For the purposes of this paragraph, a candidate shall not be deemed to be in "good standing" if the candidate has any unpaid and past due assessments or construction penalties that are required to be paid to the association.

➥ The candidate must make all disclosures required pursuant to this subsection in writing to the association with his or her candidacy information. Except as otherwise provided in this subsection, the association shall distribute the disclosures, on behalf of the candidate, to each member of the association with the ballot or, in the event ballots are not prepared and mailed pursuant to subsection ~~[6.]~~ *5,* in the next regular mailing of the association. The association is not obligated to distribute any disclosure pursuant to this subsection if the disclosure contains information that is believed to be defamatory, libelous or profane.

~~[9.]~~ *8.* Unless a person is appointed by the declarant:

(a) A person may not be a member of the executive board or an officer of the association if the person, the person's spouse or the person's parent or child, by blood, marriage or adoption, performs the duties of a community manager for that association.

(b) A person may not be a member of the executive board of a master association or an officer of that master association if the person, the person's spouse or the person's parent or child, by blood, marriage or adoption, performs the duties of a community manager for:

(1) That master association; or

(2) Any association that is subject to the governing documents of that master association.

~~[10.]~~ *9.* An officer, employee, agent or director of a corporate owner of a unit, a trustee or designated beneficiary of a trust that owns a unit, a partner of a partnership that owns a unit, a member or manager of a limited-liability company that owns a unit, and a fiduciary of an estate that owns a unit may be an officer of the association or a member of the executive board. In all events where the person serving or offering to serve as an officer of the association or a member of the executive board is not the record owner, the person shall file proof in the records of the association that:

(a) The person is associated with the corporate owner, trust, partnership, limited-liability company or estate as required by this subsection; and

(b) Identifies the unit or units owned by the corporate owner, trust, partnership, limited-liability company or estate.

10. Except as otherwise provided in subsection ~~[6]~~ *5* or NRS 116.31105, the election of any member of the executive board must be conducted by secret written ballot in the following manner:

(a) The secretary or other officer specified in the bylaws of the association shall cause a secret ballot and a return envelope to be sent, prepaid by United States mail, to the mailing address of each unit within the common-interest community or to any other mailing address designated in writing by the unit's owner.

(b) Each unit's owner must be provided with at least 15 days after the date the secret written ballot is mailed to the unit's owner to return the secret written ballot to the association.

(c) A quorum is not required for the election of any member of the executive board.

(d) Only the secret written ballots that are returned to the association may be counted to determine the outcome of the election.

(e) The secret written ballots must be opened and counted at a meeting of the association. A quorum is not required to be present when the secret written ballots are opened and counted at the meeting.

(f) The incumbent members of the executive board and each person whose name is placed on the ballot as a candidate for a member of the executive board may not possess, be given access to or participate in the opening or counting of the secret written ballots that are returned to the association before those secret written ballots have been opened and counted at a meeting of the association.

~~[12.]~~ *11.* An association shall not adopt any rule or regulation that has the effect of prohibiting or unreasonably interfering with a candidate in the candidate's campaign for election as a member of the executive board, except that the candidate's campaign may be limited to 90 days before the date that ballots are required to be returned to the association. A candidate may request that the secretary or other officer specified in the bylaws of the association send, 30 days before the date of the election and at the association's expense, to the mailing address of each unit within the common-interest community or to any other mailing address designated in writing by the unit's owner a candidate informational statement. The candidate informational statement:

(a) Must be no longer than a single, typed page;

(b) Must not contain any defamatory, libelous or profane information; and

(c) May be sent with the secret ballot mailed pursuant to subsection ~~[11]~~ *10* or in a separate mailing.

➥ The association and its directors, officers, employees and agents are immune from criminal or civil liability for any act or omission

which arises out of the publication or disclosure of any information related to any person and which occurs in the course of carrying out any duties required pursuant to this subsection.

~~[13.]~~ *12.* Each member of the executive board shall, within 90 days after his or her appointment or election, certify in writing to the association, on a form prescribed by the Administrator, that the member has read and understands the governing documents of the association and the provisions of this chapter to the best of his or her ability. The Administrator may require the association to submit a copy of the certification of each member of the executive board of that association at the time the association registers with the Ombudsman pursuant to NRS 116.31158.

Sec. 5. NRS 116.31036 is hereby amended to read as follows:

116.31036 1. Notwithstanding any provision of the declaration or bylaws to the contrary, any member of the executive board, other than a member appointed by the declarant, may be removed from the executive board, with or without cause, if at a removal election held pursuant to this section ~~[:~~

~~(a) The]~~ *, the* number of votes cast *in favor of removal* constitutes ~~[at]~~ *:*

(a) At least 35 percent of the total number of voting members of the association; and

(b) At least a majority of all votes cast in that removal election . ~~[are cast in favor of removal.]~~

2. *A removal election may be called by units' owners constituting at least 10 percent, or any lower percentage specified in the bylaws, of the total number of voting members of the association. To call a removal election, the units' owners must submit a written petition which is signed by the required percentage of the total number of voting members of the association pursuant to this subsection and which is mailed, return receipt requested, or served by a process server to the executive board or the community manager for the association. If a removal election is called pursuant to this subsection and:*

(a) The voting rights of the units' owners will be exercised through the use of secret written ballots pursuant to this section:

(1) The secret written ballots for the removal election must be sent in the manner required by this section not less than 15 days or more than 60 days after the date on which the petition is received; and

(2) The executive board must set the date for the meeting to open and count the secret written ballots so that the meeting is held not more than 15 days after the deadline for returning the secret written ballots and not later than 90 days after the date on which the petition was received.

(b) The voting rights of the owners of time shares will be exercised by delegates or representatives as set forth in NRS 116.31105, the executive board must set the date for the removal election so that the removal election is held not less than 15 days or more than 90 days after the date on which the petition is received.

➥ The association shall not adopt any rule or regulation which prevents or unreasonably interferes with the collection of the required percentage of signatures for a petition pursuant to this subsection.

3. Except as otherwise provided in NRS 116.31105, the removal of any member of the executive board must be conducted by secret written ballot in the following manner:

(a) The secretary or other officer specified in the bylaws of the association shall cause a secret ballot and a return envelope to be sent, prepaid by United States mail, to the mailing address of each unit within the common-interest community or to any other mailing address designated in writing by the unit's owner.

(b) Each unit's owner must be provided with at least 15 days after the date the secret written ballot is mailed to the unit's owner to return the secret written ballot to the association.

(c) Only the secret written ballots that are returned to the association may be counted to determine the outcome.

(d) The secret written ballots must be opened and counted at a meeting of the association. A quorum is not required to be present when the secret written ballots are opened and counted at the meeting.

(e) The incumbent members of the executive board, including, without limitation, the member who is subject to the removal, may not possess, be given access to or participate in the opening or counting of the secret written ballots that are returned to the association before those secret written ballots have been opened and counted at a meeting of the association.

~~[3.]~~ *4.* If a member of an executive board is named as a respondent or sued for liability for actions undertaken in his or her role as a member of the board, the association shall indemnify the member for his or her losses or claims, and undertake all costs of defense, unless it is proven that the member acted with willful or wanton misfeasance or with gross negligence. After such proof, the association is no longer liable for the cost of defense, and may recover costs already expended from the member of the executive board who so acted. ~~[Members of the executive board are not personally liable to the victims of crimes occurring on the property. Punitive damages may not be recovered against:~~

~~(a) The association;~~

~~(b) The members of the executive board for acts or omissions that occur in their official capacity as members of the executive board; or~~

~~(c) The officers of the association for acts or omissions that occur in their capacity as officers of the association.~~

~~4. The provisions of this section do not prohibit the Commission from taking any disciplinary action against a member of an executive board pursuant to NRS 116.745 to 116.795, inclusive.]~~

Sec. 6. NRS 116.31073 is hereby amended to read as follows:

116.31073 1. Except as otherwise provided in subsection 2 and NRS 116.31135, ~~[the association is responsible]~~ ***unless a person or governmental entity has accepted responsibility in writing*** for the maintenance, repair, restoration and replacement of ~~[any security]~~ ***a*** wall which is located within ~~[the]~~ ***a*** common-interest community ~~[.~~

~~2. The provisions of this section do not apply if the governing documents provide that a unit's owner or an entity other than the association]~~ ***or any part thereof, the owner of the real property on which the wall is located or any other person specified in the governing documents of the common-interest community*** is responsible for the maintenance, repair, restoration and replacement of the ~~[security]~~ wall.

~~[3. For the purpose of carrying out the]~~

2. Any maintenance, repair, restoration ~~[and]~~ ***or*** replacement of a ~~[security]~~ wall ~~[pursuant to this section:~~

~~(a) The association, the members of its executive board and its officers, employees, agents and community manager may enter the grounds of a unit after providing written notice and, notwithstanding any other provision of law, are not liable for trespass.~~

~~(b) Any such maintenance, repair, restoration and replacement of a security wall must be performed:~~

~~(1) During normal business hours;~~

~~(2) Within a reasonable length of time; and~~

~~(3) In a manner that does not adversely affect access to a unit or the legal rights of]~~ ***that is performed because of any damage caused by the willful or negligent act of*** a unit's owner ~~[to enjoy the use of his or her unit.~~

~~(c) Notwithstanding any other provision of law, the executive board is prohibited from imposing an assessment without obtaining prior approval of the units' owners unless the total amount of the assessment is less than 5 percent of the annual budget of the association.~~

~~4. As used in this section, "security wall" means any wall composed of stone, brick, concrete, concrete blocks, masonry or~~

~~similar building material, including, without limitation, ornamental iron or other fencing material, together with footings, pilasters, outriggers, grillwork, gates and other appurtenances, constructed around the perimeter of a residential subdivision with respect to which a final map has been recorded pursuant to NRS 278.360 to 278.460, inclusive, to protect the several tracts in the subdivision and their occupants from vandalism.]~~ ***, a tenant or an invitee of the unit's owner or tenant is the responsibility of the unit's owner.***

Sec. 7. NRS 116.3108 is hereby amended to read as follows:

116.3108 1. A meeting of the units' owners must be held at least once each year. If the governing documents do not designate an annual meeting date of the units' owners, a meeting of the units' owners must be held 1 year after the date of the last meeting of the units' owners. If the units' owners have not held a meeting for 1 year, a meeting of the units' owners must be held on the following March 1.

2. Special meetings of the units' owners may be called by the president, by a majority of the executive board or by units' owners constituting at least 10 percent, or any lower percentage specified in the bylaws, of the total number of voting members of the association. ~~[The same number of units' owners may also call a removal election pursuant to NRS 116.31036.]~~ To call a special meeting , ~~[or a removal election,]~~ the units' owners must submit a written petition which is signed by the required percentage of the total number of voting members of the association pursuant to this section and which is mailed, return receipt requested, or served by a process server to the executive board or the community manager for the association. ~~[If the petition calls for a special meeting, the]~~ *The* executive board shall set the date for the special meeting so that the special meeting is held not less than 15 days or more than 60 days after the date on which the petition is received ~~[. If the petition calls for a removal election and:~~

~~(a) The voting rights of the owners of time shares will be exercised by delegates or representatives as set forth in NRS 116.31105, the executive board shall set the date for the removal election so that the removal election is held not less than 15 days or more than 60 days after the date on which the petition is received; or~~

~~(b) The voting rights of the units' owners will be exercised through the use of secret written ballots pursuant to NRS 116.31036, the secret written ballots for the removal election must be sent in the manner required by NRS 116.31036 not less than 15 days or more than 60 days after the date on which the petition is received, and the executive board shall set the date for the meeting to open and count the secret written ballots so that the meeting is held not more than 15 days after the deadline for returning the secret written ballots.~~

~~]~~ , ***the request for a special meeting is received from the president or the vote of the majority of the executive board to call a special meeting, whichever is applicable.*** The association shall not adopt any rule or regulation which prevents or unreasonably interferes with the collection of the required percentage of signatures for a petition pursuant to this subsection.

3. Not less than 15 days or more than 60 days in advance of any meeting of the units' owners, the secretary or other officer specified in the bylaws shall cause notice of the meeting to be hand-delivered, sent prepaid by United States mail to the mailing address of each unit or to any other mailing address designated in writing by the unit's owner or, if the association offers to send notice by electronic mail, sent by electronic mail at the request of the unit's owner to an electronic mail address designated in writing by the unit's owner. The notice of the meeting must state the time and place of the meeting and include a copy of the agenda for the meeting. The notice must include notification of the right of a unit's owner to:

(a) Have a copy of the minutes or a summary of the minutes of the meeting provided to the unit's owner upon request, ~~[in]~~ ***by*** electronic ~~[format]~~ ***mail*** at no charge to the unit's owner or, if the association is unable to provide the copy or summary ~~[in]~~ ***by*** electronic ~~[format,]~~ ***mail,*** in paper format at a cost not to exceed 25 cents per page for the first 10 pages, and 10 cents per page thereafter.

(b) Speak to the association or executive board, unless the executive board is meeting in executive session.

4. The agenda for a meeting of the units' owners must consist of:

(a) A clear and complete statement of the topics scheduled to be considered during the meeting, including, without limitation, any proposed amendment to the declaration or bylaws, any fees or assessments to be imposed or increased by the association, any budgetary changes and any proposal to remove an officer of the association or member of the executive board.

(b) A list describing the items on which action may be taken and clearly denoting that action may be taken on those items. In an emergency, the units' owners may take action on an item which is not listed on the agenda as an item on which action may be taken.

(c) A period devoted to comments by units' owners and discussion of those comments. Except in emergencies, no action may be taken upon a matter raised under this item of the agenda until the matter itself has been specifically included on an agenda as an item upon which action may be taken pursuant to paragraph (b).

5. If the association adopts a policy imposing fines for any violations of the governing documents of the association, the secretary or other officer specified in the bylaws shall prepare and cause to be hand-delivered or sent prepaid by United States mail to the mailing address of each unit or to any other mailing address designated in writing by the unit's owner, a schedule of the fines that may be imposed for those violations.

6. The secretary or other officer specified in the bylaws shall cause minutes to be recorded or otherwise taken at each meeting of the units' owners. Not more than 30 days after each such meeting, the secretary or other officer specified in the bylaws shall cause the minutes or a summary of the minutes of the meeting to be made available to the units' owners. Except as otherwise provided in this subsection, a copy of the minutes or a summary of the minutes must be provided to any unit's owner upon request, ~~[in]~~ ***by*** electronic ~~[format]~~ ***mail*** at no charge to the unit's owner or, if the association is unable to provide the copy or summary ~~[in]~~ electronic ~~[format,]~~ ***mail,*** in paper format at a cost not to exceed 25 cents per page for the first 10 pages, and 10 cents per page thereafter.

7. Except as otherwise provided in subsection 8, the minutes of each meeting of the units' owners must include:

(a) The date, time and place of the meeting;

(b) The substance of all matters proposed, discussed or decided at the meeting; and

(c) The substance of remarks made by any unit's owner at the meeting if the unit's owner requests that the minutes reflect his or her remarks or, if the unit's owner has prepared written remarks, a copy of his or her prepared remarks if the unit's owner submits a copy for inclusion.

8. The executive board may establish reasonable limitations on materials, remarks or other information to be included in the minutes of a meeting of the units' owners.

9. The association shall maintain the minutes of each meeting of the units' owners until the common-interest community is terminated.

10. A unit's owner may record on audiotape or any other means of sound reproduction a meeting of the units' owners if the unit's owner, before recording the meeting, provides notice of his or her intent to record the meeting to the other units' owners who are in attendance at the meeting.

11. The units' owners may approve, at the annual meeting of the units' owners, the minutes of the prior annual meeting of the units' owners and the minutes of any prior special meetings of the units' owners. A quorum is not required to be present when the units' owners approve the minutes.

12. As used in this section, "emergency" means any occurrence or combination of occurrences that:

(a) Could not have been reasonably foreseen;

(b) Affects the health, welfare and safety of the units' owners or residents of the common-interest community;

(c) Requires the immediate attention of, and possible action by, the executive board; and

(d) Makes it impracticable to comply with the provisions of subsection 3 or 4.

Sec. 8. NRS 116.31083 is hereby amended to read as follows:

116.31083 1. A meeting of the executive board must be held at least once every quarter, and not less than once every 100 days and must be held at a time other than during standard business hours at least twice annually.

2. Except ***as otherwise provided in subsection 3 or*** in an emergency or unless the bylaws of an association require a longer period of notice, the secretary or other officer specified in the bylaws of the association shall, not less than 10 days before the date of a meeting of the executive board, cause notice of the meeting to be given to the units' owners. Such notice must be:

(a) Sent prepaid by United States mail to the mailing address of each unit within the common-interest community or to any other mailing address designated in writing by the unit's owner;

(b) If the association offers to send notice by electronic mail, sent by electronic mail at the request of the unit's owner to an electronic mail address designated in writing by the unit's owner; or

(c) Published in a newsletter or other similar publication that is circulated to each unit's owner.

3. ***If a meeting of the executive board will consist only of the executive board meeting in executive session, the secretary or other officer specified in the bylaws of the association is not required to cause notice of the meeting to be given to the units' owners. Such a meeting is subject to the provisions of subsections 2 to 7, inclusive, of NRS 116.31085. At the next regular meeting of the executive board, the executive board shall disclose that the executive board met in executive session pursuant to this subsection and state the general subject matter of the meeting.***

4. In an emergency, the secretary or other officer specified in the bylaws of the association shall, if practicable, cause notice of the meeting to be sent prepaid by United States mail to the mailing address of each unit within the common-interest community. If delivery of the notice in this manner is impracticable, the notice must be hand-delivered to each unit within the common-interest community or posted in a prominent place or places within the common elements of the association.

~~[4.]~~ *5.* The notice of a meeting of the executive board must state the time and place of the meeting and include a copy of the agenda for the meeting , ~~[or]~~ the date on which and the locations where copies of the agenda may be conveniently obtained by the units' owners ~~[.]~~ ***or, if the association offers to send notice of a meeting of the executive board by electronic mail, a statement that an agenda will be sent by electronic mail at the request of a unit's owner to an electronic mail address designated in writing by the unit's owner.*** The notice must include notification of the right of a unit's owner to:

(a) Have a copy of the audio recording, the minutes or a summary of the minutes of the meeting provided to the unit's owner upon request, ~~[in]~~ ***by*** electronic ~~[format]~~ ***mail*** at no charge to the unit's owner or, if the association is unable to provide the copy or summary ~~[in]~~ ***by*** electronic ~~[format,]~~ ***mail,*** in paper format at a cost not to exceed 25 cents per page for the first 10 pages, and 10 cents per page thereafter.

(b) Speak to the association or executive board, unless the executive board is meeting in executive session.

~~[5.]~~ *6.* The agenda of the meeting of the executive board must comply with the provisions of subsection 4 of NRS 116.3108. A period required to be devoted to comments by the units' owners and discussion of those comments must be scheduled for both the beginning and the end of each meeting. During the period devoted to comments by the units' owners and discussion of those comments at the beginning of each meeting, comments by the units' owners and discussion of those comments must be limited to items listed on the agenda. In an emergency, the executive board may take action on an item which is not listed on the agenda as an item on which action may be taken.

~~[6.]~~ *7.* At least once every quarter, and not less than once every 100 days, unless the declaration or bylaws of the association impose more stringent standards, the executive board shall review, at a minimum, the following financial information at one of its meetings:

(a) A current year-to-date financial statement of the association;

(b) A current year-to-date schedule of revenues and expenses for the operating account and the reserve account, compared to the budget for those accounts;

(c) A current reconciliation of the operating account of the association;

(d) A current reconciliation of the reserve account of the association;

(e) The latest account statements prepared by the financial institutions in which the accounts of the association are maintained; and

(f) The current status of any civil action or claim submitted to arbitration or mediation in which the association is a party.

~~[7.]~~ *8.* The secretary or other officer specified in the bylaws shall cause each meeting of the executive board to be audio recorded and the minutes to be recorded or otherwise taken at each meeting of the executive board, but if the executive board is meeting in executive session, the meeting must not be audio recorded. Not more than 30 days after each such meeting, the secretary or other officer specified in the bylaws shall cause the audio recording of the meeting, the minutes of the meeting and a summary of the minutes of the meeting to be made available to the units' owners. Except as otherwise provided in this subsection, a copy of the audio recording, the minutes or a summary of the minutes must be provided to any unit's owner upon request, ~~[in]~~ *by* electronic ~~[format]~~ *mail* at no charge to the unit's owner or, if the association is unable to provide the copy or summary ~~[in]~~ *by* electronic ~~[format,]~~ *mail,* in paper format at a cost not to exceed 25 cents per page for the first 10 pages, and 10 cents per page thereafter.

~~[8.]~~ *9.* Except as otherwise provided in subsection ~~[9]~~ *10* and NRS 116.31085, the minutes of each meeting of the executive board must include:

(a) The date, time and place of the meeting;

(b) Those members of the executive board who were present and those members who were absent at the meeting;

(c) The substance of all matters proposed, discussed or decided at the meeting;

(d) A record of each member's vote on any matter decided by vote at the meeting; and

(e) The substance of remarks made by any unit's owner who addresses the executive board at the meeting if the unit's owner requests that the minutes reflect his or her remarks or, if the unit's owner has prepared written remarks, a copy of his or her prepared remarks if the unit's owner submits a copy for inclusion.

~~[9.]~~ *10.* The executive board may establish reasonable limitations on materials, remarks or other information to be included in the minutes of its meetings.

~~[10.]~~ *11.* The association shall maintain the minutes of each meeting of the executive board until the common-interest community is terminated.

~~[11.]~~ *12.* A unit's owner may record on audiotape or any other means of sound reproduction a meeting of the executive board, unless the executive board is meeting in executive session, if the

unit's owner, before recording the meeting, provides notice of his or her intent to record the meeting to the members of the executive board and the other units' owners who are in attendance at the meeting.

~~[12.]~~ *13.* As used in this section, "emergency" means any occurrence or combination of occurrences that:

(a) Could not have been reasonably foreseen;

(b) Affects the health, welfare and safety of the units' owners or residents of the common-interest community;

(c) Requires the immediate attention of, and possible action by, the executive board; and

(d) Makes it impracticable to comply with the provisions of subsection 2 or 5.

Sec. 9. NRS 116.31085 is hereby amended to read as follows:

116.31085 1. Except as otherwise provided in this section, a unit's owner may attend any meeting of the units' owners or of the executive board and speak at any such meeting. The executive board may establish reasonable limitations on the time a unit's owner may speak at such a meeting.

2. An executive board may not meet in executive session to open or consider bids for an association project as defined in NRS 116.31086, or to enter into, renew, modify, terminate or take any other action regarding a contract.

3. An executive board may meet in executive session only to:

(a) Consult with the attorney for the association on matters relating to proposed or pending litigation if the contents of the discussion would otherwise be governed by the privilege set forth in NRS 49.035 to 49.115, inclusive.

(b) Discuss the character, alleged misconduct ~~[,]~~ *or* professional competence ~~[, or physical or mental health]~~ of a community manager *,* ~~[or]~~ an employee of the association ~~[,]~~ *or a vendor who has entered into a contract with the association.*

(c) Except as otherwise provided in subsection 4, discuss a violation of the governing documents, including, without limitation, the failure to pay an assessment.

(d) Discuss the alleged failure of a unit's owner to adhere to a schedule required pursuant to NRS 116.310305 if the alleged failure may subject the unit's owner to a construction penalty.

(e) Discuss with a vendor of the association the vendor's alleged misconduct, professional competence or failure to perform under a contract.

4. An executive board shall meet in executive session to hold a hearing on an alleged violation of the governing documents unless the person who may be sanctioned for the alleged violation requests in writing that an open hearing be conducted by the executive board.

If the person who may be sanctioned for the alleged violation requests in writing that an open hearing be conducted, the person:

(a) Is entitled to attend all portions of the hearing related to the alleged violation, including, without limitation, the presentation of evidence and the testimony of witnesses;

(b) Is entitled to due process, as set forth in the standards adopted by regulation by the Commission, which must include, without limitation, the right to counsel, the right to present witnesses and the right to present information relating to any conflict of interest of any member of the hearing panel; and

(c) Is not entitled to attend the deliberations of the executive board.

5. The provisions of subsection 4 establish the minimum protections that the executive board must provide before it may make a decision. The provisions of subsection 4 do not preempt any provisions of the governing documents that provide greater protections.

6. Except as otherwise provided in this subsection, any matter discussed by the executive board when it meets in executive session must be generally noted in the minutes of the meeting of the executive board. The executive board shall maintain minutes of any decision made pursuant to subsection 4 concerning an alleged violation and, upon request, provide a copy of the decision to the person who was subject to being sanctioned at the hearing or to the person's designated representative.

7. Except as otherwise provided in subsection 4, a unit's owner is not entitled to attend or speak at a meeting of the executive board held in executive session.

Sec. 10. NRS 116.3113 is hereby amended to read as follows:

116.3113 1. Commencing not later than the time of the first conveyance of a unit to a person other than a declarant, the association shall maintain, to the extent reasonably available ~~[, both of the following:]~~ ***and subject to reasonable deductibles:***

(a) Property insurance on the common elements and, in a planned community, also on property that must become common elements, insuring against ~~[all]~~ risks of direct physical loss commonly insured against ~~[or, in the case of a converted building, against fire and extended coverage perils. The total amount of]~~ , ***which*** insurance after application of any deductibles must be not less than 80 percent of the actual cash value of the insured property at the time the insurance is purchased and at each renewal date, exclusive of land, excavations, foundations and other items normally excluded from property policies ~~;~~ ~~]~~

(b) ~~[Liability]~~ ***Commercial general liability*** insurance, including insurance for medical payments, in an amount determined by the

executive board but not less than any amount specified in the declaration, covering all occurrences commonly insured against for ~~[death,]~~ bodily injury ~~[,]~~ and property damage arising out of or in connection with the use, ownership, or maintenance of the common elements and, in cooperatives, also of all units ~~[.]~~ ***; and***

(c) Crime insurance which includes coverage for dishonest acts by members of the executive board and the officers, employees, agents, directors and volunteers of the association and which extends coverage to any business entity that acts as the community manager of the association and the employees of that entity. Such insurance may not contain a conviction requirement, and the minimum amount of the policy must be not less than an amount equal to 3 months of aggregate assessments on all units plus reserve funds.

2. In the case of a building ~~[that is part of a cooperative or]~~ that contains units ~~[having]~~ ***divided by*** horizontal boundaries described in the declaration, ***or vertical boundaries that comprise common walls between units,*** the insurance maintained under paragraph (a) of subsection 1, to the extent reasonably available, must include the units, but need not include improvements and betterments installed by units' owners.

3. If the insurance described in subsections 1 and 2 is not reasonably available, the association promptly shall cause notice of that fact to be ~~[hand-delivered or sent prepaid by United States mail]~~ ***given*** to all units' owners. The declaration may require the association to carry any other insurance, and the association ~~[in any event]~~ may carry any other insurance it considers appropriate to protect the association or the units' owners.

4. An insurance policy issued to the association does not prevent a unit's owner from obtaining insurance for the unit's owner's own benefit.

Sec. 11. NRS 116.311395 is hereby amended to read as follows:

116.311395 1. Except as otherwise provided in subsection 2, an association ~~[, a member of the executive board, or a community manager]~~ shall deposit ~~[or invest]~~ ***and maintain*** all funds of the association ~~[at]~~ ***in*** a financial institution ***whose accounts are insured by the Federal Deposit Insurance Corporation, the National Credit Union Share Insurance Fund or the Securities Investor Protection Corporation and*** which:

(a) Is located in this State;

(b) Is qualified to conduct business in this State; or

(c) Has consented to be subject to the jurisdiction, including the power to subpoena, of the courts of this State and the Division.

2. ~~[Except as otherwise provided by the governing documents, in addition to the requirements of]~~ ***Funds held by the association as petty cash, imprest funds or change funds are not required to be deposited or maintained in accordance with subsection 1. The amount of petty cash, imprest funds and change funds held by the association must be set forth in the policy established by the executive board for the investment of the funds of the association.***

~~3. [subsection 1, an association shall deposit, maintain and invest all funds of the association:~~

~~(a) In a financial institution whose accounts are insured by the Federal Deposit Insurance Corporation, the National Credit Union Share Insurance Fund or the Securities Investor Protection Corporation;~~

~~(b) With a private insurer approved pursuant to NRS 678.755; or~~

~~(c) In a government security backed by the full faith and credit of the Government of the United States.~~

~~3.]~~ The Commission shall adopt regulations prescribing the contents of the declaration to be executed and signed by a financial institution located outside of this State to submit to consent to the jurisdiction of the courts of this State and the Division.

Sec. 12. NRS 116.3115 is hereby amended to read as follows:

116.3115 1. Until the association makes an assessment for common expenses, the declarant shall pay all common expenses. After an assessment has been made by the association, assessments must be made at least annually, based on a budget adopted at least annually by the association in accordance with the requirements set forth in NRS 116.31151. Unless the declaration imposes more stringent standards, the budget must include a budget for the daily operation of the association and a budget for the reserves required by paragraph (b) of subsection 2.

2. Except for assessments under subsections 4 to 7, inclusive:

(a) All common expenses, including the reserves, must be assessed against all the units in accordance with the allocations set forth in the declaration pursuant to subsections 1 and 2 of NRS 116.2107.

(b) The association shall establish adequate reserves, funded on a reasonable basis, for the repair, replacement and restoration of the major components of the common elements and any other portion of the common-interest community that the association is obligated to maintain, repair, replace or restore. The reserves may be used only for those purposes, including, without limitation, repairing, replacing and restoring roofs, roads and sidewalks, and must not be used for daily maintenance. The association may comply with the provisions of this paragraph through a funding plan that is designed to allocate the costs for the repair, replacement and restoration of the

major components of the common elements and any other portion of the common-interest community that the association is obligated to maintain, repair, replace or restore over a period of years if the funding plan is designed in an actuarially sound manner which will ensure that sufficient money is available when the repair, replacement and restoration of the major components of the common elements or any other portion of the common-interest community that the association is obligated to maintain, repair, replace or restore are necessary. Notwithstanding any provision of the governing documents to the contrary, to establish adequate reserves pursuant to this paragraph, including, without limitation, to establish or carry out a funding plan, the executive board may, without seeking or obtaining the approval of the units' owners, impose any necessary and reasonable assessments against the units in the common-interest community. Any such assessments imposed by the executive board must be based on the study of the reserves of the association conducted pursuant to NRS 116.31152.

3. Any assessment for common expenses or installment thereof that is 60 days or more past due ~~[bears]~~ ***may bear*** interest at a rate ~~[equal to]~~ ***which may not exceed*** the prime rate at the largest bank in Nevada as ascertained by the Commissioner of Financial Institutions on January 1 or July 1, as the case may be, immediately preceding the date the assessment becomes past due, plus 2 percent. The rate must be adjusted accordingly on each January 1 and July 1 thereafter until the balance is satisfied.

4. Except as otherwise provided in the governing documents:

(a) Any common expense associated with the maintenance, repair, restoration or replacement of a limited common element must be assessed against the units to which that limited common element is assigned, equally, or in any other proportion the declaration provides;

(b) Any common expense or portion thereof benefiting fewer than all of the units must be assessed exclusively against the units benefited; and

(c) The costs of insurance must be assessed in proportion to risk and the costs of utilities must be assessed in proportion to usage.

5. Assessments to pay a judgment against the association may be made only against the units in the common-interest community at the time the judgment was entered, in proportion to their liabilities for common expenses.

6. If any common expense is caused by the misconduct of any unit's owner, the association may assess that expense exclusively against his or her unit.

7. The association of a common-interest community created before January 1, 1992, is not required to make an assessment

against a vacant lot located within the community that is owned by the declarant.

8. If liabilities for common expenses are reallocated, assessments for common expenses and any installment thereof not yet due must be recalculated in accordance with the reallocated liabilities.

9. The association shall provide written notice to each unit's owner of a meeting at which an assessment for a capital improvement is to be considered or action is to be taken on such an assessment at least 21 calendar days before the date of the meeting.

Sec. 13. NRS 116.31151 is hereby amended to read as follows:

116.31151 1. Except as otherwise provided in subsection 2 and unless the declaration of a common-interest community imposes more stringent standards, the executive board shall, not less than 30 days or more than 60 days before the beginning of the fiscal year of the association, prepare and distribute to each unit's owner a copy of:

(a) The budget for the daily operation of the association. The budget must include, without limitation, the estimated annual revenue and expenditures of the association and any contributions to be made to the reserve account of the association.

(b) The budget to provide adequate funding for the reserves required by paragraph (b) of subsection 2 of NRS 116.3115. The budget must include, without limitation:

(1) The current estimated replacement cost, estimated remaining life and estimated useful life of each major component of the common elements and any other portion of the common-interest community that the association is obligated to maintain, repair, replace or restore;

(2) As of the end of the fiscal year for which the budget is prepared, the current estimate of the amount of cash reserves that are ~~[necessary,]~~ ***required to adequately fund the reserves,*** and the current amount of accumulated cash reserves that are set aside, to repair, replace or restore the major components of the common elements and any other portion of the common-interest community that the association is obligated to maintain, repair, replace or restore;

(3) A statement as to whether the executive board has determined or anticipates that the levy of one or more ~~[special]~~ ***reserve*** assessments will be necessary to repair, replace or restore any major component of the common elements or any other portion of the common-interest community that the association is obligated to maintain, repair, replace or restore or to provide adequate funding for the reserves designated for that purpose; and

(4) A general statement describing the procedures used for the estimation and accumulation of cash reserves pursuant to subparagraph (2), including, without limitation, the qualifications of the person responsible for the preparation of the study of the reserves required by NRS 116.31152.

2. In lieu of distributing copies of the budgets of the association required by subsection 1, the executive board may distribute to each unit's owner a summary of those budgets, accompanied by a written notice that:

(a) The budgets are available for review at the business office of the association or some other suitable location within the county where the common-interest community is situated or, if it is situated in more than one county, within one of those counties but not to exceed 60 miles from the physical location of the common-interest community; and

(b) Copies of the budgets will be provided upon request.

3. Within 60 days after adoption of any proposed budget for the common-interest community, the executive board shall provide a summary of the proposed budget to each unit's owner and shall set a date for a meeting of the units' owners to consider ratification of the proposed budget not less than 14 days or more than 30 days after the mailing of the summaries. Unless at that meeting a majority of all units' owners, or any larger vote specified in the declaration, reject the proposed budget, the proposed budget is ratified, whether or not a quorum is present. If the proposed budget is rejected, the periodic budget last ratified by the units' owners must be continued until such time as the units' owners ratify a subsequent budget proposed by the executive board.

4. The executive board shall, at the same time and in the same manner that the executive board makes the budget available to a unit's owner pursuant to this section, make available to each unit's owner ~~[the]~~ *:*

(a) The policy established *by the executive board* for the ~~[association]~~ *investment of the funds of the association; and*

(b) The policy established by the executive board concerning the collection of any fees, fines, assessments or costs imposed against a unit's owner pursuant to this chapter. The policy must include, without limitation:

~~[(a)]~~ *(1)* The responsibility of the unit's owner to pay any such fees, fines, assessments or costs in a timely manner; and

~~[(b)]~~ *(2)* The association's rights concerning the collection of such fees, fines, assessments or costs if the unit's owner fails to pay the fees, fines, assessments or costs in a timely manner.

Sec. 14. NRS 116.31153 is hereby amended to read as follows:

116.31153 1. Money in the reserve account of an association required by paragraph (b) of subsection 2 of NRS 116.3115 may not be withdrawn without the signatures of at least two members of the executive board or the signatures of at least one member of the executive board and one officer of the association who is not a member of the executive board.

2. Except as otherwise provided in subsection 3, money in the operating account of an association may not be withdrawn without the signatures of at least one member of the executive board or one officer of the association and a member of the executive board, an officer of the association or the community manager.

3. Money in the operating account of an association may be withdrawn without the signatures required pursuant to subsection 2 to:

(a) Transfer money to the reserve account of the association at regular intervals; ~~[or]~~

(b) Make automatic payments for utilities ~~[.]~~ *;*

(c) Make an electronic transfer of money to a state agency pursuant to NRS 353.1467;

(d) Make an electronic transfer of money to the United States Government, or any agency thereof, pursuant to any federal law requiring transfers of money to be made by an electronic means authorized by the United States Government or the agency thereof; or

(e) Make an electronic transfer of money to make a payment to a vendor or community manager for goods or services provided by the vendor or community manager pursuant to a written agreement which requires the vendor or community manager to provide goods or services to the association during a period specified in the written agreement between the vendor or community manager and the association.

4. An association may use electronic signatures to withdraw money in the operating account of the association if:

(a) The electronic transfer of money is made pursuant to a written agreement entered into between the association and the financial institution where the operating account of the association is maintained;

(b) The executive board has expressly authorized the electronic transfer of money; and

(c) The association has established internal accounting controls to safeguard the assets of the association which comply with generally accepted accounting principles.

5. As used in this section, "electronic transfer of money" has the meaning ascribed to it in NRS 353.1467.

Sec. 15. NRS 116.3116 is hereby amended to read as follows:

116.3116 1. The association has a lien on a unit for any construction penalty that is imposed against the unit's owner pursuant to NRS 116.310305, any assessment levied against that unit or any fines imposed against the unit's owner from the time the construction penalty, assessment or fine becomes due. Unless the declaration otherwise provides, any penalties, fees, charges, late charges, fines and interest charged pursuant to paragraphs (j) to (n), inclusive, of subsection 1 of NRS 116.3102 are enforceable as assessments under this section. If an assessment is payable in installments, the full amount of the assessment is a lien from the time the first installment thereof becomes due.

2. A lien under this section is prior to all other liens and encumbrances on a unit except:

(a) Liens and encumbrances recorded before the recordation of the declaration and, in a cooperative, liens and encumbrances which the association creates, assumes or takes subject to;

(b) A first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent or, in a cooperative, the first security interest encumbering only the unit's owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent; and

(c) Liens for real estate taxes and other governmental assessments or charges against the unit or cooperative.

~~[The~~

3. A lien *under this section* is also prior to all security interests described in paragraph (b) *of subsection 2* to the extent of ~~[any]~~ *:*

(a) Any charges incurred by the association on a unit pursuant to NRS 116.310312 *;* and ~~[to the extent of]~~

(b) An amount equal to the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding ~~[institution of an action to enforce the lien ,]~~ *:*

(1) The association's mailing of a notice of delinquent assessment in accordance with paragraph (a) of subsection 1 of NRS 116.31162 with respect to the association's lien; or

(2) A trustee's sale of the unit under NRS 107.080 or a foreclosure sale of the unit under NRS 40.430 to enforce the security interest described in paragraph (b) of subsection 2,

and fees not to exceed $1,950 to cover the cost of collecting a past due obligation which are imposed pursuant to NRS 116.310313, unless federal regulations adopted by the Federal

Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien. If federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien, the period during which the lien is prior to all security interests described in paragraph (b) ***of subsection 2*** must be determined in accordance with those federal regulations, except that notwithstanding the provisions of the federal regulations, the period of priority for the lien must not be less than the 6 months immediately preceding institution of an action to enforce the lien. This subsection does not affect the priority of mechanics' or materialmen's liens, or the priority of liens for other assessments made by the association.

~~[3.]~~ ***This subsection supersedes any contrary provision in the governing documents of the association.***

4. After a trustee's sale of a unit under NRS 107.080 or a foreclosure sale of a unit under NRS 40.430 to enforce a security interest described in paragraph (b) of subsection 2, upon payment to the association of the amounts described in subsection 3, any unpaid amounts for which subsection 1 creates a lien and which accrued before the trustee's sale or foreclosure sale are a personal obligation of the person who owned the unit at the time the amounts became due and the association does not have a lien on the unit for those amounts.

5. Unless the declaration otherwise provides, if two or more associations have liens for assessments created at any time on the same property, those liens have equal priority.

~~[4.]~~ *6.* Recording of the declaration constitutes record notice and perfection of the lien. No further recordation of any claim of lien for assessment under this section is required.

~~[5.]~~ *7.* A lien for unpaid assessments is extinguished unless proceedings to enforce the lien are instituted within 3 years after the full amount of the assessments becomes due.

~~[6.]~~ *8.* This section does not prohibit actions to recover sums for which subsection 1 creates a lien or prohibit an association from taking a deed in lieu of foreclosure.

~~[7.]~~ *9.* A judgment or decree in any action brought under this section must include costs and reasonable attorney's fees for the prevailing party.

~~[8.]~~ *10.* The association, upon written request, shall furnish to a unit's owner a statement setting forth the amount of unpaid assessments against the unit. If the interest of the unit's owner is real estate or if a lien for the unpaid assessments may be foreclosed under NRS 116.31162 to 116.31168, inclusive, the statement must

be in recordable form. The statement must be furnished within 10 business days after receipt of the request and is binding on the association, the executive board and every unit's owner.

~~[9.]~~ *11.* In a cooperative, upon nonpayment of an assessment on a unit, the unit's owner may be evicted in the same manner as provided by law in the case of an unlawful holdover by a commercial tenant, and:

(a) In a cooperative where the owner's interest in a unit is real estate under NRS 116.1105, the association's lien may be foreclosed under NRS 116.31162 to 116.31168, inclusive.

(b) In a cooperative where the owner's interest in a unit is personal property under NRS 116.1105, the association's lien:

(1) May be foreclosed as a security interest under NRS 104.9101 to 104.9709, inclusive; or

(2) If the declaration so provides, may be foreclosed under NRS 116.31162 to 116.31168, inclusive.

Sec. 16. NRS 116.31183 is hereby amended to read as follows:

116.31183 1. An executive board, a member of an executive board, a community manager or an officer, employee or agent of an association shall not take, or direct or encourage another person to take, any retaliatory action against a unit's owner because the unit's owner has:

(a) Complained in good faith about any alleged violation of any provision of this chapter or the governing documents of the association;

(b) Recommended the selection or replacement of an attorney, community manager or vendor; or

(c) Requested in good faith to review the books, records or other papers of the association.

2. ***A unit's owner shall not take, or direct or encourage another person to take, any retaliatory action against a member of the executive board, an officer, employee or agent of the association, or another unit's owner because the member of the executive board, the officer, employee or agent, or the unit's owner has:***

(a) Performed his or her duties under the governing documents or the provisions of this chapter; or

(b) Exercised his or her rights under the governing documents or the provisions of this chapter.

3. In addition to any other remedy provided by law, upon a violation of this section, a ~~[unit's owner]~~ ***person aggrieved by the violation*** may bring a separate action to recover:

(a) Compensatory damages; and

(b) Attorney's fees and costs of bringing the separate action.

Sec. 17. NRS 116.4106 is hereby amended to read as follows:

116.4106 1. The public offering statement of a common-interest community containing any converted building must contain, in addition to the information required by NRS 116.4103 and 116.41035:

(a) A statement by the declarant, based on a report prepared by an independent registered architect or licensed professional engineer, describing the present condition of all structural components and mechanical and electrical installations material to the use and enjoyment of the building;

(b) A list of any outstanding notices of uncured violations of building codes or other municipal regulations, together with the estimated cost of curing those violations; and

(c) The budget to maintain the reserves required pursuant to paragraph (b) of subsection 2 of NRS 116.3115 which must include, without limitation:

(1) The current estimated replacement cost, estimated remaining life and estimated useful life of each major component of the common elements;

(2) As of the end of the fiscal year for which the budget was prepared, the current estimate of the amount of cash reserves that are necessary to repair, replace and restore the major components of the common elements and the current amount of accumulated cash reserves that are set aside for such repairs, replacements and restorations;

(3) A statement as to whether the declarant has determined or anticipates that the levy of one or more ~~[special]~~ *reserve* assessments will be required within the next 10 years to repair, replace and restore any major component of the common elements or to provide adequate reserves for that purpose;

(4) A general statement describing the procedures used for the estimation and accumulation of cash reserves described in subparagraph (2), including, without limitation, the qualifications of the person responsible for the preparation of the study of reserves required pursuant to NRS 116.31152; and

(5) The funding plan that is designed to allocate the costs for the repair, replacement and restoration of the major components of the common elements over a period of years.

2. This section applies only to a common-interest community comprised of a converted building or buildings containing more than 12 units that may be occupied for residential use.

Sec. 18. NRS 116.4117 is hereby amended to read as follows:

116.4117 1. Subject to the requirements set forth in subsection 2, if a declarant, community manager or any other person subject to this chapter fails to comply with any of its provisions or

any provision of the declaration or bylaws, any person or class of persons suffering actual damages from the failure to comply may bring a civil action for damages or other appropriate relief.

2. Subject to the requirements set forth in NRS 38.310 and except as otherwise provided in NRS 116.3111, a civil action for damages or other appropriate relief for a failure or refusal to comply with any provision of this chapter or the governing documents of an association may be brought:

(a) By the association against:

(1) A declarant;

(2) A community manager; or

(3) A unit's owner.

(b) By a unit's owner against:

(1) The association;

(2) A declarant; or

(3) Another unit's owner of the association.

(c) By a class of units' owners constituting at least 10 percent of the total number of voting members of the association against a community manager.

3. ***Members of the executive board are not personally liable to the victims of crimes occurring within the common-interest community.***

4. Except as otherwise provided in ~~[NRS 116.31036,]~~ ***this subsection,*** punitive damages may be awarded for a willful and material failure to comply with any provision of this chapter if the failure is established by clear and convincing evidence.

~~[4.]~~ ***Punitive damages may not be recovered against:***

(a) The association;

(b) The members of the executive board for acts or omissions that occur in their official capacity as members of the executive board; or

(c) The officers of the association for acts or omissions that occur in their capacity as officers of the association.

5. The court may award reasonable attorney's fees to the prevailing party.

~~[5.]~~ ***6.*** The civil remedy provided by this section is in addition to, and not exclusive of, any other available remedy or penalty.

7. The provisions of this section do not prohibit the Commission from taking any disciplinary action against a member of an executive board pursuant to NRS 116.745 to 116.795, inclusive.

Sec. 19. NRS 116A.410 is hereby amended to read as follows:

116A.410 1. The Commission shall by regulation provide for the issuance by the Division of certificates. The regulations:

(a) Must establish the qualifications for the issuance of such a certificate, including, without limitation, the education and experience required to obtain such a certificate. The regulations must include, without limitation, provisions that:

(1) Provide for the issuance of a temporary certificate for a 1-year period to a person who:

(I) Holds a professional designation in the field of management of a common-interest community from a nationally recognized organization;

(II) Provides evidence that the person has been engaged in the management of a common-interest community for at least 5 years; and

(III) Has not been the subject of any disciplinary action in another state in connection with the management of a common-interest community.

(2) Except as otherwise provided in subparagraph (3), provide for the issuance of a temporary certificate for a 1-year period to a person who:

(I) Receives an offer of employment as a community manager from an association or its agent; and

(II) Has management experience determined to be sufficient by the executive board of the association or its agent making the offer in sub-subparagraph (I). The executive board or its agent must have sole discretion to make the determination required in this sub-subparagraph.

(3) Require a temporary certificate described in subparagraph (2) to expire before the end of the 1-year period if the certificate holder ceases to be employed by the association, or its agent, which offered the person employment as described in subparagraph (2).

(4) Require a person who is issued a temporary certificate as described in subparagraph (1) or (2) to successfully complete not less than 18 hours of instruction relating to the Uniform Common-Interest Ownership Act within the 1-year period.

(5) Provide for the issuance of a certificate at the conclusion of the 1-year period if the person:

(I) Has successfully completed not less than 18 hours of instruction relating to the Uniform Common-Interest Ownership Act; and

(II) Has not been the subject of any disciplinary action pursuant to this chapter or chapter 116 of NRS or any regulations adopted pursuant thereto.

(6) Provide that a temporary certificate described in subparagraph (1) or (2) and a certificate described in subparagraph (5):

(I) Must authorize the person who is issued a temporary certificate described in subparagraph (1) or (2) or certificate described in subparagraph (5) to act in all respects as a community manager and exercise all powers available to any other community manager without regard to experience; and

(II) Must not be treated as a limited, restricted or provisional form of a certificate.

(b) ~~[Must require an applicant or the employer of the applicant to post a bond in a form and in an amount established by regulation. The Commission shall, by regulation, adopt a sliding scale for the amount of the bond that is based upon the amount of money that applicants are expected to control. In adopting the regulations establishing the form and sliding scale for the amount of a bond required to be posted pursuant to this paragraph, the Commission shall consider the availability and cost of such bonds.~~

~~(c)]~~ May require applicants to pass an examination in order to obtain a certificate other than a temporary certificate described in paragraph (a). If the regulations require such an examination, the Commission shall by regulation establish fees to pay the costs of the examination, including any costs which are necessary for the administration of the examination.

~~[(d)]~~ *(c)* Must establish a procedure for a person who was previously issued a certificate and who no longer holds a certificate to reapply for and obtain a new certificate without undergoing any period of supervision under another community manager, regardless of the length of time that has passed since the person last acted as a community manager.

~~[(e)]~~ *(d)* May require an investigation of an applicant's background. If the regulations require such an investigation, the Commission shall by regulation establish fees to pay the costs of the investigation.

~~[(f)]~~ *(e)* Must establish the grounds for initiating disciplinary action against a person to whom a certificate has been issued, including, without limitation, the grounds for placing conditions, limitations or restrictions on a certificate and for the suspension or revocation of a certificate.

~~[(g)]~~ *(f)* Must establish rules of practice and procedure for conducting disciplinary hearings.

2. The Division may collect a fee for the issuance of a certificate in an amount not to exceed the administrative costs of issuing the certificate.

3. As used in this section, "management experience" means experience in a position in business or government, including, without limitation, in the military:

(a) In which the person holding the position was required, as part of holding the position, to engage in one or more management activities, including, without limitation, supervision of personnel, development of budgets or financial plans, protection of assets, logistics, management of human resources, development or training of personnel, public relations, or protection or maintenance of facilities; and

(b) Without regard to whether the person holding the position has any experience managing or otherwise working for an association.

Sec. 20. NRS 116A.620 is hereby amended to read as follows:

116A.620 1. Any management agreement must:

(a) Be in writing and signed by all parties;

(b) Be entered into between the client and the community manager or the employer of the community manager if the community manager is acting on behalf of a corporation, partnership, limited partnership, limited-liability partnership, limited-liability company or other entity;

(c) State the term of the management agreement;

(d) State the basic consideration for the services to be provided and the payment schedule;

(e) Include a complete schedule of all fees, costs, expenses and charges to be imposed by the community manager, whether direct or indirect, including, without limitation:

(1) The costs for any new ~~[client]~~ ***association*** or start-up costs;

(2) The fees for special or nonroutine services, such as the mailing of collection letters, the recording of liens and foreclosing of property;

(3) Reimbursable expenses;

(4) The fees for the sale or resale of a unit or for setting up the account of a new member; and

(5) The portion of fees that are to be retained by the client and the portion to be retained by the community manager;

(f) State the identity and the legal status of the contracting parties;

(g) State any limitations on the liability of each contracting party ~~[.]~~ ***, including, without limitation, any provisions for indemnification of the community manager;***

(h) Include a statement of the scope of work of the community manager;

(i) State the spending limits of the community manager;

(j) Include provisions relating to the grounds and procedures for termination of the community manager;

(k) Identify the types and amounts of insurance coverage to be carried by each contracting party, including, without limitation:

(1) A ~~[requirement that]~~ ***statement as to whether*** the community manager ~~[or his or her employer shall]~~ ***will*** maintain insurance covering liability for errors ~~[or]~~ ***and*** omissions ~~[,]~~ ***or*** professional liability ***;*** ~~[or a surety bond to compensate for losses actionable pursuant to this chapter in an amount of $1,000,000 or more;]~~

(2) An indication of which contracting party will maintain fidelity bond coverage; ~~[and]~~

(3) A statement as to whether the client will maintain directors and officers liability coverage for the executive board; ***and***

(4) A statement as to whether each contracting party must be named as an additional insured under any required insurance;

(l) ~~[Include provisions for dispute resolution;~~

~~(m)]~~ Acknowledge that all records and books of the client are the property of the client, except any proprietary information and software belonging to the community manager;

~~[(n)]~~ ***(m)*** State the physical location, including the street address, of the records of the client, which must be within 60 miles from the physical location of the common-interest community;

~~[(o)]~~ ***(n)*** State the frequency and extent of regular inspections of the common-interest community; and

~~[(p)]~~ ***(o)*** State the extent, if any, of the authority of the community manager to sign checks on behalf of the client in an operating account.

2. In addition to any other requirements under this section, a management agreement may:

(a) Provide for mandatory binding arbitration; ~~[or]~~

(b) ***Provide for indemnification of the community manager in accordance with and subject to the appropriate provisions of title 7 of NRS; and***

(c) Allow the provisions of the management agreement to apply month to month following the end of the term of the management agreement, but the management agreement may not contain an automatic renewal provision.

3. Not later than 10 days after the effective date of a management agreement, the community manager shall provide each member of the executive board evidence of the existence of the required insurance, including, without limitation:

(a) The names and addresses of all insurance companies;

(b) The total amount of coverage; and

(c) The amount of any deductible.

4. After signing a management agreement, the community manager shall provide a copy of the management agreement to each

member of the executive board. Within 30 days after an election or appointment of a new member to the executive board, the community manager shall provide the new member with a copy of the management agreement.

5. Any changes to a management agreement must be initialed by the contracting parties. If there are any changes after the execution of a management agreement, those changes must be in writing and signed by the contracting parties.

6. Except as otherwise provided in the management agreement, upon the termination or assignment of a management agreement, the community manager shall, within 30 days after the termination or assignment, transfer possession of all books, records and other papers of the client to the succeeding community manager, or to the client if there is no succeeding community manager, regardless of any unpaid fees or charges to the community manager or management company. ***If any books, records or other papers of the client are in an electronic format, the community manager must transfer possession of the books, records or other papers in a shareable format which:***

(a) Does not require a person seeking access to the books, records or other papers to enter a password to obtain such access; and

(b) Allows the client to immediately save, print and use the books, records or other papers.

7. Notwithstanding any provision in a management agreement to the contrary, a management agreement may be terminated by the client without penalty upon 30 days' notice following a violation by the community manager of any provision of this chapter or chapter 116 of NRS.

Sec. 21. NRS 116A.630 is hereby amended to read as follows:

116A.630 In addition to any additional standards of practice for community managers adopted by the Commission by regulation pursuant to NRS 116A.400, a community manager shall:

1. Except as otherwise provided by specific statute, at all times:

(a) Act as a fiduciary in any client relationship; and

(b) Exercise ordinary and reasonable care in the performance of duties.

2. Comply with all applicable:

(a) Federal, state and local laws, regulations and ordinances; and

(b) Lawful provisions of the governing documents of each client.

3. Keep informed of new developments in the management of a common-interest community through continuing education, including, without limitation, new developments in law, insurance coverage and accounting principles.

4. Advise a client to obtain advice from an independent expert relating to matters that are beyond the expertise of the community manager.

5. Under the direction of a client, uniformly enforce the provisions of the governing documents of the association.

6. At all times ensure that:

(a) The financial transactions of a client are current, accurate and properly documented; and

(b) There are established policies and procedures that are designed to provide reasonable assurances in the reliability of the financial reporting, including, without limitation:

(1) Proper maintenance of accounting records;

(2) Documentation of the authorization for any purchase orders, expenditures or disbursements;

(3) Verification of the integrity of the data used in business decisions;

(4) Facilitation of fraud detection and prevention; and

(5) Compliance with all applicable laws and regulations governing financial records.

7. Prepare or cause to be prepared interim and annual financial statements that will allow the Division, the executive board, the units' owners and the accountant or auditor to determine whether the financial position of an association is fairly presented in accordance with all applicable laws and regulations.

8. Cause to be prepared, if required by the Division, a financial audit performed by an independent certified public accountant of the records of the community manager pertaining to the common-interest community, which must be made available to the Division.

9. Make the financial records of an association available for inspection by the Division in accordance with the applicable laws and regulations.

10. Cooperate with the Division in resolving complaints filed with the Division.

11. Upon written request, make the financial records of an association available to the units' owners electronically or during regular business hours required for inspection at a reasonably convenient location, which must be within 60 miles from the physical location of the common-interest community, and provide copies of such records in accordance with the applicable laws and regulations. As used in this subsection, "regular business hours" means Monday through Friday, 9 a.m. to 5 p.m., excluding legal holidays.

12. ~~[Maintain]~~ ***At the direction of the client, deposit, maintain*** and invest association funds in ~~[a financial institution whose accounts are insured by the Federal Deposit Insurance Corporation,~~

~~National Credit Union Share Insurance Fund, Securities Investor Protection Corporation, or a private insurer approved pursuant to NRS 678.755, or in government securities that are backed by the full faith and credit of the United States Government.]~~ ***accordance with NRS 116.311395.***

13. Except as required under collection agreements, maintain the various funds of the client in separate financial accounts in the name of the client and ensure that the association is authorized to have direct access to those accounts.

14. Provide notice to each unit's owner that the executive board is aware of all legal requirements pursuant to the applicable laws and regulations.

15. Maintain internal accounting controls, including, without limitation, segregation of incompatible accounting functions.

16. Ensure that the executive board develops and approves written investment policies and procedures.

17. Recommend in writing to each client that the client register with the Division, maintain its registration and file all papers with the Division and the Secretary of State as required by law.

18. Comply with the directions of a client, unless the directions conflict with the governing documents of the client or the applicable laws or regulations of this State.

19. Recommend in writing to each client that the client be in compliance with all applicable federal, state and local laws, regulations and ordinances and the governing documents of the client.

20. Obtain, when practicable, at least three qualified bids for any capital improvement project for the client.

21. Develop written collection policies, approved by the executive board, to comply with all applicable federal, state and local laws, regulations and ordinances relating to the collection of debt. The collection policies must require:

(a) That the executive board approve all write-offs of debt; and

(b) That the community manager provide timely updates and reports as necessary.

Sec. 22. NRS 76.020 is hereby amended to read as follows:

76.020 1. Except as otherwise provided in subsection 2, "business" means:

(a) Any person, except a natural person, that performs a service or engages in a trade for profit;

(b) Any natural person who performs a service or engages in a trade for profit if the person is required to file with the Internal Revenue Service a Schedule C (Form 1040), Profit or Loss From Business Form, or its equivalent or successor form, a Schedule E (Form 1040), Supplemental Income and Loss Form, or its

equivalent or successor form, or a Schedule F (Form 1040), Profit or Loss From Farming Form, or its equivalent or successor form, for that activity; or

(c) Any entity organized pursuant to this title, including, without limitation, those entities required to file with the Secretary of State, whether or not the entity performs a service or engages in a business for profit.

2. The term does not include:

(a) A governmental entity.

(b) A nonprofit religious, charitable, fraternal or other organization that qualifies as a tax-exempt organization pursuant to 26 U.S.C. § 501(c).

(c) A person who operates a business from his or her home and whose net earnings from that business are not more than 66 2/3 percent of the average annual wage, as computed for the preceding calendar year pursuant to chapter 612 of NRS and rounded to the nearest hundred dollars.

(d) A natural person whose sole business is the rental of four or fewer dwelling units to others.

(e) A business whose primary purpose is to create or produce motion pictures. As used in this paragraph, "motion pictures" has the meaning ascribed to it in NRS 231.020.

(f) A business organized pursuant to chapter 82 or 84 of NRS ~~[.]~~ ***or a unit-owners' association, as that term is defined in NRS 116.011 or 116B.030, that is organized pursuant to chapter 81 of NRS.***

Sec. 23. NRS 76.100 is hereby amended to read as follows:

76.100 1. A person shall not conduct a business in this State unless and until the person obtains a state business license issued by the Secretary of State. If the person is:

(a) An entity required to file an initial or annual list with the Secretary of State pursuant to this title, the person must obtain the state business license at the time of filing the initial or annual list.

(b) Not an entity required to file an initial or annual list with the Secretary of State pursuant to this title, the person must obtain the state business license before conducting a business in this State.

2. An application for a state business license must:

(a) Be made upon a form prescribed by the Secretary of State;

(b) Set forth the name under which the applicant transacts or intends to transact business, or if the applicant is an entity organized pursuant to this title and on file with the Secretary of State, the exact name on file with the Secretary of State, the entity number as assigned by the Secretary of State, if known, and the location in this State of the place or places of business;

(c) Be accompanied by a fee in the amount of $100; and

(d) Include any other information that the Secretary of State deems necessary.

➥ If the applicant is an entity organized pursuant to this title and on file with the Secretary of State and the applicant has no location in this State of its place of business, the address of its registered agent shall be deemed to be the location in this State of its place of business.

3. The application must be signed pursuant to NRS 239.330 by:

(a) The owner of a business that is owned by a natural person.

(b) A member or partner of an association or partnership.

(c) A general partner of a limited partnership.

(d) A managing partner of a limited-liability partnership.

(e) A manager or managing member of a limited-liability company.

(f) An officer of a corporation or some other person specifically authorized by the corporation to sign the application.

4. If the application for a state business license is defective in any respect or the fee required by this section is not paid, the Secretary of State may return the application for correction or payment.

5. The state business license required to be obtained pursuant to this section is in addition to any license to conduct business that must be obtained from the local jurisdiction in which the business is being conducted.

6. For the purposes of this chapter, a person shall be deemed to conduct a business in this State if a business for which the person is responsible:

(a) Is organized pursuant to this title, other than a business organized pursuant to chapter 82 or 84 of NRS ~~[,]~~ ***or a unit-owners' association, as that term is defined in NRS 116.011 or 116B.030, that is organized pursuant to chapter 81 of NRS.***

(b) Has an office or other base of operations in this State;

(c) Has a registered agent in this State; or

(d) Pays wages or other remuneration to a natural person who performs in this State any of the duties for which he or she is paid.

7. As used in this section, "registered agent" has the meaning ascribed to it in NRS 77.230.

Sec. 24. 1. The Legislative Commission shall appoint a subcommittee consisting of three members of the Senate and three members of the Assembly to conduct a study during the 2011-2013 interim concerning the laws and regulations governing common-interest communities in this State. The Legislative Commission shall designate a chair and vice-chair of the subcommittee.

2. Any recommendations for legislation proposed by the subcommittee must be approved by a majority of the members of

the Senate and a majority of the members of the Assembly appointed to the subcommittee.

3. The Legislative Commission shall submit a copy of the final written report of the study and any recommendations for legislation to the Director of the Legislative Counsel Bureau for transmission to the 77th Session of the Nevada Legislature.