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,	CASE NO. 63178 Dist. Ct. Case No. A-11-647850-B

RESPONDENT'S NOTICE OF SUPPLEMENTAL AUTHORITY

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SUPPLEMENTAL AUTHORITY

Under Nevada Rule of Appellate Procedure 31(e), the Respondent submits as supplemental authority the following legal propositions and authority:

The Super Priority Lien is limited to 9 months of assessments plus nuisance abatement charges, and no more. *SFR Investments Pool 1 v. U.S. Bank*, 130 Nev. Adv. Op. 75, 334 P.3d 408, 409 (2014), reh'g denied (Oct. 16, 2014) (Attached hereto as Ex. 1). [1]

> "NRS 116.3116 gives a homeowners' association (HOA) a superpriority lien on an individual homeowner's property for up to nine months of unpaid HOA dues." *SFR Investments Pool 1 v. U.S. Bank*, 130 Nev. Adv. Op. 75, 334 P.3d 408, 409 (2014), reh'g denied (Oct. 16, 2014); (*SFR Investments Pool 1 v. U.S. Bank*, 130 Nev. Adv. Op. 75, 334 P.3d 408, 409 (2014), reh'g denied (Oct. 16, 2014)
>
> "As to first deeds of trust, NRS 116.3116(2) thus splits an HOA lien into two pieces, a superpriority piece and a subpriority piece. The superpriority piece, consisting of the last nine months of unpaid HOA dues and maintenance and nuisance-abatement charges, is "prior to" a first deed of trust. The subpriority piece, consisting of all other HOA fees or assessments, is subordinate to a first deed of trust." *SFR Investments Pool 1 v. U.S. Bank*, 130 Nev. Adv. Op. 75, 334 P.3d 408, 411 (2014), reh'g denied (Oct. 16, 2014);
>
> "Recall that, unlike § 3–116(b), which currently limits the superpriority piece of an HOA's lien to six months of unpaid dues, Nevada's superpriority lien covers nine months of dues as well as maintenance and nuisance-abatement charges "incurred ... pursuant to NRS 116.310312." *SFR Investments Pool 1 v. U.S. Bank*, 130 Nev. Adv. Op. 75, 334 P.3d 408, 416 (2014), reh'g denied (Oct. 16, 2014);

[1] See Respondent's Answering Brief, p.29 - "LOCAL AUTHORITIES ALL CONCLUDE THE SUPER PRIORITY LIEN IS LIMITED."

The Super Priority Lien is limited to 9 months of assessments, plus nuisance abatement charges, and no more. *CitiMortgage, Inc. v. Alessi & Koenig*, LLC, No. 2:13-CV-01976-JCM, 2015 WL 112892 (D. Nev. Jan. 8, 2015) (Attached hereto as Ex. 2). [2]

> "As to first deeds of trust, NRS 116.3116(2) thus splits an HOA lien into two pieces, a superpriority piece and a subpriority piece. The superpriority piece, consisting of the last nine months of unpaid HOA dues and maintenance and nuisance-abatement charges, is "prior to" a first deed of trust. The subpriority piece, consisting of all other HOA fees or assessments, is subordinate to a first deed of trust. *CitiMortgage, Inc. v. Alessi & Koenig, LLC*, No. 2:13-CV-01976-JCM, 2015 WL 112892, at *4 (D. Nev. Jan. 8, 2015);
>
> "Pursuant to the foregoing statute, Solana's superpriority interest is limited to nine months of assessments." *CitiMortgage, Inc. v. Alessi & Koenig, LLC*, No. 2:13-CV-01976-JCM, 2015 WL 112892, at *5 (D. Nev. Jan. 8, 2015).
>
> "The superpriority lien portion consists of "the last nine months of unpaid HOA dues and maintenance and nuisance-abatement charges," while the subpriority piece consists of "all other HOA fees or assessments."SFR Inv. Pool 1, 334 P.3d at 411; see also 7912 Limbwood Ct. Trust, 979 F.Supp.2d at 1150 ("The superpriority lien consists only of unpaid assessments and certain charges specifically identified in § 116.31162.")." *CitiMortgage, Inc. v. Alessi & Koenig, LLC*, No. 2:13-CV-01976-JCM, 2015 WL 112892, at *5 (D. Nev. Jan. 8, 2015)

[2] See Respondent's Answering Brief, p.29 - "LOCAL AUTHORITIES ALL CONCLUDE THE SUPER PRIORITY LIEN IS LIMITED."

The Super Priority Lien is limited to 9 months of assessments, plus nuisance abatement charges, and no more. *US Bank, N.A. v. Bacara Ridge Ass'n*, No. 2:15-CV-00542-RCJ, 2015 WL 3467063 (D. Nev. June 1, 2015) (Attached hereto as Ex. 3). [3]

> "That amount was equal to or greater than nine months' worth of regular assessments, (id. ¶ 47), which is the maximum amount of the super-priority portion of the lien, assuming no maintenance and abatement costs under Nevada Revised Statutes ("NRS") section 116.310312, seeNev.Rev.Stat. § 116.3116(2) (final unnumbered paragraph)." *US Bank, N.A. v. Bacara Ridge Ass'n*, No. 2:15-CV-00542-RCJ, 2015 WL 3467063, at *1 (D. Nev. June 1, 2015);
>
> "... Plaintiff is correct that tender of the super-priority amount before the sale would have avoided the extinguishment of the first mortgage, and that the super-priority amount includes only up to nine months' of regular assessments and any costs of abatement and maintenance but not any collection costs. See NEV.REV.STAT. § 116.3116; 7912 Limbwood Court Trust v. Wells Fargo Bank, N.A., 979 F.Supp.2d 1142, 1150 (D.Nev.2013) (Pro, J.) (citing State of Nevada, Department of Business and Industry, Real Estate Division Adv. Op. No. 13–01, Dec. 12, 2012)." *US Bank, N.A. v. Bacara Ridge Ass'n*, No. 2:15-CV-00542-RCJ, 2015 WL 3467063, at *4 (D. Nev. June 1, 2015)

After the 2009, 2011 and 2013 legislative rejections to changes to the super priority law, recent legislative history confirms the 2015 amendment (SB 306) adding collection costs into the super priority lien is a change (revision) to the law, not a clarification.

SENATE BILL NO. 306 – SENATORS FORD AND HAMMOND - MARCH 16, 2015 (Attached hereto as Ex. 4). [4]

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[3] See Respondent's Answering Brief, p.29 - "LOCAL AUTHORITIES ALL CONCLUDE THE SUPER PRIORITY LIEN IS LIMITED."

[4] See Respondent's Answering Brief, p. 46 - "IN 2009, 2011 AND 2013, PROPOSALS WERE INTRODUCED TO AMEND NRS 116.3116 TO ALLOW FOR COLLECTION COSTS ON TOP OF THE SUPER PRIORITY LIEN, BUT LEGISLATIVE PROPOSALS WERE REJECTED ON ALL OCCASIONS."

"SUMMARY— **Revises** provisions relating to liens on real property located within a common-interest community. (BDR 10-55)" SENATE BILL NO. 306 – SENATORS FORD AND HAMMOND - MARCH 16, 2015, (See Ex. 4, Page 1);

AN ACT relating to common-interest communities; **revising** provisions governing a unit-owners' association's lien on a unit for certain amounts due to the association; **revising** provisions governing the foreclosure of an association's lien SENATE BILL NO. 306 - SENATORS FORD AND HAMMOND - MARCH 16, 2015, (See Ex. 4, Page 1);

Legislative Counsel's Digest.... the association's lien is prior to the first security interest on the unit to the extent of certain maintenance and abatement charges and a certain amount of assessments for common expenses.... This bill **amends** various provisions governing the association's super-priority lien and the procedures required for an association to foreclose its lien. Section 1 of this bill authorizes a limited amount of the costs of enforcing the association's lien to be included in the super-priority lien. SENATE BILL NO. 306 - SENATORS FORD AND HAMMOND - MARCH 16, 2015, (See Ex. 4, Page 1);

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS: Section 1. 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 6 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 ***and any costs of collecting a past due obligation charged pursuant to NRS 11 116.310313*** are enforceable as assessments under this section...." SENATE BILL NO. 306 – SENATORS FORD AND HAMMOND - MARCH 16, 2015, (See. Ex. 4, Page 3).

After the 2009, 2011 and 2013 legislative rejections to changes to the super priority law, recent legislative history confirms the 2015 amendment (SB 306) adding collection costs into the super priority lien is a change (revision) to the law, not a clarification.

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY Seventy-Eighth Session - April 7, 2015 (Attached hereto as Ex. 5). [5]

> SENATE BILL 306: **Revises** provisions relating to liens on real property located within a common-interest community. (BDR 10-55)" MINUTES OF THE SENATE COMMITTEE ON JUDICIARY Seventy-Eighth Session - April 7, 2015, (See Ex. 5, Page 2).
>
> This bill is the quintessential example of compromise legislation. Work on this bill began last year. I gathered a group of individuals to address the superpriority lien issue after the Nevada Supreme Court ruled on its effectiveness relative to canceling out a first deed of trust. Senator Hammond, the cosponsor of the bill, joined the working group, and we worked in a bipartisan manner toward developing a solution to the superpriority lien issue. SENATE BILL NO. 306 – SENATORS FORD AND HAMMOND - MARCH 16, 2015, page 2, Testimony of Senator Aaron D. Ford (Senatorial District No. 11), Sponsor of SB No. 306; (See Ex. 5, Page 2).

After the 2009, 2011 and 2013 legislative rejections to changes to the super priority law, recent legislative history confirms the 2015 amendment (SB 306) adding collection costs into the super priority lien is a change (revision) to the law, not a clarification.

2015 Nevada Laws Ch. 266 (S.B. 306)NEVADA 2015 SESSION LAWSREGULAR SESSION OF THE 78TH LEGISLATURE (2015) (Attached hereto

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[5] See Respondent's Answering Brief, p. 49 - "IN 2009, 2011 AND 2013, PROPOSALS WERE INTRODUCED TO AMEND NRS 116.3116 TO ALLOW FOR COLLECTION COSTS ON TOP OF THE SUPER PRIORITY LIEN, BUT LEGISLATIVE PROPOSALS WERE REJECTED ON ALL OCCASIONS."

as Ex. 6). [6]

> AN ACT relating to common-interest communities; **revising** provisions governing a unit-owners' association's lien on a unit for certain amounts due to the association; **revising** provisions governing the foreclosure of an association's lien.... COMMON INTEREST COMMUNITIES—LIENS AND INCUMBRANCES—NOTICE, 2015 Nevada Laws Ch. 266 (S.B. 306) (see Ex. 6, Page 1)
>
> Under existing law, a unit-owners' association has a lien on a unit for certain amounts due to the association and may foreclose its lien through a nonjudicial foreclosure sale. (NRS 116.3116–116.31168) Generally, the association's lien is not prior to a first security interest on the unit recorded before the date on which the amount sought to be enforced became delinquent. However, the association's lien is prior to the first security interest on the unit to the extent of certain maintenance and abatement charges and a certain amount of assessments for common expenses. COMMON INTEREST COMMUNITIES—LIENS AND INCUMBRANCES—NOTICE, 2015 Nevada Laws Ch. 266 (S.B. 306) (See Ex. 6, page 1)
>
> This bill **amends** various provisions governing the association's super-priority lien and the procedures required for an association to foreclose its lien. Section 1 of this bill authorizes a limited amount of the costs of enforcing the association's lien to be included in the super-priority lien. COMMON INTEREST COMMUNITIES—LIENS AND INCUMBRANCES—NOTICE, 2015 Nevada Laws Ch. 266 (S.B. 306) (See Ex. 6, Page. 1).

Dated this 21st day of December, 2015

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[6] See Respondent's Answering Brief, p. 49 - "IN 2009, 2011 AND 2013, PROPOSALS WERE INTRODUCED TO AMEND NRS 116.3116 TO ALLOW FOR COLLECTION COSTS ON TOP OF THE SUPER PRIORITY LIEN, BUT LEGISLATIVE PROPOSALS WERE REJECTED ON ALL OCCASIONS."

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the Nevada Supreme Court by using the appellate CM/ECF system on December 21, 2015, Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that, on the 22nd day of December, 2015, service of RESPONDENT'S NOTICE OF SUPPLEMENTAL AUTHORITY was made this date by depositing a true and correct copy of the same for mailing, first class mail, at Las Vegas, Nevada, addressed follows:

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Ex. 1

KeyCite Yellow Flag - Negative Treatment

Declined to Extend by Trust v. K & P Homes, D.Nev., November 9, 2015

334 P.3d 408
Supreme Court of Nevada.

SFR INVESTMENTS POOL 1, LLC, A Nevada Limited Liability Company, Appellant,
v.
U.S. BANK, N.A., A National Banking Association as Trustee for the Certificate Holders of the Banc of America Mortgage Pass-through Certificates, Series 2008–A, Respondent.

No. 63078. | Sept. 18, 2014. | Rehearing Denied Oct. 16, 2014.

Synopsis

Background: Following common interest community association's trustee's sale of property on which association dues were delinquent, purchaser filed action to quiet title and enjoin sale of property by deed of trust beneficiary. The Eighth Judicial District Court, Clark County, Nancy L. Allf, J., denied purchaser's motion for preliminary injunction and dismissed its complaint. Purchaser appealed.

Holdings: The Supreme Court, Pickering, J., held that:

[1] association had true superpriority lien over property;

[2] association was not required to judicially foreclose on its lien;

[3] nonjudicial foreclosure sale did not violate beneficiary's due process rights; and

[4] association's mortgage savings clause did not subordinate association's lien to deed of trust.

Order of dismissal reversed, order denying preliminary injunction vacated, and case remanded.

Gibbons, C.J., filed separate opinion concurring in part and dissenting in part, with which Parraguirre and Cherry, JJ., concurred.

West Headnotes (6)

[1] Common Interest Communities
Perfection and priority
Mortgages
Priorities of Mortgages in General

Common interest community association had true superpriority lien over former homeowner's property for unpaid association dues under homeowners' association (HOA) lien statute, rather than mere payment priority, such that proper foreclosure of lien would extinguish first deed of trust on property; statute did not speak in terms of payment priorities, but rather stated that HOA lien was prior to other liens, and "prior" referred to lien, not payment or proceeds. West's NRSA 116.3116, 116.31162-116.31168.

117 Cases that cite this headnote

[2] Statutes
Sponsors or authors

Official comment written by drafters of a statute and available to legislature before statute is enacted has considerable weight as aid to statutory construction.

Cases that cite this headnote

[3] Common Interest Communities
Lien foreclosure; other remedies and proceedings for nonpayment

Common interest community association was not required to judicially foreclose on its superpriority lien over former homeowner's property for unpaid association dues, but rather association was permitted to foreclose on lien by nonjudicial foreclosure sale; statute governing foreclosure of liens stated that association, as planned community, was permitted to foreclose its lien by sale, and statute provided for notices required of nonjudicial foreclosure sales and concerned mechanics and requirements of nonjudicial sales of association liens. West's NRSA 116.075, 116.3116, 116.31162-116.31168.

101 Cases that cite this headnote

[4] Common Interest Communities
Lien foreclosure; other remedies and proceedings for nonpayment
Constitutional Law
Enforcement; proceedings

Common interest community association's foreclosure of its superpriority lien on former homeowner's property for unpaid association dues by nonjudicial foreclosure sale did not violate due process rights of lender that held first deed of trust on property, which was extinguished by foreclosure sale, despite contention that lender was not given adequate notice of sale; association's foreclosure sale complied with all statutory requirements. U.S.C.A. Const.Amend. 14; West's NRSA 107.090, 116.31162-116.31168.

117 Cases that cite this headnote

[5] Appeal and Error
Striking out or dismissal

On appeal from motion to dismiss for failure to state a claim upon which relief can be granted, court must take all factual allegations in complaint as true and not delve into matters asserted defensively that are not apparent from face of the complaint. Rules Civ.Proc., Rule 12(b)(5).

Cases that cite this headnote

[6] Common Interest Communities
Perfection and priority
Mortgages
Priority as affected by provisions of mortgage or by agreement

Mortgage savings clause in common interest community association's covenants, conditions, and restrictions did not subordinate association's superpriority lien over former homeowner's property, based on homeowner's non-payment of association dues, to first deed of trust; statutory scheme governing common interest ownership prohibited variation of provisions by agreement and waiver of rights conferred by statute, except as expressly provided, and statutes providing for liens against owners of common interest properties did not expressly provide for waiver of association's right to priority position for superpriority lien. West's NRSA 116.1104, 116.3116.

7 Cases that cite this headnote

Attorneys and Law Firms

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Akerman LLP and Ariel E. Stern and Natalie L. Winslow, Las Vegas. for Respondent.

BEFORE THE COURT EN BANC.

OPINION

By the Court, PICKERING, J.:

NRS 116.3116 gives a homeowners' association (HOA) a superpriority lien on an individual homeowner's property for up to nine months of unpaid HOA dues. With limited exceptions, this lien is "prior to all other liens and encumbrances" on the homeowner's property, even a first deed of trust recorded before the dues became delinquent. NRS 116.3116(2). We must decide whether this is a true priority lien such that its foreclosure extinguishes a first deed of trust on the property and, if so, whether it can be foreclosed nonjudicially. We answer both questions in the affirmative and therefore reverse.

I.

This dispute involves a residence located in a common-interest community known as Southern Highlands. The property was subject to Covenants, Conditions, and Restrictions (CC & Rs) recorded in 2000. In 2007 it was further encumbered by a note and deed of trust in favor of, via assignment, respondent U.S. Bank, N.A. By 2010, the former homeowners, who are not parties to this case, had fallen delinquent on their Southern Highlands Community Association (SHHOA) dues and also defaulted on their obligations to U.S. Bank. Separately, SHHOA and U.S. Bank each initiated nonjudicial foreclosure proceedings.

Appellant SFR Investments Pool 1, LLC (SFR) purchased the property at the SHHOA's trustee's sale, which took place on September 5, 2012. SFR received and recorded *410 a trustee's deed reciting compliance with all applicable notice requirements. In the meantime, the trustee's sale on U.S. Bank's deed of trust had been postponed to December 19, 2012. Days before then, SFR filed an action to quiet title and enjoin the sale. SFR alleged that the SHHOA trustee's deed extinguished U.S. Bank's deed of trust and vested clear title in SFR, leaving U.S. Bank nothing to foreclose.

The district court temporarily enjoined the U.S. Bank trustee's sale pending briefing and argument on SFR's motion for a preliminary injunction. Ultimately, the district court denied SFR's motion for a preliminary injunction and granted U.S. Bank's countermotion to dismiss. It held that an HOA must proceed judicially to validly foreclose its superpriority lien. Since SHHOA foreclosed nonjudicially, the district court reasoned, U.S. Bank's first deed of trust survived the SHHOA trustee's sale and was senior to the trustee's deed SFR received.

SFR appealed. The district court stayed U.S. Bank's trustee's sale pending decision of this appeal.

II.

A.

The HOA lien statute, NRS 116.3116, is a creature of the Uniform Common Interest Ownership Act of 1982, § 3–116, 7 U.L.A., part II 121–24 (2009) (amended 1994, 2008) (UCIOA), which Nevada adopted in 1991, 1991 Nev. Stat., ch. 245, § 1–128, at 535–79, and codified as NRS Chapter 116. *See* NRS 116.001. One purpose of adopting a Uniform Act like the UCIOA is "to make uniform the law with respect to [its] subject [matter] among states enacting it." NRS 116.1109(2). Thus, in addition to the usual tools of statutory construction, we have available the comments of the National Conference of Commissioners on Uniform State Laws, national commentary, and other states' cases to explicate NRS Chapter 116. 2A Norman J. Singer & Shambie Singer, *Sutherland Statutory Construction* § 48:11, at 603–08 (7th ed.2014); *see Casey v. Wells Fargo Bank, N.A.*, 128 Nev. ——, ——, 290 P.3d 265, 268 (2012).

NRS 116.3116(1) gives an HOA a lien on its homeowners' residences—the UCIOA calls them "units," *see* NRS 116.093—"for any construction penalty that is imposed against the unit's owner ..., 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." NRS 116.3116(2) elevates the priority of the HOA lien over other liens. It states that the HOA's lien is "prior to all other liens and encumbrances on a unit" except for:

(a) Liens and encumbrances recorded before the recordation of the declaration [creating the common-interest community] ...;

(b) *A first security interest on the unit recorded 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.

NRS 116.3116(2) (emphasis added). If subsection 2 ended there, a first deed of trust would have complete priority over an HOA lien. But it goes on to carve out a partial exception to subparagraph (2)(b)'s exception for first security interests:

The [HOA] lien is also prior to all security interests described in paragraph (b) to the extent of any [maintenance and nuisance-abatement] charges incurred by the association on a unit pursuant to NRS 116.310312 and *to the extent of the assessments for common expenses* [i.e., HOA dues] 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.... *This subsection does not affect* the priority of mechanics' or materialmen's liens, or *the priority of liens *411 for other assessments made by the association.*

NRS 116.3116(2) (emphases added).[1]

As to first deeds of trust, NRS 116.3116(2) thus splits an HOA lien into two pieces, a superpriority piece and a subpriority piece. The superpriority piece, consisting of the last nine months of unpaid HOA dues and maintenance and nuisance-abatement charges, is "prior to" a first deed of trust. The subpriority piece, consisting of all other HOA fees or assessments, is subordinate to a first deed of trust.

NRS 116.3116 largely tracks section 3–116(a)–(i) of the 1982 UCIOA.[2] But it does not use the language in subsections (j) and (k) of UCIOA § 3–116, which offer alternative HOA lien foreclosure provisions for adaptation to local law. *See* 1982 UCIOA § 3–116(j)(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]]."); *id.* § 3–116(k) (offering an optional fast-track foreclosure method for cooperatives, which often carry substantial debt service obligations). Instead, the Nevada Legislature handcrafted a series of provisions to govern HOA lien foreclosures, NRS 116.31162 through NRS 116.31168, and refashioned 1982 UCIOA §§ 3–116(j)(2) and (3), concerning cooperatives, as NRS 116.3116(10).

To initiate foreclosure under NRS 116.31162 through NRS 116.31168, a Nevada HOA must notify the owner of the delinquent assessments. NRS 116.31162(1)(a). If the owner does not pay within 30 days, the HOA may record a notice of default and election to sell. NRS 116.31162(*l*)(b). Where the UCIOA states general third-party notice requirements, *see* 1982 UCIOA § 3–116(j)(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."), NRS 116.31168 imposes specific timing and notice requirements.

"The provisions of NRS 107.090," governing notice to junior lienholders and others in deed-of-trust foreclosure sales, "apply to the foreclosure of an association's lien as if a deed of trust were being foreclosed." NRS 116.31168(1). The HOA must provide the homeowner notice of default and election to sell; it also must notify "[e]ach person who has requested notice pursuant to NRS 107.090 or 116.31168" and "[a]ny holder of a recorded security interest encumbering the unit's owner's interest who has notified the association, 30 days before the recordation of the notice of default, of the existence of the security interest." NRS 116.31163(1), (2). The homeowner must be given at least 90 days to pay off the lien. NRS 116.31162. If the lien is not paid off, then the HOA may proceed to foreclosure sale. *Id.* Before doing so, the HOA must give notice of the sale to the owner and to the holder of a recorded security interest if the security interest holder "has notified the association, before the mailing of the notice of sale of the existence of the security interest." NRS 116.311635(1)(b)(2); *see* NRS 107.090(3)(b), (4) (requiring notice of default and notice of sale to "[e]ach other person with an interest whose interest or claimed interest is subordinate to the deed of trust").

NRS 116.31164 addresses the procedure for sale upon foreclosure of an HOA lien and specifies the distribution order for the proceeds of sale. A trustee's deed reciting compliance with the notice provisions of NRS 116.31162 through NRS 116.31168 "is conclusive" *412 as to the recitals "against the unit's former owner, his or her heirs and assigns, and all other persons." NRS 116:31166(2). And, "[t]he sale of a unit pursuant to NRS 116.31162, 116.31163 and 116.31164 vests

in the purchaser the title of the unit's owner without equity or right of redemption." NRS 116.31166(3).

B.

U.S. Bank maintains that NRS 116.3116(2) merely creates a payment priority as between the HOA and the beneficiary of the first deed of trust. If so, then the dues and maintenance and nuisance-abatement piece of the HOA lien does not acquire superpriority status until the beneficiary of the first deed of trust forecloses, at which point, to obtain clear, insurable title, the foreclosure-sale buyer would have to pay off that piece of the HOA lien. But if the superpriority piece is a true priority lien, then it is senior to the first deed of trust. As such, it can be foreclosed and its foreclosure will extinguish the first deed of trust. *See, e.g.,* Restatement (Third) of Prop.: Mortgages § 7.1 (1997) ("A valid foreclosure of a mortgage terminates all interests in the foreclosed real estate that are junior to the mortgage being foreclosed and whose holders are properly joined or notified under applicable law.").

Nevada's state and federal district courts are divided on whether NRS 116.3116 establishes a true priority lien. *Compare 7912 Limbwood Court Trust v. Wells Fargo Bank, N.A.,* 979 F.Supp.2d 1142, 1149 (D.Nev.2013) ("[A] foreclosure sale on the HOA super priority lien extinguishes all junior interests, including the first deed of trust."), *Cape Jasmine Court Trust v. Cent. Mortg. Co.,* No. 2:13CV–1125APG–CWH, 2014 WL 1305015, at *4 (D.Nev. Mar. 31, 2014) (same), *and First 100, LLC v. Burns,* No. A677693 (8th Jud.Dist.Ct. May 31, 2013) (order denying motion to dismiss) (same), *with Bayview Loan Servicing, LLC v. Alessi & Koenig, LLC,* 962 F.Supp.2d 1222, 1225 (D.Nev.2013) ("The super-priority amount is senior to an earlier-recorded first mortgage in the sense that it must be satisfied before a first mortgage upon its own foreclosure, but it is *in parity with* an earlier-recorded first mortgage with respect to extinguishment, i.e., the foreclosure of neither extinguishes the other.") (emphasis in original); *Weeping Hollow Ave. Trust v. Spencer,* No. 2:13–CV–00544–JCM–VCF, 2013 WL 2296313, at *6 (D.Nev. May 24, 2013) (same), *and Diakonos Holdings, LLC v. Countrywide Home Loans, Inc.,* No. 2:12–CV–00949–KJD–RJJ, 2013 WL 531092, at *3 (D.Nev. Feb. 11, 2013) (similar).

[1] Textually, NRS 116.3116 supports the *Limbwood, Cape Jasmine*, and *First 100* view that it establishes a true priority lien. NRS 116.3116(2) does not speak in terms of *payment* priorities. It states that the HOA "lien ... is *prior to* " other liens and encumbrances "except ... [a] first security interest," then adds that, "The lien is *also prior to* [first] security interests" to the extent of nine months of unpaid HOA dues and maintenance and nuisance-abatement charges. *Ibid.* (emphases added). "Prior" refers to the lien, not payment or proceeds, and is used the same way in both sentences, a point the phrase "*also* prior to" drives home. And "priority lien" and "prior lien" mean the same thing, according to *Black's Law Dictionary* 1008 (9th ed.2009): "A lien that is superior to one or more other liens on the same property, usu. because it was perfected first."

The official comments to UCIOA § 3–116 confirm its text. Payment priority proponents insist that the statute cannot mean what it says because the result—a split lien, a piece of which has priority over a first deed of trust—is unprecedented. *Cf. Bayview Loan Servicing,* 962 F.Supp.2d at 1226 (observing that, "the real estate community in Nevada clearly understands the statutes to work the way the Court finds," that is to say, as establishing only a payment priority). But the official comments to UCIOA § 3–116 forthrightly acknowledge that the split-lien approach represents a "significant departure from existing practice." 1982 UCIOA § 3–116 cmt. 1; 1994 & 2008 UCIOA § 3–116 cmt. 2. It is a specially devised mechanism designed to "strike[ ] 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." *Id.* The comments continue: *413 "As a practical matter, secured lenders will most likely pay the 6 [in Nevada, nine, *see supra* note 1] months' assessments demanded by the association *rather than having the association ioreciose on the unit.*" *Id.* (emphasis added). If the superpriority piece of the HOA lien just established a payment priority, the reference to a first security holder paying off the superpriority piece of the lien to stave off foreclosure would make no sense.[3]

[2] "An official comment written by the drafters of a statute and available to a legislature before the statute is enacted has considerable weight as an aid to statutory construction." *Acierno v. Worthy Bros. Pipeline Corp.,* 656 A.2d 1085, 1090 (Del.1995). The comments to the 1982 UCIOA were available to the 1991 Legislature when it enacted NRS Chapter 116. Even though the comments emphasize that the split-lien approach is "[a] significant departure from existing practice," 1982 UCIOA § 3–116 cmt. 1, the Legislature enacted NRS 116.3116(2) with UCIOA § 3–116's superpriority provision intact. From this it follows that, however unconventional, the superpriority piece of the HOA lien carries true priority over a first deed of trust.

The Uniform Law Commission (ULC) has established a Joint Editorial Board for Uniform Real Property Acts (JEB), made up of members from the ULC; the ABA Section of Real Property, Probate and Trust Law; and the American College of Real Estate Lawyers, which "is responsible for monitoring all uniform real property acts," of which the UCIOA is one, http://www.uniformlawcommission.com/Committee.aspx?title=Joint Editorial Board for Uniform Real Property Acts. The JEB's 2013 report entitled, *The Six–Month "Limited Priority Lien" for Association Fees Under the Uniform Common Interest Ownership Act,* also supports that § 3–116(b) establishes a true priority lien.[4] Addressing the recent foreclosure crisis and the incentives the crisis created for first security holders to strategically delay foreclosure, this report canvasses the case law construing the UCIOA's superpriority lien. It endorses the decision in *Summerhill Village Homeowners Ass'n v. Roughley,* ——Wash.App. ——, 289 P.3d 645, 647–48 (2012), which, addressing a statute using the same superpriority language as NRS 116.3116(2), holds that an HOA's judicial foreclosure of the superpriority piece of its lien extinguished the first deed of trust. JEB, *The Six–Month* "*Limited Priority Lien,*" at 8–9. The report then criticizes by name two of the three Nevada federal district court cases cited above as being on the payment-priority side of the NRS 116.3116(2) split—*Weeping Hollow* and *Diakonos*—saying they "misread and misinterpret the Uniform Laws limited priority lien provision, which ... constitutes a true lien priority, [such that] the association's proper enforcement of its lien ... extinguish[es] the otherwise senior mortgage lien." *Id.* at 10 n. 9.

The comments liken the HOA lien to "other inchoate liens such as real estate taxes and mechanics liens." 1994 & 2008 UCIOA § 3–116 cmt. 1. An HOA's "sources of revenues are usually limited to common assessments." *414 JEB, *The Six–Month* "*Limited Priority Lien,*" at 4. This makes an HOA's ability to foreclose on the unpaid dues portion of its lien essential for common-interest communities. *Id.* at 1–2. Otherwise, when a homeowner walks away from the property and the first deed of trust holder delays foreclosure, the HOA has to "either increase the assessment burden on the remaining unit/parcel owners or reduce the services the association provides (e.g., by deferring maintenance on common amenities)." *Id.* at 5–6. To avoid having the community subsidize first security holders who delay foreclosure, whether strategically or for some other reason, UCIOA § 3–116 creates a true superpriority lien:

> A foreclosure sale of the association's lien (whether judicial or nonjudicial) is governed by the principles generally applicable to lien foreclosure sales, i.e., a foreclosure sale of a lien entitled to priority extinguishes that lien and any subordinate liens, transferring those liens to the sale proceeds. Nothing in the Uniform Laws establishes (or was intended to establish) a contrary result.

Id. at 9 (footnotes omitted); *accord* Memorandum from the JEB to the Comm'rs for the Unif. Law Comm'n 3 (June 11, 2014) (noting that, "[a]s originally drafted, § 3–116(c) was intended to create a true lien priority, and thus the association's foreclosure properly should be viewed as extinguishing the lien of the otherwise first mortgagee (to the same extent that foreclosure of a real estate tax lien would extinguish that same mortgage)," citing *7912 Limbwood Court Trust,* 979 F.Supp.2d at 1149).

U.S. Bank's final objection is that it makes little sense and is unfair to allow a relatively nominal lien—nine months of HOA dues—to extinguish a first deed of trust securing hundreds of thousands of dollars of debt. But as a junior lienholder, U.S. Bank could have paid off the SHHOA lien to avert loss of its security; it also could have established an escrow for SHHOA assessments to avoid having to use its own funds to pay delinquent dues. 1982 UCIOA § 3116 cmt. 1; 1994 & 2008 UCIOA § 3–116 cmt. 2. The inequity U.S. Bank decries is thus of its own making and not a reason to give NRS 116.3116(2) a singular reading at odds with its text and the interpretation given it by the authors and editors of the UCIOA. *See* NRS 116.1109 (obligating this court to interpret its version of the UCIOA so as to "make uniform the law ... among states enacting it").

C.

[3] Since NRS 116.3116(2) establishes a true superpriority lien, the next question we must decide is whether the lien may be foreclosed nonjudicially or requires judicial foreclosure. NRS Chapter 116 answers this question directly: An HOA may foreclose its lien by nonjudicial foreclosure sale. Thus, NRS 116.3116(1) defines what an HOA lien covers, while NRS 116.31162(1) states that "in a planned community"—a "planned community" is any type of "common-interest community that is not a condominium or a cooperative," NRS

116.075—"the association may foreclose its lien by sale." To "foreclose [a] lien by sale" under NRS 116.31162(1) encompasses an HOAs conducting a nonjudicial foreclosure sale. This is evident from the remainder of NRS 116.31162, which speaks to the statutory notices of delinquency, default and election to sell required of a nonjudicial foreclosure sale, and the sections that follow, NRS 116.31163 through NRS 116.31168, all of which concern the mechanics and requirements of nonjudicial foreclosure sales of HOA liens. The only limits Chapter 116 places on HOA lien foreclosure sales appear in NRS 116.31162(5) and (6), which restrict foreclosure of HOA liens for certain fines and penalties and liens on homes in Nevada's foreclosure mediation program (FMP). *See also State v. Javier C.,* 128 Nev. ——, ——, 289 P.3d 1194, 1197 (2012) ("Nevada follows the maxim 'expressio unius est exclusio alterius,' the expression of one thing is the exclusion of another."). Given this statutory text, we cannot agree with our dissenting colleagues that NRS Chapter 116 requires judicial foreclosure of the superpriority piece of an HOA lien but authorizes nonjudicial foreclosure of everything else.

Together, NRS 116.3116(1) and NRS 116.31162 provide for the nonjudicial foreclosure of the whole of an HOA's lien, not *415 just the subpriority piece of it. U.S. Bank and our dissenting colleagues do not come to terms with NRS 116.31162. Instead, they focus on a single phrase in NRS 116.3116(2) which defines the superpriority piece of the lien as comprising "assessments for common expenses ... 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.) Not acknowledging that NRS 116.3116(2) only discusses lien priority, not foreclosure methods, they maintain that the phrase "institution of an action to enforce the lien" suggests a civil action, a lawsuit brought in a court of law. But the phrase is not so narrow that it excludes nonjudicial foreclosure proceedings. *Black's Law Dictionary* 869 (9th ed.2009) defines "institution" as "[t]he commencement of something, *such as* a civil or criminal action." (Emphasis added.) As *Blacks* recognizes, "foreclosure" proceedings are "instituted" and include both "judicial foreclosure" and "nonjudicial foreclosure" methods. *Id.* at 719 (defining "foreclosure," "judicial foreclosure," and "nonjudicial" or "power: of-sale foreclosure"). And in the context of foreclosures, "action" appears to be commonly used in connection with nonjudicial as well as judicial foreclosures. *See In re Bonner Mall P'ship,* 2 F.3d 899, 902 (9th Cir.1993) (referring to a bank "commenc[ing] a nonjudical foreclosure action"); *Santiago v. BAC Home Loans Servicing, L.P.,* 20 F.Supp.2d 585, 589, 2014 WL 2075994, at *3 (W.D.Tex.2014) (holding an assignee to be "an appropriate party to initiate a nonjudicial foreclosure action against the Property"); *In re Beach,* 447 B.R. 313, 316 (Bankr.D.Idaho 2011) ("[T]he Bank initiated a nonjudicial foreclosure action...."); *Bowmer v. Dettelbach,* 109 Ohio App.3d 680, 672 N.E.2d 1081, 1086 (1996) (discussing a "nonjudicial foreclosure action ... instituted" in California); *Klem v. Wash. Mut. Bank,* 176 Wash.2d 771, 295 P.3d 1179, 1189 (2013) (addressing the powers of the trustee in "a nonjudicial foreclosure action").

The argument that NRS 116.3116(2)'s use of the word "action" means "that an HOA must foreclose judicially to invoke the superpriority" lien provision was considered and rejected in *Nationstar Mortgage, LLC v. Rob and Robbie, LLC,* No. 2:13–cv–01241–RCJ–PAL, 2014 WL 3661398, at *4 (D.Nev. July 23, 2014). The court gave "two independent reasons" for its holding. "First, 'action' does not include only civil actions. The Legislature could easily have said 'civil action' or 'judicial action,' but it used the broader term 'action.' " *Id.* In the lien foreclosure context, "where the statutes ... provide for either judicial or non judicial foreclosure, 'action' is most reasonably read to include either." *Id.*[5] Second, NRS 116.3116(2) does not "use the word 'action' in a way that makes the super-priority status depend[e]nt upon whether an 'action' has been instituted. Rather, the word 'action' is used (in the subjunctive mode, not the indicative mode) as a way to measure the portion of an HOA lien that has super-priority status." *Id.*

UCIOA § 3–116(b) uses the phrase "institution of an action to enforce the lien" in describing the superpriority lien, exactly as NRS 116.3116(2) does. Section 3–116(j) of the 1982 and 1994 UCIOA (and with minor alteration, section 3–116(k) of the 2008 UCIOA) prompt the adopting state to choose and insert its authorized foreclosure method, be it judicial or nonjudicial:

(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 *416 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.]

1982 UCIOA § 3–116(i). If the UCIOA meant "institution of an action to enforce the lien" in § 3–116(b) to signify that all superpriority HOA lien foreclosures must proceed judicially, § 3–116(j)'s repeated references to the foreclosure of "the association's lien" by judicial or nonjudicial foreclosure, depending on the enacting state's local laws, is inexplicable. And, indeed, the Joint Editorial Board for Uniform Real Property Acts has confirmed that, in the context of an HOA's superpriority lien specifically, "[a] foreclosure sale of the association's lien (*whether judicial or nonjudicial*) is governed by the principles generally applicable to lien foreclosure sales, i.e., a foreclosure sale of a lien entitled to priority extinguishes that lien and any subordinate liens." JEB, *The Six–Month "Limited Priority Lien,*" at 9 (emphasis added) (footnote omitted).

Nevada did not enact subsection (j) of § 3–116. Instead, it enacted a series of separate, consecutively numbered statutes, NRS 116.31162 through NRS 116.31168, each addressing a specific aspect of the nonjudicial foreclosure process NRS 116.31162 authorizes for HOA liens. These statutes use "enforce" throughout with reference to an HOA's nonjudicial foreclosure of its lien. *See* NRS il6.31162(*l*)(b)(2) (the notice of delinquent assessment must identify "the person authorized by the association to enforce the lien by sale"); NRS 116.31162(1)(c); NRS 116.31164(2) (discussing costs, fees, and expenses incident to an HOA's nonjudicial "enforcement of its lien"). Nothing in these statutes suggests that, by adopting them in lieu of the more abbreviated § 3116(j), Nevada was *sub silentio* rejecting the UCIOA's use of "institution of an action to enforce the lien" as applying to either judicial or nonjudicial foreclosures—much less distinguishing, though without saying so, between the subpriority piece of an HOA's lien, to which the nonjudicial foreclosure procedures detailed in NRS 116.31162 through NRS 116.31168 would apply, and the superpriority piece of an HOA's lien, which would require a judicial foreclosure proceeding not actually mentioned in Chapter 116. If anything, Nevada's elaborate nonjudicial foreclosure provisions signal the Legislature's embrace of nonjudicial foreclosure of HOA liens, not the opposite.

Recall that, unlike § 3–116(b), which currently limits the superpriority piece of an HOA's lien to six months of unpaid dues, Nevada's superpriority lien covers nine months of dues as well as maintenance and nuisance-abatement charges "incurred ... pursuant to NRS 116.310312." NRS 116.3116(2); *see supra* note 1. Addressing maintenance and nuisance-abatement charges, NRS 116.310312(4) expressly cross-references Chapter 116's nonjudicial foreclosure provisions, stating that "[t]he lien may be foreclosed under NRS 116.31162 to 116.31168, inclusive." The maintenance and nuisance-abatement statute borrows the phrase "institution of an action to enforce the lien" from NRS 116.3116 in explaining that even if federal law requires a shorter period of priority, "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." NRS 116.310312(6). This phrasing is underinclusive and beyond confusing unless read to encompass judicial and nonjudicial foreclosures alike, both in NRS 116.310312(6) and in its statute of origin, NRS 116.3116(2).

The Nevada Real Estate Division of the Department of Business and Industry (NRED) is charged with administering Chapter 116. NRS 116.615; *see* *417 *State, Dep't of Bus. & Indus. v. Nev. Ass'n Servs., Inc.,* 128 Nev. ——, ——, 294 P.3d 1223, 1227–28 (2012). NRS 116.623(*1*)(a) tasks NRED with issuing "advisory opinions as to the applicability or interpretation of ... [a]ny provision of this chapter." On December 12, 2012, NRED issued Advisory Opinion No. 1301. The opinion addresses, among other questions, whether NRS 116.3116(2) requires a civil action by an HOA to foreclose the superpriority piece of its lien. NRED opines that it does not: "The association is not required to institute a civil action in court to trigger the 9 month look back provided in NRS 116.3116(2)." 13–01 Op. Dep't of Bus. & Indus., Real Estate Div. 18 (2012). Elaborating, the NRED opinion states, "NRS 116 does not require an association to take any particular action to enforce its lien, but [only] that it institutes 'an action,' " which includes the HOA taking action under NRS 116.31162 to initiate the nonjudicial foreclosure process. *Id.* at 17–18. NRED's interpretation is persuasive, as it comports with both the statutory text and the JEB's interpretation of the UCIOA. *See Int'l Game Tech., Inc. v. Second Judicial Dist. Court,* 122 Nev. 132, 157, 127 P.3d 1088, 1106 (2006).

U.S. Bank and the dissent argue that judicial foreclosure should be required as a matter of policy because of the safeguards it offers—notice and an opportunity to be heard, court supervision of the sale, judicial review of the amount of the lien comprising the superpriority piece, and a one-year redemption period. *See* NRS 40.430.463; NRS 21.190–.210. But this argument assumes that requiring the superpriority piece of an HOA lien to be judicially foreclosed will actually afford such protections without need of further amendment to Chapter 116, and this is far from clear. To allow nonjudicial foreclosure of the subpriority piece, which is where the dissent would draw the judicial v. nonjudicial foreclosure line, produces the same difficulties for the homeowners and junior lienholders that are cited as policy reasons for requiring judicial foreclosure of the superpriority piece of the lien; the only difference is the benefit that would inure to first security holders under the dissent's interpretation of Chapter 116. Surely, if the Legislature intended such an unusual distinction, it would have said so explicitly, but it did not.

We recognize that "there has been considerable publicity across the country regarding alleged abuse in the foreclosure process when unit owners fail to pay sums due" their HOA, prompting amendments to the UCIOA that "propose [ ] new and considerable restrictions on the foreclosure process as it applies to common interest communities." *Prefatory Note to the 2008 Amendments to the UCIOA,* 7 U.L.A., part IB, at 225 (2009). But the choice of foreclosure method for HOA liens is the Legislature's, and the Nevada Legislature has written NRS Chapter 116 to allow nonjudicial foreclosure of HOA liens, subject to the special notice requirements and protections handcrafted by the Legislature in NRS 116.31162 through NRS 116.31168. Countervailing policy arguments exist in favor of allowing nonjudicial foreclosure, including that judicial foreclosure takes longer to accomplish, thereby delaying the common-interest community's receipt of needed HOA funds. The consequences of such delays can be "devastating to the community and the remaining residents," who must either make up the dues deficiencies, arguably unjustly enriching the delaying lender, or abandon amenities and maintenance, thereby impairing the value of their homes. JEB, *The Six–Month* "*Limited Priority Lien,*" at 4–5. If revisions to the foreclosure methods provided for in NRS Chapter 116 are appropriate, they are for the Legislature to craft, not this court.

D.

U.S. Bank makes two additional arguments that merit brief discussion. First, the lender contends that the nonjudicial foreclosure in this case violated its due process rights. Second, it invokes the mortgage savings clause in the Southern Highlands CC & Rs, arguing that this clause subordinates SHHOA's lien to the first deed of trust. Neither argument holds up to analysis.

1.

[4] [5] SFR is appealing the dismissal of its complaint for failure to state a claim upon which relief can be granted. NRCP 12(b)(5). The complaint alleges that "the HOA foreclosure *418 sale

complied with all requirements of law, including but not limited to, recording and mailing of copies of Notice of Delinquent Assessment and Notice of Default, and the recording, posting and publication of the Notice of Sale." It further alleges that, "prior to the HOA foreclosure sale, no individual or entity paid the super-priority portion of the HOA Lien representing 9 months of assessments for common expenses." In view of the fact that the "requirements of law" include compliance with NRS 116.31162 through NRS 116.31168 and by incorporation, NRS 107.090, *see* NRS 116.31168(1), we conclude that U.S. Bank's due process challenge to the lack of adequate notice fails, at least at this early stage in the proceeding.[6]

The contours of U.S. Bank's due process argument are protean. To the extent U.S. Bank argues that a statutory scheme that gives an HOA a superpriority lien that can be foreclosed nonjudicially. thereby extinguishing an earlier filed deed of trust, offends due process, the argument is a nonstarter. As discussed in *7912 Limbwood Court Trust,* 979 F.Supp.2d at 1152'.

> Chapter 116 was enacted in 1991, and thus [the lender] was on notice that by operation of the statute, the [earlier recorded] CC & Rs might entitle the HOA to a super priority lien at some future date which would take priority over a [later recorded] first deed of trust.... Consequently, the conclusion that foreclosure on an HOA super priority lien extinguishes all junior liens, including a first deed of trust recorded prior to a notice of delinquent assessments, does not violate [the lender's] due process rights.

Accord Nationstar Mortg., 2014 WL 3661398, at *3 (rejecting a due process challenge to nonjudicial foreclosure of a superpriority lien).

U.S. Bank further complains about the content of the notice it received. It argues that due process requires specific notice indicating the amount of the superpriority piece of the lien and explaining how the beneficiary of the first deed of trust can prevent the superpriority foreclosure sale. But it appears from the record that specific lien amounts were stated in the notices, ranging from $1,149.24 when the notice of delinquency was recorded to $4,542.06 when the notice of sale was sent. The notices went to the homeowner and other junior lienholders, not just U.S. Bank, so it was appropriate to state the total amount of the lien. As U.S. Bank argues elsewhere, dues will typically comprise most, perhaps even all, of the HOA lien. *See supra* note 3. And from what little the record contains, nothing appears to have stopped U.S. Bank from determining the precise superpriority amount in advance of the sale or paying the entire amount and requesting a refund of the balance. *Cf. In re Medaglia,* 52 F.3d 451, 455 (2d Cir.1995) ("[I]t is well established that due process is not offended by requiring a person with actual, timely knowledge of an event that may affect a right to exercise due diligence and take necessary steps to preserve that right."). On this record, at the pleadings stage, we credit the allegations of the complaint that SFR provided all statutorily required notices as true and sufficient to withstand a motion to dismiss. *See 7912 Limbwood Court Trust,* 979 F.Supp.2d at 1152–53.

2.

[6] U.S. Bank last argues that, even if NRS 116.3116(2) allows nonjudicial foreclosure of a superpriority lien, the mortgage savings clause in the Southern Highlands CC & Rs subordinated SHHOA's superpriority lien to the first deed of trust. The mortgage savings clause states that "no lien created under this Article 9 [governing nonpayment of assessments], nor the enforcement of any provision of this Declaration shall defeat or render invalid the rights of the beneficiary under any Recorded first deed of trust encumbering a Unit, made in good faith and for value." It also states that "[t]he lien of the *419 assessments, including interest and costs, shall be subordinate to the lien of any first Mortgage upon the Unit."

NRS 116.1104 defeats this argument. It states that Chapter 116's "provisions may not be varied by agreement, and rights conferred by it may not be waived ... [e]xcept as *expressly* provided in" Chapter 116. (Emphasis added.) "Nothing in [NRS] 116.3116 expressly provides for a waiver of the HOA's right to a priority position for the HOA's super priority lien." *See 7912 Limbwood Court Trust,* 979 F.Supp.2d at 1153: The mortgage savings

clause thus does not affect NRS 116.3116(2)'s application in this case.[7] *See Boulder Oaks Cmty. Ass'n v. B & J Andrews Enters., LLC,* 125 Nev. 397, 407, 215 P.3d 27, 34 (2009) (holding that a CC & Rs clause that created a statutorily prohibited voting class was void and unenforceable).

III.

NRS 116.3116(2) gives an HOA a true superpriority lien, proper foreclosure of which will extinguish a first deed of trust. Because Chapter 116 permits nonjudicial foreclosure of HOA liens, and because SFR's complaint alleges that proper notices were sent and received, we reverse the district court's order of dismissal. In view of this holding, we vacate the order denying preliminary injunctive relief and remand for further proceedings consistent with this opinion.

We concur: HARDESTY, DOUGLAS and SAITTA, JJ.

GIBBONS, C.J., with whom PARRAGUIRRE and CHERRY, JJ., agree, concurring in part and dissenting in part:

While I concur with the majority that NRS 116.3116(2) establishes a true superpriority for an HOA's lien, the enforcement of the superpriority portion of the lien requires institution of an action. I would conclude that this statutory language mandates that a civil judicial foreclosure complaint be filed in order to extinguish a first deed of trust.

The Legislature's use of the term "action" indicates that a superpriority lienholder must file a judicial foreclosure complaint

The phrase "institution of an action" may not inherently mean the filing of a judicial action. *See Black's Law Dictionary* 800 (6th ed.1990) (defining "institution" as "[t]he commencement or inauguration of anything, as the commencement of an action"); *id.* at 28 (defining "action" as "[c]onduct; behavior; something done; the condition of acting; an act or series of acts"). But when used in "its usual legal sense," "action" means "a lawsuit brought in a court." *Id.; see also BP Am. Prod. Co. v. Burton,* 549 U.S. 84, 91, 127 S.Ct. 638, 166 L.Ed.2d 494 (2006) ("The key terms in this provision—'action' and 'complaint'—are ordinarily used in connection with judicial, not administrative, proceedings.").

In my view, NRS 116.3116 is using "action" in its usual legal sense. Other subsections in NRS 116.3116 reference concepts specific to judicial proceedings in relation to the word "action." NRS 116.3116(8) states that a "judgment or decree in any action brought under this section must include costs and reasonable attorney's fees for the prevailing party." NRS 116.3116(11) states:

> In an action by an association to collect assessments or to foreclose a lien created under this section, the court may appoint a receiver to collect all rents or other income from the unit alleged to be due and owing to a unit's owner before commencement or during pendency of the action.... 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....

*420 The way NRS 116.3116 uses action to indicate a court action demonstrates that "institution of an action" means the filing of a judicial proceeding. *See Savage v. Pierson,* 123 Nev. 86, 94 & n. 32, 157 P.3d 697, 702 & n. 32 (2007) ("[I]f a word is used in different parts of a statute, it will be given the same meaning unless it appears from the whole statute that the Legislature intended to use the word differently.").

To be sure, Chapter 116 does not consistently use "action" to mean a judicial action. *See, e.g.,* NRS 116.2119 (the association's declaration may require that the lenders who hold security interests in the units "approve specified actions of the units' owners or the association as a condition to the effectiveness of those actions" but it may not require approval for

certain specified nonjudicial "actions"); NRS 116.785(1) (giving the Commission for Common–Interest Communities and Condominium Hotels, if it finds a violation of NRS Chapter 116, the authority to "take any or all of the following actions," and providing various nonjudicial actions). But when Chapter 116 uses a phrase akin to "institution of an action," it signals the filing of an action in court. *See, e.g.,* NRS 116.2124 (any person holding an interest in a common interest community "may *commence an action* in the district court" to terminate the community in the event of a catastrophe (emphasis added)); NRS 116.31088 (discussing rules for when the association is considering "*the commencement of a civil action* " (emphasis added)); NRS 116.320(3) ("In *any action commenced to enforce* the provisions of this section, the prevailing party is entitled to recover reasonable attorney's fees and costs." (emphasis added)); NRS 116.795(1) (the regulatory agency "may *bring an action* in ... any court of competent jurisdiction" to enjoin further continuing violations of Chapter 116 (emphasis added)). The specific phraseology used in NRS 116.3116(2), "institution of an action," demonstrates that a judicial action, rather than just any enforcement action, was what the Legislature contemplated as the method for extinguishing a first deed of trust. *See also Benson v. Zoning Bd. of Appeals of Town of Westport,* 89 Conn.App. 324, 873 A.2d 1017, 1021–24 (2005) (concluding that although the phrase "institution of an action" as used in the statute at issue was ambiguous, the phrase had "never been held to mean anything other than the filing of a civil action in court" and that the legislature had not made it clear that other proceedings would suffice).

I recognize that Chapter 116 gives the association the option to enforce its lien through nonjudicial foreclosure by following the procedures provided in NRS 116.31162 to 116.31168. The association may even nonjudicially foreclose on its lien for maintenance and abatement charges, charges that may be included in the superpriority portion of the association's lien. *See* NRS 116.310312(4). But, as explained, the lien's superpriority is tied to the "institution of an action to enforce the lien." NRS 116.3116(2); NRS 116.310312(6). Thus, I would conclude that while the association has the option to nonjudicially foreclose on its lien, it must foreclose through judicial action in order to trigger the extinguishing effect of the superpriority portion of its lien.

The NRED advisory opinion should not be given deference because it conflicts with NRS 116.3116(2)'s statutory language

This conclusion is in disagreement with the agency charged with regulating and administering Chapter 116, the Nevada Department of Business and Industry's Real Estate Division (NRED). *See* NRS 116.615; NRS 116.623; *State, Dep't of Bus. & Indus. v. Nev. Ass'n Servs., Inc.,* 128 Nev. ——, ——, 294 P.3d 1223, 1227 (2012). NRED has interpreted "action to enforce the lien" as being met by an association taking action to nonjudicially foreclose on its lien pursuant to NRS 116.31162; thus, according to NRED, an association need not file a civil judicial action to trigger the superpriority portion of the association's lien under NRS 116.3116(2). *See* 13–01 Op. Dep't of Bus. & Indus., Real Estate Div. 17–18 (2012).

However, only agency interpretations that are within the statutory language are afforded deference, *Taylor v. State, Dep't of Health & Human Servs.,* 129 Nev. ——, ——, 314 P.3d 949, 951 (2013), and NRED's interpretation is not within NRS 116.3116's language. Although NRS Chapter 116's statutory *421 scheme allows an association to nonjudicially foreclose on its lien, it must judicially foreclose to trigger the superpriority effect of its lien. *See* NRS 116.3116(2).

The Nevada Legislature intentionally departed from the model code to require institution of a judicial action in NRS 116.3116

I also recognize that NRS 116.3116(2)'s proclamation that the association must file a judicial action to trigger the superpriority effect of its lien is at odds with the uniform act upon which the statute was based. The Joint Editorial Board for Uniform Real Property Acts, which counsels the Uniform Law Commission on uniform real estate laws, has stated that an association may foreclose on superpriority portions of its lien and extinguish the first security "in the manner in which a mortgage is foreclosed"; so, "an association may foreclose its lien by nonjudicial proceedings if the state permits nonjudicial foreclosure." Joint Editorial Board for

Uniform Real Property Acts, *The Six–Month "Limited Priority Lien" for Association Fees Under the Uniform Common Interest Ownership Act,* at 9 n. 8 (2013).

This interpretation is consistent with the UCIOA section upon which NRS 116.3116 is based. The uniform act allows for an adopting state to insert its authorized foreclosure method, whether it be judicial foreclosure or by power of sale. But once the adopting state chooses a method, it becomes mandatory:

(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].

1982 UCIOA § 3–116(j) (emphases added).

NRS 116.3116 departed from the uniform act in that it permits, but does not mandate, nonjudicial foreclosure. *See* NRS 116.3116(7) ("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."). And, NRS 116.3116(2), as well as NRS 116.310312(6), tie the "institution of an action" to the triggering of the lien's superpriority effect. NRS 116.3116' s variance from the uniform act renders the Joint Editorial Board's report interpreting the uniform act's intentions not informative on the proper reading of "institution of an action" as used in NRS 116.3116(2). *See Sallee v. Stewart,* 827 N.W.2d 128, 142 (Iowa 2013) (citing 2B Norman J. Singer & J.D. Shambie Singer, *Statutes & Statutory Construction* § 52:5, at 370 (rev. 7th ed.2012), for "noting that ordinarily 'when a legislature models a statute after a uniform act, but does not adopt particular language, courts conclude the omission was "deliberate" or "intentional," and that the legislature rejected a particular policy of the uniform act' ").

Furthermore, the report post-dates the Legislature's adoption of the UCIOA. And while preenactment official commentary to uniform acts, including the UCIOA, generally may inform this court's understanding of the Legislature's codification of that uniform act, *see Boulder Oaks Cmty. Ass'n v. B & J Andrews Enters., LLC,* 125 Nev. 397, 405–06, 215 P.3d 27, 32–33 (2009) (considering the UCIOA's official comments when interpreting Nevada's codification of the uniform act), this post-hoc commentary is not persuasive, especially in the face of statutory language that states otherwise. *Cf. Ybarra v. State,* 97 Nev. 247, 249, 628 P.2d 297, 297–98 (1981) (noting that generally, "a statute adopted from another jurisdiction will be presumed to have been adopted with the construction placed upon it by the courts of that jurisdiction *before* its adoption" (emphasis added)); 2B Norman J. Singer & J.D. Shambie Singer, *Statutes & Statutory Construction* § 52:2 (rev. 7th ed.2012) ("When the state of origin *422 interprets a statute after the adopting state statute has been enacted, courts do not presume the adopting state also adopted the subsequent construction.").

Policy considerations

In my view, the Legislature's decision to require associations to judicially foreclose their lien to extinguish the first security interest alleviates potential problems that could arise under the majority's holding that nonjudicial foreclosures are enough. As the majority points out, by incorporating certain notice provisions from Chapter 107, Chapter 116 appears to mandate that the association mail the notice of default and notice of sale to the first security holders who have recorded their security interest when the association is foreclosing on its lien. NRS 116.31168(1); NRS 107.090. But what the majority fails to adequately address is that the association is not required to indicate in its notices that superpriority portion of its lien being foreclosed

on, let alone what the amount of the superpriority portion is the association's notice of delinquent assessment and notice of default and election to sell need only state "the assessments and other sums which are due in accordance with subsection 1 of NRS 116.3116." NRS 116.31162(*l*)(a); NRS 116.31162(*l*)(b); *see also* NRS 116.311635(3)(a) (notice of sale must provide "the amount necessary to satisfy the lien"). Although the first security holder could prevent the extinguishment of its interest by purchasing the property at the association's foreclosure sale, *see Carrillo v. Valley Bank of Nev.,* 103 Nev. 157, 158, 734 P.2d 724, 725 (1987), *Keever v. Nicholas Beers Co.,* 96 Nev. 509, 515, 611 P.2d 1079, 1083 (1980), in the nonjudicial foreclosure setting, first security interest holders have no means by which to determine whether an association is even foreclosing on superpriority portions of its lien such as to prompt it to purchase the property at the association's sale. Thus, in my view, the majority fails to give adequate consideration to the due process implications of its holding. *Cf. Kotecki v. Augusztiny,* 87 Nev. 393, 395, 487 P.2d 925, 926 (1971) (" '(W)hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.' " (quoting *Mullane v. Cent. Hanover Bank & Trust Co.,* 339 U.S. 306, 315, 70 S.Ct. 652, 94 L.Ed. 865 (1950))).

Relatedly, after the first deed of trust loses its security in the property pursuant to the association's foreclosure of its superpriority lien, the former homeowner generally will be liable for the amount still owed on the debt. NRS 40.455. Under the majority's holding, in the nonjudicial foreclosure setting, the owner will be left with no mechanism by which to obtain the property's value as an offset against the amount still owed. For example, even if the foreclosure-sale purchaser took the property for an amount significantly lower than its fair market value, the owner would not have an unjust enrichment action against that purchaser; a sale under the nonjudicial foreclosure scheme for an association's lien "vests in the purchaser the title of the unit's owner without equity or right of redemption." NRS 116.31166(3). This also means that the owner, as well as the first security, will have no right to redeem the property under the majority's holding.NRS 116.31166(3); *see also Bldg. Energetix Corp. v. EHE, LP,* 129 Nev. ——, ——, 294 P.3d 1228, 1233 (2013) (recognizing that there is no right to redeem after a Chapter 107 nonjudicial foreclosure sale because a sale under that chapter " 'Vests in the purchaser the title of the grantor and any successors in interest without equity or right of redemption' " (quoting NRS 107.080(5))).

But if the association follows the Legislature's directive and forecloses through court action, *see* NRS 116.3116(2), then the rules governing civil proceedings, *see generally* NRS Title 2, Chapters 10–22, and specifically the rules governing actions affecting real property, as well as the Nevada Rules of Civil Procedure, would govern.[1] A specific protection that comes with judicial foreclosure *423 is the one-year right of redemption that is available to both the property owner and the otherwise-extinguished junior lienholders, which includes the first security interest in this context. NRS 21.190; 21.200; 21.210; *see also Bldg. Energetix Corp.,* 129 Nev. at ——, 294 P.3d at 1233. If the owner or junior lienholders pay what the purchaser at the judicial foreclosure sale paid to acquire the property, plus any other statutorily required amounts, they can redeem the property, NRS 21.200; 21.210; 21.220, allowing the property's value to be applied to the first security interest's outstanding loan amount. The full adjudication of the rights between the pertinent parties and as to the property, including the association, the owner, and the first security interest, as well as any other pertinent party, combined with the statutory protections afforded with a judicial foreclosure, further demonstrate that judicial foreclosure on an association's lien is necessary to trigger its superpriority effect under NRS 116.3116(2).

We concur: PARRAGUIRRE and CHERRY, JJ.

All Citations

334 P.3d 408, 130 Nev. Adv. Op. 75

Footnotes

1 UCIOA § 3–116 differs from NRS 116.3116(1) in that it limits the superpriority to six rather than nine months of unpaid dues, does not make provision for Federal Home Loan Mortgage Corporation and Federal National Mortgage Association regulations, and does not include maintenance and nuisance-abatement charges in the superpriority lien.

2 NRS 116.3116(3) was added in 2013, 2013 Nev. Stat., ch. 552, § 7, at 3788, and is unique. NRS 116.3116(11) was added in 2011, 2011 Nev. Stat., ch. 389, § 49, at 2450 (renumbered from subsection 10 to 11 by 2013 Nev. Stat., ch. 552, § 7 at 3789), and replicates subparagraph (*l*) of the 1994 version and subparagraph (m) of the 2008 version of the UCIOA. *See* UCIOA § 3–116(m) (2008), 7 U.L.A., part IB 377 (2009); UCIOA § 3–116(*l*) (1994), 7 U.L.A., part IB 571–72 (2009). *See* note 1 above for additional variations.

3 The lion's share of most HOA liens will be the unpaid dues, which have superpriority status. This does not make NRS 116.3116(2)(b) superfluous as U.S. Bank suggests, citing *Bayview Loan Servicing,* 962 F.Supp.2d at 1227. It simply reflects the policy choices underlying the statute as structured.

4 The dissent dismisses the work of the ULC JEB as "post-hoc commentary" that is "not persuasive" with respect to the judicial v. nonjudicial foreclosure issue addressed in Section II.C, *infra.* These observations mistake our reliance on the 2013 ULC JEB report for guidance as a legislative-intent analysis, which it is not—the "intent" of the 1991 Legislature that adopted the 1982 UCIOA could hardly be affected by comments 20+ years in the future. Courts often rely on post-enactment ULC Editorial Board commentary as persuasive, though not mandatory, precedent; doing so here is consistent with the mandate that we interpret the UCIOA, like other Uniform Acts, "to make uniform the law with respect to the subject of [the act] among states enacting it." NRS 116.1109(2); *e.g., Chase Plaza Condo. Ass'n v. JPMorgan Chase Bank, N.A.,* 98 A.3d 166, 178, 2014 WL 4250949, at *10 n. 5 (D.C. Aug. 28, 2014) (relying on the ULC JEB report cited in the text as persuasive authority); *Export–Import Bank of United States v. Asia Pulp & Paper Co.,* 609 F.3d 111, 119–20 & 119 n. 8 (2d Cir.2010) (consulting post-enactment commentary by the ULC's Permanent Editorial Board for the Uniform Commercial Code (UCC) in interpreting a particular UCC provision).

5 We recognize that NRS 116.3116 uses "action" to signify civil action in NRS 116.3116(8) (a "judgment or decree in any action brought under this section must include costs and reasonable attorney's fees") and NRS 116.3116(11) (authorizing appointment of a receiver "[i]n an action by an association to collect assessments or to foreclose a lien"). But we accept that "action" includes civil court actions. The point is that "institution of an action to enforce the lien" is not restricted to judicial actions but, rather, includes nonjudicial foreclosure actions as well.

6 On a motion to dismiss, a court must take all factual allegations in the complaint as true and not delve into matters asserted defensively that are not apparent from the face of the complaint. *See Buzz Stew, LLC v. City of N. Las Vegas,* 124 Nev. 224, 227–28, 181 P.3d 670, 672 (2008). Consistent with this standard, we note but do not resolve U.S. Bank's suggestion that we could affirm by deeming SFR's purchase "void as commercially unreasonable."

7 *Coral Lakes Community Ass'n v. Busey Bank, N.A.,* 30 So.3d 579 (Fla.Dist.Ct.App.2010), on which U.S. Bank relies, does not suggest a different result. The CC & Rs that contained the subordination clause in *Coral Lakes* were in place before the statute that limited the ability to subrogate association liens took effect. *Id.* at 581–84 & 582 n. 3. The court refused to enforce the statute because disturbing the prior, contractual relationship "would implicate constitutional concerns about impairment of vested contractual rights." *Id.* at 584. Here, however, the Southern Highlands CC & Rs were recorded after the Legislature adopted and enacted Chapter 116, so no similar concerns about impairment of any party's vested contractual rights arise.

1 NRS 40.430's "one action" rule for recovery of debt or enforcement of rights secured by a mortgage or other lien upon real property would not govern the association's judicial foreclosure action, as liens that arise pursuant to an assessment under Chapter 116 are not considered a "mortgage or other lien." NRS 40.433.

Ex. 2

2015 WL 112892
Only the Westlaw citation is currently available.
United States District Court,
D. Nevada.

CITIMORTGAGE, INC., Plaintiff,
v.
ALESSI & KOENIG, LLC, et al., Defendants.

No. 2:13–cv–01976–JCM–GWF. | Signed Jan. 8, 2015.

Attorneys and Law Firms

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ORDER

JAMES C. MAHAN, District Judge.

***1** Presently before the court is plaintiff CitiMortgage, Inc.'s (hereinafter "plaintiff") motion for summary judgment. (Doc. # 32). Defendants Solana Unit–Owners' Association and Alessi & Koenig, LLC (hereinafter "defendants") did not file a response, and the deadline to respond has now passed.

Also before the court is plaintiff's request for judicial notice. (Doc. # 33).

I. Background

On or about May 9, 2008, Raydalee B. Renaud ("Renaud") opened a revolving line of credit in the amount of $99,000.00, with CitiBank, N.A. (Doc. # 1). This line of credit was secured by a deed of trust on Renaud's property. (Doc. # 1).

Plaintiff is the beneficiary of the deed of trust. (Doc. # 32.) On May 19, 2008, plaintiff recorded the deed of trust. (Doc. # 1.) On November 7, 2012, defendant Solana Unit–Owners' Association ("Solana") recorded a notice of delinquent assessment against the property. (Doc. # 1.)

Defendant Alessi & Koenig, LLC ("Alessi & Koenig") acts as trustee for Solana. (Doc. # 1). On January 31, 2013, Alessi & Koenig recorded a notice of default and election to sell under homeowners association ("HOA") lien. (Doc. # 1.) The notice provided that as of December 27, 2012, the amount due on the property was $3,631.00. (Doc. # 32.)

On August 30, 2013, Alessi & Koenig recorded a notice of trustee's sale against the property. (Doc. # 1.) The notice set the property for sale on September 25, 2013. (Doc. # 1.)

On September 20, 2013, plaintiff contacted Alessi & Koenig by email requesting a payoff demand for the nine month superpriority portion of the HOA lien. Plaintiff also requested that the property sale be postponed. (Doc. # 1).

Alessi & Koenig responded providing a payoff demand for the total amount due to the HOA on the property, $6,930.60. (Doc. # 1.) Alessi & Koenig represented that this request was good through the day before the sale. It also stated that it was unable to provide a payoff demand for the superpriority amount because a foreclosure had not yet occurred on the property. (Doc. # 1.)

On September 26, 2013, plaintiff contacted Alessi & Koenig requesting an updated payoff demand, as the earlier demand had expired. (Doc. # 1.) Plaintiff stated that it was contemplating paying off the account to release the HOA lien. Plaintiff also asked whether Alessi & Koenig would waive the fees and costs assessed on the demand breakdown, pursuant to its regular practice. (Doc. # 1.)

Also on September 26, 2013, Alessi & Koenig responded that the sale had been postponed to October 30, 2013. On October 23, 2013, Alessi & Koenig sent a reduced demand for $6,689.60, good through October 29, 2013. (Doc. # 1.) However, it still did not provide a payoff demand for the superpriority amount.

On October 28, 2013, plaintiff filed a complaint for declaratory relief in the instant case. (Doc. # 1.) Plaintiff sought a judicial declaration that its interest would not be affected by an HOA foreclosure sale. (Doc. # 1.)

***2** Alternatively, plaintiff sought a declaratory that Solana's superpriority lien was limited to nine months of assessments. Plaintiff asked the court to declare that its

payment of this amount would satisfy the superpriority portion of the lien. (Doc. # 1.)

On October 31, 2013, Alessi & Koenig informed plaintiff that the sale was postponed to December 4, 2013, to allow time for a payoff to be received. (Doc. # 32.) On November 26, 2013, plaintiff sent a proposed settlement check to Alessi & Koenig in the amount of $1,845 .00. (Doc. # 32.)

Plaintiff stated that it would revoke its offer if Alessi & Koenig did not accept it by close of business on December 2, 2013. Plaintiff also asked defendants to execute a notice of partial release of lien indicating that the superpriority lien had been satisfied and released. (Doc. # 32.)

Defendants accepted the payment and credited it toward the total amount of the lien. However, they refused to acknowledge that this credit satisfied the superpriority portion of the lien. (Doc. # 32.) On December 4, 2013, Solana held a foreclosure sale on the property. (Doc. # 32.) However, no bids were received, and the property was not sold. (Doc. # 32.)

Plaintiff now moves for summary judgment and seeks a declaration that its payment of $1,845.00, satisfied the superpriority portion of Solana's lien. (Doc. # 32.)

II. Legal Standard

i. Judicial notice

Federal Rule of Evidence 201 provides for judicial notice of adjudicative facts. Under Rule 201(b)(2), the court may "judicially notice a fact that is not subject to reasonable dispute because it ... can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. Fed.R.Evid. 201(b)(2).

Rule 201(c)(2) states that the court "must take judicial notice if a party requests it and the court is supplied with the necessary information." Fed.R.Evid. 201(c)(2). The court may take judicial notice of public records if the facts noticed are not subject to reasonable dispute. *See United States v. Corinthian Colls.*, 655 F.3d 984, 998–99 (9th Cir.2011); *see also Intri–Plex Tech., Inv. v. Crest Grp., Inc.*, 499 F.3d 1048, 1052 (9th Cir.2007) (citations and quotation marks omitted).

ii. Summary judgment

The Federal Rules of Civil Procedure allow summary judgment when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that "there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(a). A principal purpose of summary judgment is "to isolate and dispose of factually unsupported claims." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

For purposes of summary judgment, disputed factual issues should be construed in favor of the non-moving party. *Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871, 888 (1990). However, to be entitled to a denial of summary judgment, the non-moving party must "set forth specific facts showing that there is a genuine issue for trial ." *Id.*

***3** In determining summary judgment, a court applies a burden-shifting analysis. "When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case." *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir.2000) (citations omitted).

By contrast, when the non-moving party bears the burden of proving the claim or defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate an essential element of the non-moving party's case; or (2) by demonstrating that the non-moving party failed to make a showing sufficient to establish an element essential to that party's case on which that party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323–24. If the moving party fails to meet its initial burden, summary judgment must be denied and the court need not consider the non-moving party's evidence. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159–60 (1970).

If the moving party satisfies its initial burden, the burden then shifts to the opposing party to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 631 (9th Cir.1987).

Pursuant to Local Rule 7–2(d), an opposing party's failure

to file a timely response to any motion constitutes the party's consent to the granting of the motion and is proper grounds for dismissal. LR 7–2(d). A court cannot, however, grant a summary judgment motion merely because it is unopposed, even where its local rules might permit it. *Henry v. Gill Indus., Inc.*, 983 F.2d 943, 949–50 (9th Cir.1993); *see also Martinez v. Stanford*, 323 F.3d 1178, 1182 (9th Cir.2003) (a district court cannot grant a motion for summary judgment based merely on the fact that the opposing party failed to file an opposition).

Even without an opposition, the court must apply standards consistent with Federal Rule of Civil Procedure 56, determining if the moving party's motion demonstrates that there is no genuine issue of material fact and judgment is appropriate as a matter of law. *Henry*, 983 F.2d at 950; *see also Clarendon Am. Ins. Co. v. Jai Thai Enters., LLC*, 625 F.Supp.2d 1099, 1103 (W.D.Wash.2009).[1]

III. Discussion

i. Judicial notice

Plaintiff asks the court to take judicial notice of the deed of trust; notice of delinquent assessment; notice of default and election to sell under homeowner association lien; and notice of trustee's sale of the property. (Doc. # 33.) Plaintiff attaches certified copies of these documents to its request. (Doc. # 33.) Each of these documents was recorded with the Clark County recorder's office. (Doc. # 33.)

***4** These documents are a matter of public record. Further, defendants have not filed any opposition to plaintiff's request. The court finds that the facts contained in these documents are not subject to reasonable dispute. Accordingly, the court will take judicial notice of the above-mentioned documents.

ii. Summary judgment

Plaintiff seeks a declaratory judgment that the superpriority portion of Solana's lien has been satisfied. (Doc. # 32.) Plaintiff contends that the parties dispute only the proper interpretation of Nevada Revised Statute 116.3116(2) and the amount of the superpriority portion of Solana's lien. (Doc. # 32.)

The Declaratory Judgment Act provides that "any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201(a).

The court agrees that there is no genuine issue of material fact in this case. Defendants did not file a response to plaintiff's motion for summary judgment, and the parties' filings do not indicate any factual dispute. Rather, it appears clear that the parties dispute the effect of plaintiff's payment to Solana on Solana's superpriority lien.

In order to determine whether plaintiff is entitled to a declaratory judgment regarding the superpriority lien's status, the court will first examine the parties' legal interests under Nevada Revised Statute 116.3116. The court will then look to the amount of the superpriority lien and the effect of plaintiff's payment to Solana on that interest.

A. NRS 116.3116

NRS 116.3116(1) gives an HOA a lien on its homeowners' residences 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." NRS 116.3116(1).

NRS 116.3116(2) provides that a first deed of trust has priority over an HOA lien. *See* NRS 116.3116(2) ("A lien under this section is prior to all other liens and encumbrances on a unit except ... [a] first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent...." NRS 116.3116(2)(b).

However, NRS 116.3116(2) also states that the HOA lien has superpriority status over a first deed of trust "to the extent of the assessments ... 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).

As the Nevada Supreme Court has explained,

As to first deeds of trust, NRS 116.3116(2) thus splits an HOA lien into two pieces, a superpriority piece and a subpriority piece. The superpriority piece, consisting of the last nine months of unpaid HOA dues and maintenance and nuisance-abatement charges, is "prior to" a first deed of trust. The subpriority piece, consisting of all other HOA fees or assessments, is subordinate to a first deed of trust.

***5** *SFR Inv. Pool 1 v. U.S. Bank*, 334 P.3d 408, 411 (Nev.2014).

The holder of a first deed of trust may pay off the superpriority interest in order to keep its interest from being extinguished upon foreclosure of an HOA superpriority lien. *See id.* at 414 ("But as a junior lienholder, U.S. Bank could have paid off the SHHOA lien to avert loss of its security...."); *7912 Limbwood Ct. Trust v. Wells Fargo Bank, N.A., et al.*, 979 F.Supp.2d 1142, 1149 (D.Nev.2013) ("If junior lienholders want to avoid this result, they readily can preserve their security interests by buying out the senior lienholder's interest.") (citing *Carillo v. Valley Bank of Nev.*, 734 P.2d 724, 725 (Nev.1987); *Keever v. Nicholas Beers Co .*, 611 P.2d 1079, 1083 (Nev.1980)).

These cases establish plaintiff's rights in the face of an HOA superpriority lien. Pursuant to the foregoing statute, Solana's superpriority interest is limited to nine months of assessments. If plaintiff paid this amount in full, Solana's remaining interest is subordinate to plaintiff's first deed of trust. Accordingly, the court will now examine whether plaintiff paid the requisite amount and the effect of this payment on priority of the parties' interests.

B. Plaintiff's payment

Solana's superpriority interest is limited "to the extent of the assessments ... 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). Nevada Revised Statute 116.3116 does not include late charges or collection fees as a part of this calculation. *See* NRS 116.3116.

The superpriority lien portion consists of "the last nine months of unpaid HOA dues and maintenance and nuisance-abatement charges," while the subpriority piece consists of "all other HOA fees or assessments." *SFR Inv. Pool 1*, 334 P.3d at 411; *see also 7912 Limbwood Ct. Trust*, 979 F.Supp.2d at 1150 ("The superpriority lien consists only of unpaid assessments and certain charges specifically identified in § 116.31162.").

Further, the Nevada Supreme Court has concluded that "institution of an action to enforce the lien" indicates the commencement of foreclosure proceedings by the HOA. *See SFR Inv. Pool 1*, 334 P.3d at 415 (holding that the phrase may refer to either judicial or nonjudicial foreclosure proceedings). "[T]he word 'action' is used ... as a way to measure the portion of an HOA lien that has superpriority status." *Id.* (citation omitted).

Accordingly, Solana's superpriority lien is limited to the nine months of HOA assessment fees immediately preceding Solana's recording of its notice of default and election to sell, which occurred on January 31, 2013. (Doc. # 33.) Alessi & Koenig's payoff proposal forwarded to plaintiff includes a breakdown of the HOA fees, late charges, and collection costs due on the property. (Doc. # 32.) Plaintiff provides proof of payment to Alessi & Koenig in the amount of $1,845.00. (Doc. # 32.)

***6** Plaintiff explains that this amount reflects nine months of assessments in the amount of $205.00 each. In fact, the assessment amounts from September, 2012, to January, 2013, were only $199.00 per month. However, $205.00 reflects the monthly rate for the assessments for the remaining relevant months. Therefore, as plaintiff notes, $1,845.00, actually exceeds the amount due for nine months of assessments. (Doc. # 32.)

Alessi & Koenig's payoff proposal does not include any additional superpriority fees or costs under NRS 116.3116. The fee breakdown for the relevant time period includes only monthly assessments, late charges, collection costs, and collection administration fees. As a result, payment exceeding nine months of assessment charges suffices to discharge the superpriority portion of Solana's lien.

Based on the foregoing, plaintiff has met its burden of demonstrating that there is no genuine issue of material fact in the case and that it is entitled to judgment as a matter of law. Plaintiff provided payment sufficient to cover the superpriority portion of Solana's lien. Accordingly, plaintiff's motion for summary judgment will be granted.

Plaintiff is entitled to a declaratory judgment that its payment to Solana satisfied the superpriority portion of Solana's lien. The remaining portion of Solana's lien is subordinate to plaintiff's deed of trust on the property.

IV. Conclusion

Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that plaintiff's request for judicial notice, (doc. # 33), be, and the same hereby is, GRANTED.

IT IS FURTHER ORDERED that plaintiff's motion for summary judgment, (doc. # 32), be, and the same hereby is, GRANTED.

All Citations

Slip Copy, 2015 WL 112892

Footnotes

1 "[S]ummary judgment cannot be granted by default, even if there is a complete failure to respond to the motion." Fed.R.Civ.P. 56, 2010 cmt. to subdivision (e). The court may only grant summary judgment if "the motion and supporting materials ... show that the movant is entitled to it." Fed.R.Civ.P. 56(e).

End of Document

Ex. 3

2015 WL 3467063
Only the Westlaw citation is currently available.
United States District Court,
D. Nevada.

US BANK, N.A., Plaintiff,
v.
BACARA RIDGE ASSOCIATION, Defendant.

No. 2:15–cv–00542–RCJ–CWH. | Signed June 1, 2015.

Attorneys and Law Firms

Allison R. Schmidt, Ariel E. Stern, Akerman LLP, Las Vegas, NV, for Plaintiff.

Joseph P. Garin, Lipson Neilson Cole Seltzer & Garin, P.C., Las Vegas, NV, for Defendant.

ORDER

ROBERT C. JONES, District Judge.

***1** This case arises out of an HOA foreclosure sale. Pending before the Court is a Motion to Dismiss or for Summary Judgment (ECF No. 8). For the reasons given herein, the Court grants the motion in part, dismissing the unjust enrichment claim and part of the declaratory judgment claim, with leave to amend.

I. FACTS AND PROCEDURAL HISTORY

On or about December 29, 2005, non-party Hugo Avina purchased the residential real property at 6146 Glenborough Street, North Las Vegas, Nevada 89115 (the "Property"), giving non-party Countrywide Home Loans, Inc. a promissory note for $239,950 secured by a deed of trust against the Property. (Compl. ¶¶ 5, 6, 12, ECF No. 1). Plaintiff U.S. Bank, N.A. succeeded to the note and deed of trust as of June 13, 2014. (*Id.* ¶ 14). The note is in default, and Plaintiff intends to foreclose; but Defendant Bacara Ridge Association's foreclosure based on delinquent HOA assessments has put a cloud on Plaintiff's deed of trust. (*Id.* ¶¶ 16–18).

On November 5, 2009, Defendant caused to be recorded a notice of delinquent assessment lien, indicating $796.75 in past due assessments, interest, costs, penalties, and collection and lien costs. (*Id.* ¶¶ 21–22). Defendant caused to be recorded a second notice on August 5, 2010, indicating a new total of $1,893. (*Id.* ¶¶ 24–25). On September 23, 2010, Defendant caused to be recorded a release of the second notice as having been "in error ." (*Id.* ¶ 27). Presumably, the first lien remained unaffected. The same day, Defendant caused to be recorded a notice of default and election to sell under homeowners association lien (the "NOD"), indicating that $2,686.25 was due for "past due payments plus permitted costs and expenses." (*Id.* ¶ 30). The NOD did not identify the super-priority portion of the lien. (*Id.* ¶ 32). On February 15, 2011, Defendant caused to be recorded a notice of trustee's sale ("NOS"), indicating a sale on March 18, 2011 based on $3,923.17 in past due assessments and "reasonable estimated" costs, expenses, and advances." (*Id.* ¶¶ 34–36). None of the notices or other recorded documents indicated the amount of the super-priority portion of the lien or how the beneficiary of a first mortgage could satisfy the super-priority amount. (*Id.* ¶¶ 40–44). On December 3, 2010, after the NOD was recorded but before the NOS was, the previous beneficiary of Plaintiff's note and DOT caused $416.25 to be delivered to Defendant in order to satisfy the super-priority portion of the lien, but Defendant rejected the tender. (*Id.* ¶ 46–47, 69). That amount was equal to or greater than nine months' worth of regular assessments, (*id.* ¶ 47), which is the maximum amount of the super-priority portion of the lien, assuming no maintenance and abatement costs under Nevada Revised Statutes ("NRS") section 116.310312, *see* Nev.Rev.Stat. § 116.3116(2) (final unnumbered paragraph). Defendant purchased the Property at the trustee's sale on or about October 21, 2011 for $6,156.97, approximately 2.5% of the unpaid principal balance on the note. (Compl.¶¶ 49–53).

***2** Plaintiff sued Defendant in diversity in this Court seeking a declaration under 28 U.S.C. § 2201 that the trustee's sale did not extinguish the DOT for three independent reasons: (1) the super-priority portion of Defendant's lien was satisfied before the equity of redemption was foreclosed; (2) the recorded notices were legally insufficient; and (3) the sale was commercially unreasonable. Plaintiff requests injunctive relief against the transfer or encumbrance of the Property with a claim that the transfer or encumbrance is free of the DOT, as well as an injunction requiring Defendant to pay all taxes, insurance, and HOA dues during the pendency of the action. Plaintiff has also brought a claim for unjust enrichment. Defendant has moved to dismiss, or, in the

alternative, for summary judgment. The Court granted a stipulation for extension of time to respond through May 26, 2015, but as of May 27, 2015 no response or stipulation or motion for a further extension of time had been filed.

II. LEGAL STANDARDS

A. Dismissal for Failure to State a Claim

Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief" in order to "give the defendant fair notice of what the ... claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957). Federal Rule of Civil Procedure 12(b)(6) mandates that a court dismiss a cause of action that fails to state a claim upon which relief can be granted. A motion to dismiss under Rule 12(b)(6) tests the complaint's sufficiency. *See N. Star Int'l v. Ariz. Corp. Comm'n*, 720 F.2d 578, 581 (9th Cir.1983). When considering a motion to dismiss under Rule 12(b)(6) for failure to state a claim, dismissal is appropriate only when the complaint does not give the defendant fair notice of a legally cognizable claim and the grounds on which it rests. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In considering whether the complaint is sufficient to state a claim, the court will take all material allegations as true and construe them in the light most favorable to the plaintiff. *See NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir.1986). The court, however, is not required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir.2001).

A formulaic recitation of a cause of action with conclusory allegations is not sufficient; a plaintiff must plead facts pertaining to his own case making a violation "plausible," not just "possible." *Ashcroft v. Iqbal*, 556 U.S. 662, 677–79 (2009) (citing *Twombly*, 550 U.S. at 556) ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."). That is, under the modern interpretation of Rule 8(a), a plaintiff must not only specify or imply a cognizable legal theory (*Conley* review), but also must allege the facts of his case so that the court can determine whether the plaintiff has any basis for relief under the legal theory he has specified or implied, assuming the facts are as he alleges (*Twombly–Iqbal* review). Put differently, *Conley* only required a plaintiff to identify a major premise (a legal theory) and conclude liability therefrom, but *Twombly–Iqbal* requires a plaintiff additionally to allege minor premises (facts of the plaintiff's case) such that the syllogism showing liability is logically complete and that liability necessarily, not only possibly, follows (assuming the allegations are true).

***3** "Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion. However, material which is properly submitted as part of the complaint may be considered on a motion to dismiss." *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n. 19 (9th Cir.1990) (citation omitted). Similarly, "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss" without converting the motion to dismiss into a motion for summary judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir.1994). Moreover, under Federal Rule of Evidence 201, a court may take judicial notice of "matters of public record." *Mack v. S. Bay Beer Distribs., Inc.*, 798 F.2d 1279, 1282 (9th Cir.1986). Otherwise, if the district court considers materials outside of the pleadings, the motion to dismiss is converted into a motion for summary judgment. *See Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir.2001).

B. Summary Judgment

A court must grant summary judgment when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). Material facts are those which may affect the outcome of the case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *See id.* A principal purpose of summary judgment is "to isolate and dispose of factually unsupported claims." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986). In determining summary judgment, a court uses a burden-shifting scheme:

> the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue

material to its case.

C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc., 213 F.3d 474, 480 (9th Cir.2000) (citations and internal quotation marks omitted). In contrast, when the nonmoving party bears the burden of proving the claim or defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate an essential element of the nonmoving party's case; or (2) by demonstrating that the nonmoving party failed to make a showing sufficient to establish an element essential to that party's case on which that party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323–24. If the moving party fails to meet its initial burden, summary judgment must be denied and the court need not consider the nonmoving party's evidence. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970).

***4** If the moving party meets its initial burden, the burden then shifts to the opposing party to establish a genuine issue of material fact. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *T .W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 631 (9th Cir.1987). In other words, the nonmoving party cannot avoid summary judgment by relying solely on conclusory allegations unsupported by facts. *See Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir.1989). Instead, the opposition must go beyond the assertions and allegations of the pleadings and set forth specific facts by producing competent evidence that shows a genuine issue for trial. *See* Fed.R.Civ.P. 56(e); *Celotex Corp.*, 477 U.S. at 324.

At the summary judgment stage, a court's function is not to weigh the evidence and determine the truth, but to determine whether there is a genuine issue for trial. *See Anderson*, 477 U.S. at 249. The evidence of the nonmovant is "to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255. But if the evidence of the nonmoving party is merely colorable or is not significantly probative, summary judgment may be granted. *See id.* at 249–50.

III. ANALYSIS

The Court grants the motion to dismiss as to the unjust enrichment claim, with leave to amend. An unjust enrichment claim cannot lie except where the plaintiff alleges that he or she bestowed a benefit upon the defendant that in equity belongs to the plaintiff. *See Leasepartners Corp., Inc. v. Robert L. Brooks Trust*, 942 P.2d 182, 187 (Nev.1997) (quoting *Unionamerica v. McDonald*, 626 P.2d 1272, 1273 (Nev.1981) (quoting *Dass v. Epplen*, 424 P.2d 779, 780 (Colo.1967))); Restatement (First) of Restitution § 1 cmt. b (1937). Although the far-below-market-price paid by Defendant at its own sale casts serious doubt upon the commercial reasonableness and therefore the validity of the foreclosure sale, Defendant cannot be said to have been unjustly enriched in the legal sense, because Plaintiff seems to allege that Defendant in fact rejected the tender of the $416.25. If Plaintiff were to allege that Defendant in fact kept the $416.25, or some other amount, and foreclosed anyway, there might be an unjust enrichment claim as to that amount. The Court will therefore give leave to amend the unjust enrichment claim.

The Court mostly denies the motion as to the claims for declaratory and injunctive relief. First, Plaintiff is correct that tender of the super-priority amount before the sale would have avoided the extinguishment of the first mortgage, and that the super-priority amount includes only up to nine months' of regular assessments and any costs of abatement and maintenance but not any collection costs. *See* Nev.Rev.Stat. § 116.3116; *7912 Limbwood Court Trust v. Wells Fargo Bank, N.A.*, 979 F.Supp.2d 1142, 1150 (D.Nev.2013) (Pro, J.) (citing State of Nevada, Department of Business and Industry, Real Estate Division Adv. Op. No. 13–01, Dec. 12, 2012). Plaintiff has both sufficiently alleged those facts, (*see* Compl. ¶¶ 46–47), and Defendant has not satisfied its initial burden on summary judgment on the point. The evidence adduced in support of summary judgment consists only of legal documents concerning the property, such as CC & R, deeds, and the like, and no evidence is adduced concerning the tender of the super-priority amount, such as a declaration or affidavit to the effect that no such tender was made.

***5** Second, the Court grants the motion to dismiss, with leave to amend, as against the request for a declaration that the foreclosure was invalid because the notices were invalid under Nevada law and the Nevada and U.S. Constitutions. The Complaint does not sufficiently explain the allegations that the notices were invalid under state or federal law. Plaintiff must identify the provisions of law under which the notices were insufficient and allege the factual deficiencies thereunder in order to give Defendant fair notice of the nature of the claim.

Third, Defendant is not entitled to either dismissal or summary judgment as to the commercial reasonableness of the sale. There appears to be no dispute that Defendant

purchased the Property for a song at its own sale, perhaps even on a mere credit bid. A sale for such a tiny fraction of the value of the Property made to the foreclosing entity itself raises serious concerns about the commercial reasonableness of the sale. *See Levers v. Rio King Land & Inv. Co.*, 560 P.2d 917, 919–20 (Nev.1977). Plaintiff also complains of lack of notice and a foreclosure procedure not calculated to obtain an equitable sales price or to attract bidders but rather designed to maximize profit for Defendant at the expense of the homeowner and junior lienors. The fact that the foreclosing entity, which then bought the Property at its own sale, may have wrongfully rejected a tender by a junior lienor attempting to protect its interest before the sale warrants even closer scrutiny on this issue. Again, no evidence is adduced tending to negate this claim.

CONCLUSION

IT IS HEREBY ORDERED that the Motion to Dismiss or for Summary Judgment (ECF No. 8) is GRANTED IN PART and DENIED IN PART. The unjust enrichment claim and the part of the declaratory judgment claim concerning lack of notice(s) are DISMISSED, with leave to amend, but the motion is otherwise denied.

IT IS SO ORDERED.

All Citations

Slip Copy, 2015 WL 3467063

Ex. 4

REQUIRES TWO-THIRDS MAJORITY VOTE
(§§ 2, 6)

S.B. 306

SENATE BILL NO. 306–SENATORS FORD AND HAMMOND

MARCH 16, 2015

Referred to Committee on Judiciary

SUMMARY—Revises provisions relating to liens on real property located within a common-interest community. (BDR 10-55)

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 governing a unit-owners' association's lien on a unit for certain amounts due to the association; revising provisions governing the foreclosure of an association's lien; requiring the trustee under a deed of trust securing real property to provide a homeowners' association certain notice concerning the Foreclosure Mediation Program under certain circumstances; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Under existing law, a unit-owners' association has a lien on a unit for certain amounts due to the association and may foreclose its lien through a nonjudicial foreclosure sale. (NRS 116.3116-116.31168) Generally, the association's lien is not prior to a first security interest on the unit recorded before the date on which the amount sought to be enforced became delinquent. However, the association's lien is prior to the first security interest on the unit to the extent of certain maintenance and abatement charges and a certain amount of assessments for common expenses. The portion of the association's lien that is prior to the first security interest on the unit is commonly referred to as the "super-priority lien." (NRS 116.3116) In *SFR Investments Pool 1, LLC v. U.S. Bank*, 130 Nev. Adv. Op. 75, 334 P.3d 408 (2014), the Nevada Supreme Court held that the foreclosure of the super-priority lien by the association extinguishes the first security interest on the unit.

This bill amends various provisions governing the association's super-priority lien and the procedures required for an association to foreclose its lien. **Section 1** of this bill authorizes a limited amount of the costs of enforcing the association's lien to be included in the super-priority lien. **Section 1** also specifically states that an association, a member of the association's executive board, an officer or employee of the association or the community manager of the association is not required to be

a licensed debt collection agency or contract with a licensed debt collection agency to collect amounts included in the association's lien until a notice and default and election to sell the unit to enforce the lien is recorded. Finally, **section 1** specifically states that any payment of an amount included in the association's lien by the holder of a subordinate lien on the unit becomes a debt due from the unit's owner to the holder of the lien.

Sections 2-7 of this bill revise provisions governing the procedures for the foreclosure of the association's lien. **Sections 2-4** revise provisions relating to the notice of the association's foreclosure required to be given to the holders of recorded security interests on the unit. Under **sections 2 and 3**, an association is required to mail by certified or registered mail, return receipt requested, not later than 10 days after recording the notice of default and election to sell, a copy of the notice to each holder of a security interest recorded before the association recorded the notice. **Section 4** similarly requires the association to mail by certified or registered mail, return receipt requested, not later than 10 days after recording notice of the foreclosure sale of the unit, a copy of the notice of sale to each holder of a security interest recorded before the association recorded the notice of sale. **Section 2** also: (1) specifically states that the mailing of the copy of the notice of default and election to sell and the copy of the notice of sale to each holder of a recorded security interest is a condition which must be satisfied before the association may sell the unit; and (2) requires the association to record an affidavit stating the name of each holder of a recorded security interest to whom a copy of the notice of default and election to sell and notice of sale was mailed and the address to which those notices were sent. **Section 4** further requires the publishing, posting and giving of notice of the foreclosure sale of a unit by an association in a manner similar to the publishing, posting and giving of notice of the nonjudicial foreclosure sale of real property secured by a deed of trust.

Sections 5 and 6 revise provisions relating to the foreclosure sale of a unit by an association. **Section 5** requires the sale to be conducted at the same location that a nonjudicial foreclosure sale of real property secured by a deed of trust must be conducted and requires that the sale be commercially reasonable. **Section 5** also removes provisions authorizing the association or person conducting the sale to postpone a sale and, instead, requires notice of a rescheduled sale to be given in the same manner that notice of the sale is given. **Section 6** provides that if the holder of the first security interest pays the amount of the super-priority lien not later than 10 days before the date of sale, the foreclosure of the association's lien does not extinguish the first security interest. **Section 6** also provides that after a sale of a unit to enforce the association's lien, the unit's owner or a holder of a security interest on the unit may redeem the unit by paying certain amounts to the purchaser within 60 days after the sale. If the unit's owner redeems the unit, the unit's owner is restored to his or her ownership of the unit. If a holder of a security interest on the unit redeems the unit, that holder becomes the owner of the unit. **Section 6** further provides that upon expiration of the redemption period, any failure to comply with the requirements of existing law for the foreclosure of the association's lien does not affect the rights of a bona fide purchaser or encumbrancer for value.

Existing law further provides that if a unit is subject to the Foreclosure Mediation Program, a unit-owners' association may not foreclose its lien on the unit until the trustee has recorded the required certificate. (NRS 107.086, 116.31162) **Section 2** revises the language of existing law and specifies that a unit-owners' association may foreclose its lien on a unit that is subject to the Foreclosure Mediation Program if the unit's owner has failed to pay amounts that became due to the association during the pendency of the mediation. **Section 8** of this bill requires the trustee under a deed of trust to notify the association that a unit

is subject to the Foreclosure Mediation Program, and to notify the association that the trustee has received the required certificate from the Program.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. 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 ***and any costs of collecting a past due obligation charged pursuant to NRS 116.310313*** 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 ~~[;]~~ ***, except that a lien under this section is prior to a security interest described in this paragraph to the extent set forth in subsection 3;*** and

(c) Liens for real estate taxes and other governmental assessments or charges against the unit or cooperative.

~~[➥ The lien is also]~~

3. A lien under this section is 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 the]~~ ***;***

(b) The unpaid amount of 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,~~] ***, not to exceed 9 months of such assessments; and***

(c) The costs incurred by the association to enforce the lien in an amount not to exceed the amounts set forth in subsection 5,

➥ 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 ***the recording of a notice of default and election to sell pursuant to paragraph (b) of subsection 1 of NRS 116.31162 or the*** institution of ~~[an]~~ ***a judicial*** action to enforce the lien.

4. This ~~[subsection]~~ ***section*** does not affect the priority of mechanics' or materialmen's liens, or the priority of liens for other assessments made by the association.

~~[3.]~~ ***5. The amount of the costs of enforcing the association's lien that are prior to the security interest described in paragraph (b) of subsection 2 must not exceed the actual costs incurred by the association, must not include more than one trustee's sale guaranty and must not exceed:***

(a) For a demand or intent to lien letter, $150.

(b) For a notice of delinquent assessment, $325.

(c) For an intent to record a notice of default letter, $90.

(d) For a notice of default, $400.

(e) For a trustee's sale guaranty, $400.

➥ ***No costs of enforcing the association's lien, other than the costs described in this subsection, and no amount of attorney's fees may be included in the amount of the association's lien that is prior to the security interest described in paragraph (b) of subsection 2.***

6. Notwithstanding any other provision of law, an association, or member of the executive board, officer, employee or unit's owner of the association, acting under the authority of this chapter or the governing documents of the association, or the community manager of the association, or any employee, agent or affiliate of the community manager, while engaged in the management of the common-interest community governed by the association, is not required to be licensed as a collection agency pursuant to chapter 649 of NRS or hire or contract with a collection agency licensed pursuant to chapter 649 to collect

amounts due to the association in accordance with subsection 1 before the recording of a notice of default and election to sell pursuant to paragraph (b) of subsection 1 of NRS 116.31162.

7. The holder of the security interest described in paragraph (b) of subsection 2 or the holder's authorized agent may establish an escrow account, loan trust account or other impound account for advance contributions for the payment of assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 if the unit's owner and the holder of that security interest consent to the establishment of such an account. If such an account is established, payments from the account for assessments for common expenses must be made in accordance with the same due dates as apply to payments of such assessments by a unit's owner.

~~[4.]~~ ***8.*** 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.

~~[5.]~~ ***9.*** 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.

~~[6.]~~ ***10.*** A lien for unpaid assessments is extinguished unless ***a notice of default and election to sell is recorded as required by paragraph (b) of subsection 1 of NRS 116.31162, or judicial*** proceedings to enforce the lien are instituted ***,*** within 3 years after the full amount of the assessments becomes due.

~~[7.]~~ ***11.*** 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.

~~[8.]~~ ***12.*** A judgment or decree in any action brought under this section must include costs and reasonable attorney's fees for the prevailing party.

~~[9.]~~ ***13.*** 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.

~~[10.]~~ ***14.*** 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.

~~[11.]~~ ***15.*** In an action by an association to collect assessments or to foreclose a lien created under this section, the court may appoint a receiver to collect all rents or other income from the unit alleged to be due and owing to a unit's owner before commencement or during pendency of the action. The receivership is governed by chapter 32 of NRS. 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 NRS 116.3115.

16. Notwithstanding any other provision of law, any payment of an amount due to an association in accordance with subsection 1 by the holder of any lien or encumbrance on a unit that is subordinate to the association's lien under this section becomes a debt due from the unit's owner to the holder of the lien or encumbrance.

Sec. 2. NRS 116.31162 is hereby amended to read as follows:

116.31162 1. Except as otherwise provided in subsection 5 ~~[or 6,]~~ ***, 6 or 7,*** in a condominium, in a planned community, in a cooperative where the owner's interest in a unit is real estate under NRS 116.1105, or in a cooperative where the owner's interest in a unit is personal property under NRS 116.1105 and the declaration provides that a lien may be foreclosed under NRS 116.31162 to 116.31168, inclusive, the association may foreclose its lien by sale after all of the following occur:

(a) The association has mailed by certified or registered mail, return receipt requested, to the unit's owner or his or her successor in interest, at his or her address, if known, and at the address of the unit, a notice of delinquent assessment which states the amount of the assessments and other sums which are due in accordance with subsection 1 of NRS 116.3116, a description of the unit against which the lien is imposed and the name of the record owner of the unit.

(b) Not less than 30 days after mailing the notice of delinquent assessment pursuant to paragraph (a), the association or other person conducting the sale has executed and caused to be recorded, with the

county recorder of the county in which the common-interest community or any part of it is situated, a notice of default and election to sell the unit to satisfy the lien which must contain the same information as the notice of delinquent assessment and which must also comply with the following:

(1) Describe the deficiency in payment.

(2) ***State the total amount of the deficiency in payment, with a separate statement of:***

(I) The amount of the association's lien that is prior to the first security interest on the unit pursuant to subsection 3 of NRS 116.3116 as of the date of the notice;

(II) The amount of the lien described in sub-subparagraph (I) that is attributable to assessments based on the periodic budget adopted by the association pursuant to NRS 116.3115 as of the date of the notice;

(III) The amount of the lien described in sub-subparagraph (I) that is attributable to amounts described in NRS 116.310312 as of the date of the notice; and

(IV) The amount of the lien described in sub-subparagraph (I) that is attributable to the costs of enforcing the association's lien as of the date of the notice.

(3) State that if the holder of the first security interest on the unit does not pay the amount of the association's lien that is prior to that first security interest pursuant to subsection 3 of NRS 116.3116, the association may foreclose its lien by sale and that the sale may extinguish the first security interest as to the unit.

(4) State the name and address of the person authorized by the association to enforce the lien by sale.

~~[(3)]~~ ***(5)*** Contain, in 14-point bold type, the following warning:

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

(c) The unit's owner or his or her successor in interest has failed to pay the amount of the lien, including costs, fees and expenses incident to its enforcement, for 90 days following the recording of the notice of default and election to sell.

(d) The unit's owner or his or her successor in interest, or the holder of a recorded security interest on the unit, has, for a period which commences in the manner and subject to the requirements described in subsection 3 and which expires 10 days before the date of sale, failed to pay the assessments and other

sums that are due to the association in accordance with subsection 1 of NRS 116.3116.

(e) The association or other person conducting the sale has executed and caused to be recorded, with the county recorder of the county in which the common-interest community or any part of it is situated, an affidavit which states, based on the direct, personal knowledge of the affiant or the personal knowledge which the affiant acquired by a review of the business records of the association or other person conducting the sale, which business records must meet the standards set forth in NRS 51.135, the following:

(1) The name of each holder of a security interest on the unit to which the notice of default and election to sell and the notice of sale was mailed, as required by subsection 2 of NRS 116.31163 and paragraph (d) of subsection 1 of NRS 116.311635; and

(2) The address at which the notices were mailed to each such holder of a security interest.

2. The notice of default and election to sell must be signed by the person designated in the declaration or by the association for that purpose or, if no one is designated, by the president of the association.

3. The period of 90 days ***described in paragraph (c) of subsection 1*** begins on the first day following:

(a) The date on which the notice of default ***and election to sell*** is recorded; or

(b) The date on which a copy of the notice of default ***and election to sell*** is mailed by certified or registered mail, return receipt requested, to the unit's owner or his or her successor in interest at his or her address, if known, and at the address of the unit, ➥ whichever date occurs later.

4. An association may not mail to a unit's owner or his or her successor in interest a letter of its intent to mail a notice of delinquent assessment pursuant to paragraph (a) of subsection 1, mail the notice of delinquent assessment or take any other action to collect a past due obligation from a unit's owner or his or her successor in interest unless ~~[, not]~~ ***:***

(a) Not earlier than 60 days after the obligation becomes past due, the association mails to the address on file for the unit's owner:

~~[(a)]~~ ***(1)*** A schedule of the fees that may be charged if the unit's owner fails to pay the past due obligation;

~~[(b)]~~ ***(2)*** A proposed repayment plan; and

~~[(c)]~~ ***(3)*** A notice of the right to contest the past due obligation at a hearing before the executive board and the procedures for requesting such a hearing ~~[.]~~ ***; and***

(b) Within 30 days after the date on which the information described in paragraph (a) is mailed, the past due obligation has not been paid in full or the unit's owner or his or her successor in interest has not entered into a repayment plan or requested a hearing before the executive board. If the unit's owner or his or her successor in interest requests a hearing or enters into a repayment plan within 30 days after the date on which the information described in paragraph (a) is mailed and is unsuccessful at the hearing or fails to make a payment under the repayment plan within 10 days after the due date, the association may take any lawful action pursuant to subsection 1 to enforce its lien.

5. ***The association may not foreclose a lien by sale if the association has not mailed a copy of the notice of default and election to sell and a copy of the notice of sale to each holder of a security interest on the unit in the manner and subject to the requirements set forth in subsection 2 of NRS 116.31163 and paragraph (d) of subsection 1 of 116.311635.***

6. 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.

~~[6.]~~ ***7.*** The association may not foreclose a lien by sale if ~~[:~~

~~(a) The unit is owner-occupied housing encumbered by a deed of trust;~~

~~(b) The beneficiary under the deed of trust, the successor in interest of the beneficiary or the trustee has recorded a notice of default and election to sell with respect to the unit pursuant to subsection 2 of NRS 107.080; and~~

~~(c) The]~~ ***the association has received notice pursuant to NRS 107.086 that the unit is subject to foreclosure mediation pursuant to that section, unless:***

(a) The trustee of record has ~~[not]~~ recorded the certificate provided to the trustee pursuant to subparagraph (1) or (2) of paragraph ~~[(d)]~~ ***(e)*** of subsection 2 of NRS 107.086 ~~[.~~

~~➥ As used in this subsection, "owner-occupied housing" has the meaning ascribed to it in NRS 107.086.]~~ ***; or***

(b) The unit's owner has failed to pay to the association any amounts enforceable as assessments pursuant to subsection 1 of NRS 116.3116 that become due during the pendency of

foreclosure mediation pursuant to NRS 107.086, other than past due obligations as described in subsection 10 of NRS 107.086.

Sec. 3. NRS 116.31163 is hereby amended to read as follows:

116.31163 The association or other person conducting the sale shall also mail, within 10 days after the notice of default and election to sell is recorded, a copy of the notice by ~~[first-class]~~ ***certified or registered*** mail ***, return receipt requested,*** to:

1. Each person who has requested notice pursuant to NRS ~~[107.090 or]~~ 116.31168;

2. ~~[Any]~~ ***Each*** holder of a recorded security interest encumbering the unit's owner's interest ~~[who has notified the association, 30 days]~~ ***which was recorded*** before the recordation of the notice of default ~~[, of the existence of the security interest;]~~ ***or, if the holder of the security interest has a registered agent in this State, the registered agent of the holder of the security interest;*** and

3. A purchaser of the unit, ~~[if the unit's owner has notified the association, 30 days]~~ ***to whom the association has been requested,*** before the recordation of the notice ~~[, that the unit is the subject of a contract of sale and the association has been requested]~~ ***of default,*** to furnish the certificate required by ***subsection 3 of*** NRS 116.4109.

Sec. 4. NRS 116.311635 is hereby amended to read as follows:

116.311635 1. The association or other person conducting the sale shall also, after the expiration of the ~~[90 days]~~ ***90-day period described in paragraph (c) of subsection 1 of NRS 116.31162*** and before selling the unit ~~[:~~

~~(a) Give]~~ ***, give*** notice of the time and place of the sale ~~[in the manner and for a time not less than that required by law for the sale of real property upon execution, except that in lieu of following the procedure for service on a judgment debtor pursuant to NRS 21.130, service must be made on]~~ ***by recording the notice of sale and by:***

(a) Posting a similar notice particularly describing the unit, for 20 days consecutively, in a public place in the county where the unit is situated;

(b) Publishing a copy of the notice three times, once each week for 3 consecutive weeks, in a newspaper of general circulation in the county where the unit is situated;

(c) Notifying the unit's owner ***or his or her successor in interest*** as follows:

(1) A copy of the notice of sale must be mailed, on or before the date of first publication or posting, by certified or registered mail, return receipt requested, to the unit's owner or his or her successor in interest at his or her address, if known, and to the address of the unit; and

(2) A copy of the notice of sale must be served, on or before the date of first publication or posting, in the manner set forth in subsection 2; and

~~[(b) Mail,]~~

(d) Mailing, on or before the date of first publication or posting, a copy of the notice by certified or registered mail, return receipt requested, to:

(1) Each person entitled to receive a copy of the notice of default and election to sell notice under NRS 116.31163;

(2) The holder of a ~~[recorded]~~ security interest ~~[or the purchaser of the unit, if either of them has notified the association,]~~ ***recorded*** before the mailing of the notice of sale ***or, if the holder of the security interest has a registered agent in this State, the registered agent of the holder of the security interest;*** ~~[, of the existence of the security interest, lease or contract of sale, as applicable; and]~~

(3) ***A purchaser of the unit to whom the association has been requested, before the mailing of the notice of sale, to furnish the certificate required by subsection 3 of NRS 116.4109; and***

(4) The Ombudsman.

2. In addition to the requirements set forth in subsection 1, a copy of the notice of sale must be served:

(a) By a person who is 18 years of age or older and who is not a party to or interested in the sale by personally delivering a copy of the notice of sale to an occupant of the unit who is of suitable age; or

(b) By posting a copy of the notice of sale in a conspicuous place on the unit.

3. Any copy of the notice of sale required to be served pursuant to this section must include:

(a) The amount necessary to satisfy the lien as of the date of the proposed sale; and

(b) The following warning in 14-point bold type:

> WARNING! A SALE OF YOUR PROPERTY IS IMMINENT! UNLESS YOU PAY THE AMOUNT SPECIFIED IN THIS NOTICE BEFORE THE SALE DATE, YOU COULD LOSE YOUR HOME, EVEN IF THE AMOUNT IS IN DISPUTE. YOU MUST ACT BEFORE THE SALE DATE. IF YOU HAVE ANY QUESTIONS, PLEASE CALL (name and telephone number of the contact person for the association). IF YOU NEED ASSISTANCE, PLEASE CALL THE FORECLOSURE SECTION OF THE OMBUDSMAN'S OFFICE, NEVADA REAL ESTATE

DIVISION, AT (toll-free telephone number designated by the Division) IMMEDIATELY.

4. Proof of service of any copy of the notice of sale required to be served pursuant to this section must consist of:

(a) A certificate of mailing which evidences that the notice was mailed through the United States Postal Service; or

(b) An affidavit of service signed by the person who served the notice stating:

(1) The time of service, manner of service and location of service; and

(2) The name of the person served or, if the notice was not served on a person, a description of the location where the notice was posted on the unit.

Sec. 5. NRS 116.31164 is hereby amended to read as follows:

116.31164 1. ***Every aspect of a sale or other disposition of a unit pursuant to NRS 116.3116 to 116.31168, inclusive, including, without limitation, the method, advertising, time, date, place and terms, must be commercially reasonable.***

2. The sale must be ~~[conducted]~~ ***made between the hours of 9 a.m. and 5 p.m. and:***

(a) If the unit is located in a county whose population is less than 100,000, at the courthouse in the county in which the ~~[common-interest community]~~ ***unit*** or part of it is ~~[situated, and]~~ ***located.***

(b) If the unit is located in a county whose population is 100,000 or more, at the public location in the county designated by the governing body of the county to conduct a sale of real property pursuant to NRS 107.080.

3. The sale may be conducted by the association, its agent or attorney, or a title insurance company or escrow agent licensed to do business in this State, except that the ~~[sale may be made at the office of the association if the notice of the sale so provided, whether the unit is located within the same county as the office of the association or not.]~~ ***person conducting the sale may not become a purchaser at the sale or be interested in any purchase at such a sale.***

4. The association or other person conducting the sale may ~~[from time to time]~~ ***not*** postpone the sale ~~[by such advertisement and notice as it considers reasonable or, without further advertisement or notice, by proclamation made to the persons assembled at the time and place previously set and advertised for the sale.~~

~~2.]~~ ***, but may reschedule the sale by providing notice of the rescheduled sale in accordance with NRS 116.311635.***

5. On the day of sale ***,*** ~~[originally advertised or to which the sale is postponed,]~~ at the time and place specified in the notice ***,*** ~~[or postponement,]~~ the person conducting the sale may sell the unit at public auction to the highest cash bidder. Unless otherwise provided in the declaration or by agreement, the association may purchase the unit and hold, lease, mortgage or convey it. The association may purchase by a credit bid up to the amount of the unpaid assessments and any permitted costs, fees and expenses incident to the enforcement of its lien.

~~[3.]~~ ***6.*** After the sale, the person conducting the sale shall ~~[:~~

~~(a) Make, execute and, after payment is made, deliver to the purchaser, or his or her successor or assign, a deed without warranty which conveys to the grantee all title of the unit's owner to the unit;~~

~~(b) Deliver a copy of the deed to the Ombudsman within 30 days after the deed is delivered to the purchaser, or his or her successor or assign;]~~ ***:***

(a) Comply with the provisions of subsection 2 of NRS 116.31166; and

~~[(c)]~~ ***(b)*** Apply the proceeds of the sale for the following purposes in the following order:

(1) The reasonable expenses of sale;

(2) 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 the declaration, reasonable attorney's fees and other legal expenses incurred by the association;

(3) Satisfaction of the association's lien;

(4) Satisfaction in the order of priority of any subordinate claim of record; and

(5) Remittance of any excess to the unit's owner.

Sec. 6. NRS 116.31166 is hereby amended to read as follows:

116.31166 1. ***Every sale of a unit pursuant to NRS 116.31162 to 116.31168, inclusive, vests in the purchaser the title of the unit's owner subject to the right of redemption provided by this section. If the holder of the security interest described in paragraph (b) of subsection 2 of NRS 116.3116 satisfies the amount of the association's lien that is prior to its security interest not later than 10 days before the date of sale and a record of such payment is recorded in the office of the county recorder of the county in which the unit is located not later than 5 days before the date of sale, the sale of the unit does not extinguish that security interest to any extent.***

2. After the sale conducted pursuant to NRS 116.31164, the person conducting the sale shall:

(a) Give to the purchaser a certificate of the sale containing:

(1) A particular description of the unit sold;

(2) The price bid for the unit;

(3) The whole price paid; and

(4) A statement that the unit is subject to redemption; and

(b) Record a copy of the certificate in the office of the county recorder of the county in which the unit or part of it is located.

3. A unit sold pursuant to NRS 116.31162 to 116.31168, inclusive, may be redeemed by the unit's owner whose interest in the unit was extinguished by the sale, or his or her successor in interest, or any holder of a recorded security interest that is subordinate to the lien on which the unit was sold, or that holder's successor in interest. The unit's owner whose interest in the unit was extinguished, the holder of the recorded security interest on the unit or a successor in interest of those persons may redeem the property at any time within 60 days after the sale by paying the purchaser the amount of his or her purchase price, with interest at the rate of 1 percent per month thereon in addition, to the time of redemption, plus:

(a) The amount of any assessment, taxes or payments toward liens which were created before the purchase and which the purchaser may have paid thereon after the purchase, and interest on such amount;

(b) If the purchaser is also a creditor having a prior lien to that of the redemptioner, other than the association's lien under which the purchase was made, the amount of such lien, and interest on such amount; and

(c) The amount expended by the purchaser to:

(1) Maintain and improve 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; and

(2) Remove or abate a public nuisance of the unit, including, without limitation, a public nuisance which:

(I) Is visible from any common area of the community or public streets;

(II) Threatens the health or safety of the residents of the common-interest community; or

(III) Results in blighting or deterioration of the unit or surrounding area.

4. If a unit is redeemed by a holder of a recorded security interest on the unit, the holder of another recorded security interest on the unit that is subordinate to the lien under which the unit was sold, or that holder's successor in interest, may, within 30 days after the last redemption, again redeem it from the last

redemptioner on paying the sum paid on the last redemption, and interest at the rate of 2 percent per month thereon in addition, and the amount of any assessment or taxes which the last redemptioner may have paid thereon after the redemption by him or her, and interest on that amount, and, in addition, the amount of any lien held by the last redemptioner before his or her own lien, with interest, but the association's lien under which the unit was sold is not required to be so paid as a lien.

5. The unit's owner whose interest in the unit was extinguished by the sale may redeem the unit from the purchaser or from any redemptioner by payment of the amount required to redeem the unit pursuant to subsection 3 or 4, as applicable, at any time within 60 days after the date of the sale or 30 days after the last redemption by a holder of security interest, whichever is later.

6. The payment of a redemption amount must be made to the purchaser or to the holder of a security interest who last redeemed the unit.

7. Notice of redemption must be served by the person redeeming the unit on the person who conducted the sale and on the person from whom the unit is redeemed, together with:

(a) If the person redeeming the unit is the unit's owner whose interest in the unit was extinguished by the sale or his or her successor in interest, a certified copy of the deed to the unit and, if the person redeeming the unit is the successor of that unit's owner, a copy of any document necessary to establish that the person is the successor of the unit's owner.

(b) If the person redeeming the unit is the holder of a recorded security interest on the unit or the holder's successor in interest:

(1) An original or certified copy of the deed of trust securing the unit or a certified copy of any other recorded security interest of the holder.

(2) A copy of any assignment necessary to establish the claim of the person redeeming the unit, verified by the affidavit of that person, or that person's agent, or of a subscribing witness thereto.

(3) An affidavit by the person redeeming the unit, or that person's agent, showing the amount then actually due on the lien.

8. If the unit's owner whose interest in the unit was extinguished by the sale redeems the property as provided in this section:

(a) The effect of the sale is terminated, and the unit's owner is restored to his or her interest in the unit; and

(b) The person to whom the redemption amount was paid must execute and deliver to the unit's owner a certificate of redemption,

acknowledged or approved before a person authorized to take acknowledgements of conveyances of real property, and the certificate must be recorded in the office of the recorder of the county in which the unit or part of the unit is situated.

9. If the holder of a recorded security interest redeems the unit as provided in this section and the period for a successive redemption pursuant to subsection 4 or 5 has expired, the person conducting the sale shall:

(a) Make, execute and, if the amount required to redeem the unit is paid to the person from whom the unit is redeemed, deliver to the person who redeemed the unit or his or her successor or assign, a deed without warranty which conveys to the person who redeemed the unit all title of the unit's owner to the unit; and

(b) Deliver a copy of the deed to the Ombudsman within 30 days after the deed is delivered to the person who redeemed the unit, or his or her successor or assign.

10. If no redemption is made within 60 days after the date of sale, the person conducting the sale shall:

(a) Make, execute and, if payment is made, deliver to the purchaser, or his or her successor or assign, a deed without warranty which conveys to the purchaser all title of the unit's owner to the unit; and

(b) Deliver a copy of the deed to the Ombudsman within 30 days after the deed is delivered to the purchaser, or his or her successor or assign.

11. The recitals in a deed made pursuant to ~~[NRS 116.31164]~~ ***subsection 9 or 10*** of:

(a) Default, the mailing of the notice of delinquent assessment, and the ***mailing and*** recording of the notice of default and election to sell;

(b) The elapsing of the ~~[90 days; and]~~ ***90-day period set forth in paragraph (c) of subsection 1 of NRS 116.31162;***

(c) The ~~[giving]~~ ***recording, mailing, publishing and posting*** of ***the*** notice of sale ~~[.]~~ ***;***

(d) The failure to pay the assessments and other sums which are due in accordance with subsection 1 of NRS 116.3116 before the expiration of the period described in paragraph (d) of subsection 1 of NRS 116.31162; and

(e) The recording of the affidavit required to be recorded pursuant to paragraph (e) of subsection 1 of NRS 116.31162,

➥ are conclusive proof of the matters recited.

~~[2. Such a]~~

12. A deed containing ~~[those]~~ ***the*** recitals ***set forth in subsection 11*** is conclusive against the unit's former owner, his or her heirs and assigns, and all other persons. The receipt for the

purchase money contained in such a deed is sufficient to discharge the purchaser from obligation to see to the proper application of the purchase money.

~~[3. The sale of a unit pursuant to NRS 116.31162, 116.31163 and 116.31164 vests in the purchaser the title of the unit's owner without equity or right of redemption.]~~

13. Upon the expiration of the redemption period provided in this section, any failure to comply with the provisions of NRS 116.3116 to 116.31168, inclusive, does not affect the rights of a bona fide purchaser or bona fide encumbrancer for value.

Sec. 7. NRS 116.31168 is hereby amended to read as follows:

116.31168 1. ~~[The provisions of NRS 107.090 apply to the foreclosure of an association's lien as if a deed of trust were being foreclosed. The request must identify the lien by stating the names of the unit's owner and the common-interest community.~~

~~2. An association may, after recording a notice of default and election to sell, waive the default and withdraw the notice or any proceeding to foreclose. The association is thereupon restored to its former position and has the same rights as though the notice had not been recorded.]~~ ***A person with an interest or any other person who is or may be held liable for any amounts which are the subject of the association's lien pursuant to NRS 116.3116 or the servicer of a loan secured by a deed of trust or mortgage on real property which is subject to such lien desiring a copy of a notice of default and election to sell or notice of sale under the association's lien may record in the office of the county recorder of the county in which any part of the real property is situated an acknowledged request for a copy of the notice of default and election to sell or the notice of sale. The request must:***

(a) State the name and address of the person requesting copies of the notices;

(b) Identify the recorded instrument by stating the names of the parties thereto, the date of recordation and the recording information where it is recorded; and

(c) The names of the unit's owner and the common-interest community.

2. The association or other person authorized to record the notice of default and election to sell shall, within 10 days after the notice is recorded and mailed pursuant to NRS 116.31162, cause to be deposited in the United States mail an envelope, registered or certified, return receipt requested and with postage prepaid, containing a copy of the notice, addressed to each person who has recorded a request for a copy of the notice.

3. The association or other person authorized to make the sale shall, at least 20 days before the date of sale, cause to be

deposited in the United States mail an envelope, registered or certified, return receipt requested and with postage prepaid, containing a copy of the notice of time and place of sale, addressed to each person described in subsection 2.

4. As used in this section:

(a) "Person with an interest" means any person who has or claims any right, title or interest in, or lien or charge upon, a unit being foreclosed pursuant to NRS 116.31162 to 116.31168, inclusive.

(b) "Recorded instrument" means:

(1) A mortgage, deed of trust, trust deed, security deed, contract for deed, land sales contract, lease intended as security, assignment of lease or rents intended as security, pledge of an ownership interest in an association and any other consensual lien or contract for retention of title intended as security for an obligation or otherwise constituting a security interest on a unit; or

(2) A lease or other agreement providing for the occupancy of a unit,

➥ which instrument or some memorandum thereof has been recorded in the office of the county recorder of the county in which any part of the unit is located.

Sec. 8. NRS 107.086 is hereby amended to read as follows:

107.086 1. Except as otherwise provided in this subsection, in addition to the requirements of NRS 107.085, the exercise of the power of sale pursuant to NRS 107.080 with respect to any trust agreement which concerns owner-occupied housing is subject to the provisions of this section. The provisions of this section do not apply to the exercise of the power of sale if the notice of default and election to sell recorded pursuant to subsection 2 of NRS 107.080 includes an affidavit and a certification indicating that, pursuant to NRS 107.130, an election has been made to use the expedited procedure for the exercise of the power of sale with respect to abandoned residential property.

2. The trustee shall not exercise a power of sale pursuant to NRS 107.080 unless the trustee:

(a) Includes with the notice of default and election to sell which is mailed to the grantor or the person who holds the title of record as required by subsection 3 of NRS 107.080:

(1) Contact information which the grantor or the person who holds the title of record may use to reach a person with authority to negotiate a loan modification on behalf of the beneficiary of the deed of trust;

(2) Contact information for at least one local housing counseling agency approved by the United States Department of Housing and Urban Development;

(3) A notice provided by the Mediation Administrator indicating that the grantor or the person who holds the title of record will be enrolled to participate in mediation pursuant to this section if he or she pays to the Mediation Administrator his or her share of the fee established pursuant to subsection 11; and

(4) A form upon which the grantor or the person who holds the title of record may indicate an election to waive mediation pursuant to this section and one envelope addressed to the trustee and one envelope addressed to the Mediation Administrator, which the grantor or the person who holds the title of record may use to comply with the provisions of subsection 3;

(b) In addition to including the information described in paragraph (a) with the notice of default and election to sell which is mailed to the grantor or the person who holds the title of record as required by subsection 3 of NRS 107.080, provides to the grantor or the person who holds the title of record the information described in paragraph (a) concurrently with, but separately from, the notice of default and election to sell which is mailed to the grantor or the person who holds the title of record as required by subsection 3 of NRS 107.080;

(c) Serves a copy of the notice upon the Mediation Administrator; ~~[and]~~

(d) ***If the owner-occupied housing is located within a common-interest community, notifies the unit-owners' association of the common-interest community, not later than 10 days after mailing the copy of the notice of default and election to sell as required by subsection 3 of NRS 107.080, that the exercise of the power of sale is subject to the provisions of this section; and***

(e) Causes to be recorded in the office of the recorder of the county in which the trust property, or some part thereof, is situated:

(1) The certificate provided to the trustee by the Mediation Administrator pursuant to subsection 4 or 7 which provides that no mediation is required in the matter; or

(2) The certificate provided to the trustee by the Mediation Administrator pursuant to subsection 8 which provides that mediation has been completed in the matter.

3. If the grantor or the person who holds the title of record elects to waive mediation, he or she shall, not later than 30 days after service of the notice in the manner required by NRS 107.080, complete the form required by subparagraph (4) of paragraph (a) of subsection 2 and return the form to the trustee and the Mediation Administrator by certified mail, return receipt requested. If the

grantor or the person who holds the title of record does not elect to waive mediation, he or she shall, not later than 30 days after the service of the notice in the manner required by NRS 107.080, pay to the Mediation Administrator his or her share of the fee established pursuant to subsection 11. Upon receipt of the share of the fee established pursuant to subsection 11 owed by the grantor or the person who holds title of record, the Mediation Administrator shall notify the trustee, by certified mail, return receipt requested, of the enrollment of the grantor or person who holds the title of record to participate in mediation pursuant to this section and shall assign the matter to a senior justice, judge, hearing master or other designee and schedule the matter for mediation. The trustee shall notify the beneficiary of the deed of trust and every other person with an interest as defined in NRS 107.090, by certified mail, return receipt requested, of the enrollment of the grantor or the person who holds the title of record to participate in mediation. If the grantor or person who holds the title of record is enrolled to participate in mediation pursuant to this section, no further action may be taken to exercise the power of sale until the completion of the mediation.

4. If the grantor or the person who holds the title of record indicates on the form described in subparagraph (4) of paragraph (a) of subsection 2 an election to waive mediation or fails to pay to the Mediation Administrator his or her share of the fee established pursuant to subsection 11, as required by subsection 3, the Mediation Administrator shall, not later than 60 days after the Mediation Administrator receives the form indicating an election to waive mediation or 90 days after the service of the notice in the manner required by NRS 107.080, whichever is earlier, provide to the trustee a certificate which provides that no mediation is required in the matter.

5. Each mediation required by this section must be conducted by a senior justice, judge, hearing master or other designee pursuant to the rules adopted pursuant to subsection 11. The beneficiary of the deed of trust or a representative shall attend the mediation. The grantor or his or her representative, or the person who holds the title of record or his or her representative, shall attend the mediation. The beneficiary of the deed of trust shall bring to the mediation the original or a certified copy of the deed of trust, the mortgage note and each assignment of the deed of trust or mortgage note. If the beneficiary of the deed of trust is represented at the mediation by another person, that person must have authority to negotiate a loan modification on behalf of the beneficiary of the deed of trust or have access at all times during the mediation to a person with such authority.

6. If the beneficiary of the deed of trust or the representative fails to attend the mediation, fails to participate in the mediation in good faith or does not bring to the mediation each document required by subsection 5 or does not have the authority or access to a person with the authority required by subsection 5, the mediator shall prepare and submit to the Mediation Administrator a petition and recommendation concerning the imposition of sanctions against the beneficiary of the deed of trust or the representative. The court may issue an order imposing such sanctions against the beneficiary of the deed of trust or the representative as the court determines appropriate, including, without limitation, requiring a loan modification in the manner determined proper by the court.

7. If the grantor or the person who holds the title of record is enrolled to participate in mediation pursuant to this section but fails to attend the mediation, the Mediation Administrator shall, not later than 30 days after the scheduled mediation, provide to the trustee a certificate which states that no mediation is required in the matter.

8. If the mediator determines that the parties, while acting in good faith, are not able to agree to a loan modification, the mediator shall prepare and submit to the Mediation Administrator a recommendation that the matter be terminated. The Mediation Administrator shall, not later than 30 days after submittal of the mediator's recommendation that the matter be terminated, provide to the trustee a certificate which provides that the mediation required by this section has been completed in the matter.

9. Upon receipt of the certificate provided to the trustee by the Mediation Administrator pursuant to subsection 4, 7 or 8, if the property is located within a common-interest community, the trustee shall ***, not later than 10 days after receipt of the certificate,*** notify the ~~[unit-owner's]~~ ***unit-owners'*** association ~~[organized under NRS 116.3101]~~ of the existence of the certificate.

10. During the pendency of any mediation pursuant to this section, a unit's owner must continue to pay any obligation, other than any past due obligation.

11. The Supreme Court shall adopt rules necessary to carry out the provisions of this section. The rules must, without limitation, include provisions:

(a) Designating an entity to serve as the Mediation Administrator pursuant to this section. The entities that may be so designated include, without limitation, the Administrative Office of the Courts, the district court of the county in which the property is situated or any other judicial entity.

(b) Ensuring that mediations occur in an orderly and timely manner.

(c) Requiring each party to a mediation to provide such information as the mediator determines necessary.

(d) Establishing procedures to protect the mediation process from abuse and to ensure that each party to the mediation acts in good faith.

(e) Establishing a total fee of not more than $400 that may be charged and collected by the Mediation Administrator for mediation services pursuant to this section and providing that the responsibility for payment of the fee must be shared equally by the parties to the mediation.

12. Except as otherwise provided in subsection 14, the provisions of this section do not apply if:

(a) The grantor or the person who holds the title of record has surrendered the property, as evidenced by a letter confirming the surrender or delivery of the keys to the property to the trustee, the beneficiary of the deed of trust or the mortgagee, or an authorized agent thereof; or

(b) A petition in bankruptcy has been filed with respect to the grantor or the person who holds the title of record under chapter 7, 11, 12 or 13 of Title 11 of the United States Code and the bankruptcy court has not entered an order closing or dismissing the case or granting relief from a stay of foreclosure.

13. A noncommercial lender is not excluded from the application of this section.

14. The Mediation Administrator and each mediator who acts pursuant to this section in good faith and without gross negligence are immune from civil liability for those acts.

15. As used in this section:

(a) "Common-interest community" has the meaning ascribed to it in NRS 116.021.

(b) "Mediation Administrator" means the entity so designated pursuant to subsection 11.

(c) "Noncommercial lender" means a lender which makes a loan secured by a deed of trust on owner-occupied housing and which is not a bank, financial institution or other entity regulated pursuant to title 55 or 56 of NRS.

(d) "Obligation" has the meaning ascribed to it in NRS 116.310313.

(e) "Owner-occupied housing" means housing that is occupied by an owner as the owner's primary residence. The term does not include vacant land or any time share or other property regulated under chapter 119A of NRS.

(f) ***"Unit-owners' association" has the meaning ascribed to it in NRS 116.011.***

(g) "Unit's owner" has the meaning ascribed to it in NRS 116.095.

Sec. 9. 1. Subsections 1 to 6, inclusive, of NRS 116.31162 and NRS 116.31163, as amended by sections 2 and 3 of this act, respectively, apply only to a notice of default and election to sell that is recorded pursuant to paragraph (b) of subsection 1 of NRS 116.31162, as amended by section 2 of this act, on or after October 1, 2015.

2. Subsection 7 of NRS 116.31162 and NRS 107.086, as amended by sections 2 and 8 of this act, respectively, apply if a notice of default and election to sell is recorded pursuant to NRS 107.080, on or after October 1, 2015.

3. NRS 116.311635 and 116.31164, as amended by sections 4 and 5 of this act, respectively, apply only if a notice of sale is recorded pursuant to NRS 116.311635, as amended by section 4 of this act, on or after October 1, 2015.

4. NRS 116.31166, as amended by section 6 of this act, applies only to a sale of a unit pursuant to NRS 116.31162 to 116.31168, inclusive, as amended by sections 2 to 7, inclusive, of this act, respectively, which occurs on or after October 1, 2015.

Ex. 5

MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-Eighth Session
April 7, 2015

The Senate Committee on Judiciary was called to order by Chair Greg Brower at 1:28 p.m. on Tuesday, April 7, 2015, in Room 2134 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to Room 4412E of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Greg Brower, Chair
Senator Becky Harris, Vice Chair
Senator Michael Roberson
Senator Scott Hammond
Senator Ruben J. Kihuen
Senator Tick Segerblom
Senator Aaron D. Ford

GUEST LEGISLATORS PRESENT:

Senator Mark Lipparelli, Senatorial District No. 6
Senator David R. Parks, Senatorial District No. 7

STAFF MEMBERS PRESENT:

Patrick Guinan, Policy Analyst
Nick Anthony, Counsel
Lynette Jones, Committee Secretary

OTHERS PRESENT:

Alfred Pollard, Federal Housing Finance Agency
Jennifer Gaynor, Nevada Credit Union League
Rocky Finseth, Nevada Association of Realtors; Nevada Land Title Association
Diana Cline, SFR Investments Pool 1, LLC

Steve VanSickler, Nevada Mortgage Lenders Association; Silver State Schools Credit Union
Samuel P. McMullen, Nevada Bankers Association
Garrett Gordon, Community Associations Institute; Southern Highlands Homeowners Association
Gayle Kern, Community Associations Institute
Jon Sasser, Legal Aid Center of Southern Nevada
Pamela Scott, The Howard Hughes Corporation
Marilyn Brainard
Michael Alonso, Nevada Trust Companies Association
Mark Dreschler, Premier Trust
Gregory Crawford, Nevada Trust Companies Association; Alliance Trust Company
Bob Dickerson

Chair Brower:
I will open the hearing on Senate Bill (S.B.) 306.

SENATE BILL 306: Revises provisions relating to liens on real property located within a common-interest community. (BDR 10-55)

Senator Aaron D. Ford (Senatorial District No. 11):
I will present S.B. 306. I provided the Committee a copy of a memorandum from the Real Property Law Section, State Bar of Nevada (Exhibit C). This bill is the quintessential example of compromise legislation. Work on this bill began last year. I gathered a group of individuals to address the superpriority lien issue after the Nevada Supreme Court ruled on its effectiveness relative to canceling out a first deed of trust. Senator Hammond, the cosponsor of the bill, joined the working group, and we worked in a bipartisan manner toward developing a solution to the superpriority lien issue.

Senate Bill 306 balances the interest of all parties involved when a homeowners' association (HOA) forecloses its lien on a unit to collect past-due association assessments. The foreclosure of an HOA lien has an effect on homeowners, HOAs, banks, mortgage lenders, government-sponsored entities that insure and guarantee the vast majority of mortgages in Nevada, investors who purchase foreclosed homes and the title industry. A wide swath of entities and individuals are affected when a superpriority lien is foreclosed. Senate Bill 306 seeks to do a number of things to help this situation.

The bill provides protection for homeowners who have fallen behind in their HOA dues. It enables HOAs to effectively collect the assessments necessary to preserve and maintain the community, and it allows banks and mortgage lenders to protect their lien interests in a home when the HOA proceeds with a foreclosure. The bill creates certainty about the consequences of the HOA foreclosure so that HOA home titles do not become clouded. Under law, when the HOA has a lien on a unit within its community, the HOA can foreclose the lien through a nonjudicial foreclosure process. The HOA's lien is prior to all other liens on the unit except liens recorded before the declaration curating the community, the first mortgage lien, certain taxes and governmental charges. The HOA's lien can be prior to the first mortgage lien based upon certain maintenance and abatement charges and the amount of assessments for common expenses.

The portion of the HOA's lien is referred to as the superpriority lien. The superpriority lien is intended to balance the need for the HOA to collect assessments with the need to encourage lending for the purchase of units in HOAs. In *SFR Investments Pool 1, LLC v. U.S. Bank,* 130 Nev. Adv. Op. 75, 334 P.3d 408 (2014), the Nevada Supreme Court determined that the foreclosure of the superpriority lien by the HOA extinguishes the first mortgage lien on the unit.

I will go through the provisions of S.B. 306 that include changes in Proposed Amendment 6077 (Exhibit D).

Section 1 amends provisions governing the superpriority lien. Section 1, subsection 1 states the collection and foreclosure costs incurred by the HOA are included in the HOA's lien.

Section 1, subsection 2, paragraph (b) and section 1, subsection 5 establish a limit on the amount of collections included in the superpriority lien.

Section 1, subsection 6 states that the HOA and its community manager are not required to hire a collection agency to take certain actions early in the process of foreclosing the HOA's lien.

Section 1, subsection 2, paragraph (d) states the HOA's lien is not prior to certain charges authorized by local government or trash collection. There has

been uncertainty about whether these charges are prior to the HOA lien and this provision treats those charges in the same manner as governmental charges.

Section 1, subsection 16 states any payment of the HOA's lien by the holder of a subordinate lien becomes a debt due from the unit owner to the holder of the lien.

Sections 2 through 7 revise provisions governing procedures for the foreclosure of the HOA's lien. Because a foreclosure of the HOA's superpriority lien extinguishes the first mortgage lien on a home and other subordinate liens, it is important lienholders receive sufficient notice of the HOA foreclosure to enable lienholders to protect their interests.

Section 2, subsection 1, paragraph (b) requires additional information to be included in the notice of default and election to sell that must be recorded by the HOA or the person conducting the sale.

Section 2, subsection 5, and section 3 require the HOA to mail an actual copy of the notice to each holder of a recorded interest on the unit being foreclosed upon by the HOA, using certified mail return receipt requested. In addition, section 2, subsection 1, paragraphs (b) and (e) require additional information be recorded by the HOA in order to create certainty as to the status of the title of the property if the HOA forecloses on the lien.

Section 2 contains an important protection for homeowners by prohibiting the HOA from proceeding with a foreclosure 30 days after sending a homeowner notice of a proposed repayment plan or right to request a hearing before the executive board. This gives the homeowner a realistic opportunity to enter into a repayment plan or request a hearing.

Section 4 is a provision designed to enhance notice of the HOA foreclosure to homeowners and to lienholders, which is one of the key components of S.B. 306. Under law, there is a 90-day waiting period after the mailing of the notice of default and election to sell; the HOA must provide notice of the foreclosure sale to certain persons. Section 4 makes the notice required for the HOA foreclosure similar to the notice required for a nonjudicial bank foreclosure.

Section 5 enacts provisions governing the manner in which a home is sold at the HOA foreclosure sale. This section intends to establish a process to ensure

a fair and reasonable price is obtained. An example is a home foreclosed upon with a $500,000 first lien interest being sold at the HOA foreclosure sale for $5,000. Section 5 seeks to address these types of issues. Section 5, subsection 2 as amended in Proposed Amendment 6077 states,

> If the holder of the security interest described in paragraph (b) of subsection 2 of NRS 116.3116 satisfies the amount of the association's lien that is prior to its security interest not later than 5 days before the date of the sale, the sale may not occur unless a record of such satisfaction is recorded in the office of the county recorder of the county in which the unit is located not later than 2 days before the date of sale.

Section 5 enacts sale procedures similar to procedures for a nonjudicial bank foreclosure and requires the person conducting the sale to announce at the sale whether the superpriority lien has been satisfied. This ensures persons interested in the home know what they will be buying.

Chair Brower:
You indicated section 5 includes a provision affecting the amount of the home at a foreclosure sale. I am not finding that. Can you direct me to that section?

Senator Ford:
There is no specific provision in the bill that contains this language. The notices required under section 5 will help people ascertain the actual value of the home so they will know what they are buying. If the superpriority lien has not been paid, the potential buyer will know it must be addressed.

Chair Brower:
You provided an example about a home worth $500,000 being sold for $5,000. This scenario is not prohibited by S.B. 306.

Senator Ford:
It is not prohibited, but this bill seeks to remedy that situation through the additional notices required before a superpriority lien sale can take place. Before you get to a foreclosure sale, you will know if the payment of the superpriority lien has been made.

Senator Scott Hammond (Senatorial District No. 18):
Over the last few years, home foreclosure sales were made without notification. No one knew sales were being conducted, the time of the sale or who was initiating the sale. As a result, you had situations in which homes were being sold for $5,000. What the bill seeks to do is require thorough notification so everyone will know the location, time and place sales will be conducted. The notification process will ensure more buyers show up at sales and the sale price of homes gets closer to market value.

Senator Ford:
Section 6 enacts provisions governing the period following the HOA foreclosure sale. Section 6, subsection 1 states if the holder of the first mortgage lien satisfies the superpriority lien no later than 5 days before the date of the sale, the seller does not extinguish the first mortgage lien. The remaining provisions of section 6 establish a redemption period so that after the HOA foreclosure sale, the unit owner or a lienholder may redeem the property by paying certain amounts to the purchaser within 60 days after the sale. As originally drafted, section 6 authorized successive redemptions, which would have allowed the unit owner or another lienholder to redeem the property from the prior redeemer. Proposed Amendment 6077 removes the concept of successive redemptions and instead authorizes one redemption during the redemption period. Section 6 also contains provisions to create certainty of the status of the title of the unit after a foreclosure sale.

Section 6, subsection 8 provides that the deed recorded after the foreclosure sale is conclusive proof of the default and compliance with the provisions of law governing the foreclosure process. Section 6, subsection 10 provides that failure to comply with requirements of the foreclosure process does not affect the rights of a bona fide purchaser or bona fide encumbrancer for value.

Section 7 is an additional notice provision that authorizes a person with an interest to record a request to receive a copy of the notice of default and election to sell or notice of sale. Law refers to provisions in *Nevada Revised Statute* (NRS) 107.090 regarding this notice. Section 7 incorporates the language of NRS 107.090 into statute and conforms the language to HOA foreclosures.

Section 2, subsection 7 amends provisions governing the foreclosure of the HOA lien during the period the homeowner is eligible to participate in a

foreclosure mediation program. Under law, if a home with an HOA is subject to the foreclosure mediation program, the HOA may not foreclose its lien until the home is no longer subject to the program. Section 2, subsection 7 revises language of law to specify that the HOA may foreclose its lien on a home that is subject to the mediation program if the unit owner fails to pay association fees that accrued during the pendency of the foreclosure mediation.

Section 8 requires the trustee, under the deed of trust, to notify HOAs when a homeowner is eligible to participate in a foreclosure mediation program and when the trustee receives the required certificate from the mediation program.

Senator Harris:
How does this work with the foreclosure mediation program? An example is a homeowner who is delinquent on the HOA dues and in default. The notice of default has been filed and the lender and the homeowner agree to go into foreclosure mediation. Sometimes HOA fees have not been paid for more than 16 months. Does S.B. 306 provide that as long as the homeowner pays the HOA fees during the time he or she elects and remains in the foreclosure mediation program, which takes about 9 months, the HOA cannot foreclose? Is the homeowner protected if he or she has outstanding HOA fees but pays the fees while in the mediation program?

Senator Hammond:
Yes. This is the intent of the bill. The bill will allow your scenario to unfold as described.

Senator Harris:
If homeowners elect mediation, will there be documentation with regard to the foreclosure mediation program putting them on notice that they are now required to pay their HOA fees and keep them current?

Senator Ford:
That is not in S.B. 306, but it is something we can consider.

Senator Hammond:
I do not recall seeing this language in the bill.

Senator Harris:
This is important because most homeowners in default do not anticipate they will pay fees of any kind while in mediation. It would be bad for a person in mediation to be forced out of the program because he or she was not on notice that HOA fees had to be paid.

Senator Hammond:
We will determine if a provision in the bill provides notification to homeowners of the requirement for payment of HOA dues during their participation in the mediation program.

Senator Ford:
I believe S.B. 306 strikes a balance between the interests of homeowners, HOAs, banks, mortgage lenders, government-sponsored entities, investors and the title industry. Senate Bill 306 provides all homeowners with a realistic opportunity to enter into a repayment plan and an opportunity to redeem their units if they fall behind on their HOA dues. Homeowner associations can collect assessments needed to maintain their communities. Banks, mortgage lenders and government-sponsored entities will receive enhanced notice of HOA foreclosures and greater opportunities to protect their interests. Investors in the title industry will receive greater certainty regarding the title status of units that have been foreclosed upon by the HOA.

The process of the HOA foreclosure sale will be improved to ensure the sale is conducted in a reasonable manner. Alfred Pollard, a representative for the Federal Housing Finance Agency (FHFA), is here in support of the bill. The FHFA is one of the government-sponsored entities interested in Nevada's superpriority lien statutes. Mr. Pollard will speak about how this bill will provide better security for the federal government relative to its role in underwriting Nevada loans.

Senator Hammond:
The drafting of S.B. 306 has been a collaborative effort with many entities involved. The bill presented today is important to the housing industry and the FHFA. Questions raised by Senator Harris may be answered by those who have worked on the bill and are aware of the fine details of the notification process. The bill codifies the notification process and is a great example of a collaborative effort.

Senator Ford:
The Committee must understand the version of the bill endorsed by the sponsors and the FHFA is the one I presented that includes Proposed Amendment 6077. Subsequent amendments coming forward today have not been vetted and may not be approved by governmental entities.

Senator Harris:
Did you have an opportunity to meet with Verise Campbell, Deputy Director of the Foreclosure Mediation Program for Nevada, to discuss how this bill will impact the program?

Senator Ford:
I did not.

Senator Hammond:
No.

Chair Brower:
Since the Nevada Supreme Court decision regarding HOA superpriority liens, there has been confusion and displeasure about the situation. This bill attempts to fix the issue.

Alfred Pollard (General Counsel, Federal Housing Finance Agency):
I support S.B. 306 and I will read from my written testimony (Exhibit E).

Chair Brower:
You referred to a drastic or extraordinary remedy. Can you pinpoint for the Committee what you are referring to with respect to the bill?

Mr. Pollard:
Extinguishing a first mortgage in the hundreds of thousands of dollars is a strong remedy. The goal of the remedy is to make sure someone pays or helps pay outstanding association dues. This seems to be a broader remedy than is necessary to accomplish the goal.

Chair Brower:
The lending community has experienced heartburn from the Nevada Supreme Court case. The Supreme Court case ruled that a first mortgage may be

extinguished because of an HOA foreclosure. You stated that S.B. 306 does not do away with that possibility but helps the lender avoid this situation.

Mr. Pollard:
Yes. The bill helps avoid that possibility by providing clarity and certainty. Those are the real contributions of the bill. This is a complex provision of law, but there is sufficient clarity. It will help the HOAs get payment for outstanding dues and help unit owners in some cases.

In loan modification efforts, homeowners avoid responding to messages until told, "You can lose your home." This notice prompts homeowners to either go into mediation or go directly to the servicer for assistance.

When we look at the broad picture, we are trying to help Nevada homeowners stay in their units. When they cannot, what happens? Fannie Mae and Freddie Mac get involved in the preforeclosure process with the hope that foreclosure can be avoided. The goal is to get homeowners out of foreclosure without a disproportionate remedy looming. Senate Bill 306 can help reduce that possibility, but it is still controversial from our prospective.

Chair Brower:
This is a complicated bill and a complex area of the law. The Committee will simplify it as much as possible, but some issues are complicated and cannot be made simple.

Jennifer Gaynor (Nevada Credit Union League):
We support S.B. 306 with Proposed Amendment 6077. I am not proffering an amendment to the bill, but I understand the Nevada Bankers Association has put forth one that we support. We share many concerns of the FHFA, and we appreciate the efforts made by the bill sponsors and the working group.

Rocky Finseth (Nevada Association of Realtors; Nevada Land Title Association):
We support S.B. 306. We agree with Mr. Pollard. Our main issue is the ability for Nevadans to get loans. It is about helping homeowners get into homes. If lending stops, it will create a big problem for Realtors. In regard to the Nevada Land Title Association, I want to put on the record that regardless of whether S.B. 306 is in its original form or as amended, there is no guarantee any passage of legislation will ensure the issuance of title insurance. It is decided on

a case-by-case basis. The work of the group has gone a long way toward resolving a number of our concerns.

Diana Cline (SFR Investments Pool 1, LLC):
We are members of the working group on S.B. 306. We support the version of the bill as presented by Senator Ford. After years of litigation, the Nevada Supreme Court clarified the effect of lien foreclosures containing superpriority amounts. This clarification allowed markets to have foreclosure sales where prices were no longer $5,000 for a $200,000 property. Homes were sold at market value, the same price you would see at a bank foreclosure sale. This bill cleans up some of the notice concerns we have. I have concerns about the additional amendments being proffered today.

Steve VanSickler (Nevada Mortgage Lenders Association; Silver State Schools Credit Union):
We support S.B. 306. I will read from my written testimony (Exhibit F). Enhanced notification is not sufficient to satisfy a commercially reasonable standard such as in the example of $5,000 being paid for a home worth $500,000.

Extinguishment of the first mortgage lien, addressed by the FHFA, adds additional risk that impacts access to credit in common-interest communities. The FHFA stated the regulated agencies, Fannie Mae, Freddie Mac and federal home loan banks, will no longer buy loans for properties in common-interest communities in Nevada, especially in light of the extinguishment of the first mortgage lien. That alone will add additional risk to the underwriting even if the agencies agree with other prospective changes. This additional risk will result in Nevada homeowners being denied credit, and the cost of their loans will be higher. An inability to access credit will affect the value of homes in common-interest communities. This loss of value may be dramatic due to the additional risk involved when a first mortgage lienholder can be stripped of a lien.

Chair Brower:
Have you provided your suggested changes to the Committee in writing?

Mr. VanSickler:
I submitted my suggestions, and Marcus Conklin will make sure you receive them.

Chair Brower:
I am not sure you accurately quoted Mr. Pollard; perhaps you misstated his intent. The testimony of the FHFA is clear. The Committee will review your suggestions.

Samuel P. McMullen (Nevada Bankers Association):
We support S.B. 306, but we have proposed amendments (Exhibit G) in addition to Proposed Amendment 6077. We have aggressively promoted the bill and some of its ideas. We have wrapped the whole Association around a couple of concepts. We want this bill to be HOA-positive and allow it to be helpful for other participants in what has been a complicated and interest-ridden process. We want to resolve as many issues as possible through the promotion of a few ideas.

We do not want to change the superpriority extinguishment of loans if foreclosed upon by the HOA. A better way to help everyone is the genesis of this bill. The idea for S.B. 306 has been in process since the 77th Legislative Session.

Chair Brower:
Tell the Committee the problems the Bankers Association has with the bill as presented. What would you change?

Mr. McMullen:
I want to be positive about the bill.

Chair Brower:
I thought there was a global deal on this bill. I thought the Committee would hear a presentation of a globally resolved agreed-upon bill. It is fine if this is not the case, but I want to know what you like and do not like about the bill as presented so we can weigh the pros and cons of further changes.

Mr. McMullen:
There is a lot of agreement of this bill by the parties. Most of what we agree upon is in front of the Committee. We had conversations until 7:30 p.m. last night, which raised other issues we want to address today. Some of our proposed amendments may be disagreeable, but they are small.

Chair Brower:
Run the Committee through your proposed amendments. What do the bankers not like about the bill?

Mr. McMullen:
It is not that we do not like it.

Chair Brower:
You love the bill, but you think it could be better with a couple of changes.

Mr. McMullen:
Our role is to make sure we are standing up for what we believe but also facilitating other solutions. I will present my proposed amendments for the Committee. These concepts were the topic of our discussions.

Proposed Amendment 1 addresses how we should calculate the 9-month period for measuring the superpriority lien period back from its payment. This makes it easier for those who always looked back to calculate the time period. We want to put it into a model that fits the existing situation.

The most appropriate suggestion is to look back from the payment of the superpriority lien. There may be a need for clarification about the period that covers the postnotice of default. This is the 90-day delay before you can issue a notice of sale. This could be handled in the notice of sale or notice of default, which could define the per month fee so the lender pays off the superpriority lien in full, making it current given the 9-month situation.

Chair Brower:
The Committee has your proposed amendments. I interpret page 1 as a summary of eight proposed amendments; the following pages provide more details, referencing specific sections of the bill where the proposed amendments fit.

Mr. McMullen:
I did not consider Proposed Amendment 6077 in my document of proposed amendments. I used the original draft of S.B. 306. This is why I provided a summary on the first page.

Chair Brower:
Are any of your proposed Amendments 1 through 8 already part of the revised bill as presented by the sponsors?

Mr. McMullen:
Proposed Amendment 6077 is not incorporated into my proposed changes. If my proposed amendments conflict with Proposed Amendment 6077, they will be minor issues of textual juxtaposition. We support everything in Proposed Amendment 6077. I did not have time to cross-check my proposed amendments to determine if they may change Proposed Amendment 6077.

Chair Brower:
Can you tell the Committee what sections of Proposed Amendment 6077 need further changes?

Mr. McMullen:
My proposed amendments will be in addition to Proposed Amendment 6077.

Chair Brower:
Run the Committee through each of your proposed amendments.

Mr. McMullen:
Proposed Amendment 2 addresses an issue of additional costs incurred by the HOA when it starts the notice of sale process. This amendment clarifies if a lender does not act soon enough on the right to pay off the superpriority lien before the HOA starts a notice of sale, the lender must pay additional costs.

Proposed Amendment 3 clarifies the 3-year limitation applies only to the extinguishment of the HOA's lien by either the issuance of the notice of default or judicial proceedings.

Proposed Amendment 4 is critical to the Bankers Association. This gives the HOA the option to use any address and any method of finding an address, and the lender will pay for the associated costs. This was addressed in both the original bill and Proposed Amendment 6077. We do not want HOAs going through a process in which they did not accurately provide notice or did not have a receipt or written confirmation of the mailing in the file. We want to make sure everyone receives notice to avoid the need for additional notification. This is an important part of my proposed amendments.

Senator Harris:
I am concerned about the confirmation of receipt. I have dealt with banks for many years as a homeowner advocate, and I can tell you the No. 1 problem we have is communication with banks. I am concerned because in addition to banks having a corporate presence often outside the State, there are many branches and different locations within the State. I go online to determine whom I need to contact and deal with, but the process is convoluted and frustrating. How is an HOA to know whom they must notify? When the HOA does give notice, how do they guarantee any confirmation of receipt? I have personally submitted hundreds of documents to banks, and I have a hard time getting banks to acknowledge they received the documents. When you deal with the notification process in this context, it becomes important.

This issue is the same for the HOAs. How do they get confirmation of receipt of documents or proof they submitted those documents from banks that sometimes do not know the right hand from the left, or the banks are large with many units and different individuals responsible for mail intake? I agree the notice provisions are critical, but how do you guarantee it? How do you provide guidance to HOAs to ensure they get their notices to the right party and get the confirmations of receipt you require?

Mr. McMullen:
It is a critical and important point. This is why we propose the banks pay for every cost up to notice of default and provide a trustee sale guarantee policy. The title industry indicates this is similar to a statement of condition of title that lists lenders in existence at the time the trustee sale guarantee title policy is issued. They also get what is referred to as "dated down." We have gone the extra mile because it is so important to us. We want to give HOAs a tool, and banks will pay for it when they pay the collection costs. The HOAs will have no concern about whom they attempting to notify. We had offered them a registered agent, but the HOAs did not agree because they perceived liability in transferring the corporate name to the resident agent. I do not think we can solve that concern. You deal with banks a lot, and the experience has not been great.

Senator Harris:
That is not true. I have a complicated relationship with banks, having seen banks do frustrating things. I have also seen banks do some pretty incredible things.

Mr. McMullen:
My point is that banks are not perfect. Banks have said they need a strong, targeted notice process. We started by asking for critical time deadlines based on receipt. It is important that everyone is allowed to come in and get notice, not just the first mortgage company. I cannot make the language totally comfortable, but banks understand the importance of notification. They want it to go through a process. They will set up a process approach more like special assets, special projects and special problems.

In the early stages, we discussed allowing 30 to 60 days to respond. Now we have over 90 days. In the banks' best interest, they sign the notifications and get them back as the best confirmation for us of the HOAs' compliance. They have to make sure people can get notice. You do not want a situation in which you have not confirmed you received notice, but your business records contain a mailed notification. It is a waste of time to notify and later learn it was not done correctly. The notification process is a one-shot deal that must be done correctly; otherwise, you must unwind the process.

Senator Harris:
I do not disagree with what you said. For me to be satisfied, I will need more clarity with regard to where the notice needs to be sent because it is confusing. I would hate for someone to send a notice and receive confirmation the notice did not make it to the correct branch or bank representative with the ability to keep the process going forward. I have seen this situation go awry, and then we have a serious issue on the table with a person's home.

Mr. McMullen:
Yes. Based on your experience, you could help us ensure other alternatives. I want the Committee to know this is as far as we have gotten negotiating around the table. At some point, the Committee needs to decide on the best process. We want to prevent a situation where people can game the system by saying they are not signing the notification. This gives them control over the timing, and we cannot let them have that either.

My proposed Amendment 5 says the HOA cannot proceed to notice of sale if the superpriority lien has been paid. The HOA may not proceed with a sale unless it has confirmation of receipt and the superpriority lien has not been paid.

Proposed Amendment 6 is the back part of the bill. Banks need to have a strong record of paying superpriority liens and taking over the loan in a time-sensitive manner to avoid situations in which delinquent HOA dues are pushing people out of their homes. We want to give them another option. The proposed amendment provides if you go to a foreclosure sale with a paid superpriority lien, there is a material change in terms and the notice for the sale does not work. Requirements must exist for the sale in this case. You could have a situation in which the bank pays the superpriority lien 5 or 6 days before the sale, which then requires a document be recorded 2 days before the sale.

All those people who show up for the sale need to know that circumstances have changed, including the payment of the superpriority lien. This changes the dynamics of who might show up for the sale. When the terms of sale have changed, there should be disclosure and additional notice.

Proposed Amendment 7 builds more incentive for banks to pay the superpriority lien prior to the 90-day period. This is the waiting period after the notice of default has been sent. The HOAs cannot file a notice of sale within 90 days after filing a notice of default. If banks pay before the 90 days, an important piece of information is given to the HOAs. The HOAs must be notified that the outstanding superpriority portion of the lien no longer exists and decide whether to foreclose on the nonsuperpriority lien; they may still want to foreclose and banks want an indication of the HOAs' intent to proceed. A foreclosure at this point would affect lenders rights even when no superpriority issues are involved.

Proposed Amendment 8 clarifies any lender can come in and pay the superpriority lien, not just the first mortgage. In addition, we should change statute to make it clear a second or lower lender can pay the lien, but it must first pay off the full HOA superpriority lien and then pay the nonsuperpriority delinquency. We will continue to work this out with the interested parties.

It has been the banker's position to find a way to make S.B. 306 work. This bill provides a way for everyone to win. Banks can control the priority of liens and loans and make sure HOAs get paid off in a short period of time, compared to the 20 or 21 months the process may take now.

I want to clarify we did not say you only have one 9-month period for each loan. If the bank pays off the lien and the homeowner starts to regenerate a deficiency, the bank will count up to the next 9-month period. We estimate it

will be less than 2 months before the property is processed, but it could take longer. This is not about taking property away from homeowners.

Senator Harris:
You are anticipating the possibility, not the reality, of multiple defaults along the life of the loan.

Mr. McMullen:
Yes. Banks do not want to give the impression they are trying to get away with doing the process once. Many banks cover the costs of defaulting or delinquent homeowners. Banks may get those costs at the end of the loan as part of the additional lien.

Senator Harris:
You are in a tough spot. You can have the HOA come in after 9 months of delinquent payments and say it will take the house. The bank is unsecured and does not get its money back.

I have a concern about the concept of multiple defaults. This puts HOAs in a bad position, especially if those multiple defaults are close together. I recognize you can catch it quicker in the process, but you essentially have 9 months of default before the superpriority lien gets paid off to make the homeowner current—and then the homeowner becomes delinquent again. While we are getting some money to HOAs by paying off the superpriority lien, this notion of recurrent defaults on HOA fees does not put them in any better position. I am not saying that foreclosure on a superpriority lien is the right answer. I am saying there is little protection for HOAs.

Mr. McMullen:
This is a place in which the Committee should use judgment. We were responding in the negotiation part of this bill. We said we would not harm HOAs. We want the time period to rebase as soon as liens are paid off. This will push the nonpriority lien elements over and keep them as debts owed by the unit owners; the HOA can collect as they wish but not as superpriority. This issue has multiple sides. We also do not want to give unit owners the impression they never have to pay. We talked about the theory, and banks stepping in make the most sense. Banks that have already processed one default will maintain the rest. The HOAs are in control. They may or may not

foreclose. They may decide to work it out with the homeowners. We did not get to that stage in our discussions.

Senator Segerblom:
Can we have a punitive banker registry?

Mr. McMullen:
I know that is a serious question, and my answer is no.

Senator Segerblom:
Could you have a Website that provides instructions regarding the notification process? I have tried to find a registered agent for a bank, and it is impossible.

Mr. McMullen:
Some national banks have registered agents, but there is no requirement that Nevada banks have registered agents. We are working on this. Our main concern is giving the process attention and moving it through the correct channels.

Chair Brower:
The Committee is bringing everyone together to process S.B. 306 and get it right. Have all of your proposed amendments been proffered to the primary sponsors of the bill?

Mr. McMullen:
No. We did not have time.

Chair Brower:
That is the first step.

Mr. McMullen:
The working group represents all stakeholders, and most of them are aware of my proposed amendments. The bill sponsors may have issues with my proposed amendments, but I want a consensus before bringing it to the sponsors. This is a difficult bill, and it is a group effort.

Chair Brower:
It is a work in progress.

Mr. McMullen:
The Committee will have the proposed amendments by tomorrow.

Chair Brower:
The first step is to speak with the primary sponsors of the bill, and then we will see what progress can be made. We have now heard from the lenders with testimony from Mr. VanSickler and Mr. McMullen. We heard from the federal government with testimony from Mr. Pollard. Now we are going to hear testimony from the HOA representatives.

Garrett Gordon (Community Associations Institute; Southern Highlands Homeowners Association):
We support S.B. 306. Working off Proposed Amendment 6077 and Mr. McMullen's proposed amendments, we put together a compromise amendment for the approval of the bill sponsors. I submitted a document of my proposed amendments (Exhibit H).

Mr. McMullen:
It is my understanding that Mr. Gordon's proposed amendments are in addition to Proposed Amendment 6077.

Chair Brower:
Mr. Gordon, have your proposed amendments been submitted to the primary sponsors of the bill?

Mr. Gordon:
When we received Proposed Amendment 6077, I contacted the Bankers Association to get input before speaking with the sponsors. The bill sponsors are not aware of our proposed amendments, but during the working group, we have all consistently spoken about these issues.

Chair Brower:
Did you have a conversation with Mr. McMullen about the proposed amendments?

Mr. Gordon:
Yes.

Chair Brower:
Is it true you both agree to some but not all of the proposed amendments?

Mr. Gordon:
Yes.

Mr. McMullen:
I would like to clarify that it is not just me. We did everything in a group.

Chair Brower:
We need to narrow this group in order to go forward with S.B. 306.

Mr. Gordon:
I will address the remaining issues we have with the bill. In regard to the rolling lien, if the first security interest pays off the superpriority lien during the 9-month period, it does not stop there. The superpriority lien rolls or retriggers. We are concerned about the 9-month superpriority lien retriggering or rolling in the event it is paid off.

Our next issue relates to the doughnut hole problem. The intent is to give banks notice of default when borrowers are in arrears on their assessments and there is an opportunity to cure. Under statute, 90 days go by before the HOA has a right to give notice of sale. The bank has a 90-day cure period in which the HOA can take no action and no additional costs will be incurred. What if the bank pays 60 days after the notice of default? The doughnut hole issue relates to counting what is due—not at notice of default but at the time of payment—so we can capture 2 months of additional assessments. Mr. McMullen's proposed Amendment 1 attempts to address this issue.

My next issue relates to cost. We appreciate the bill sponsors working with us on a compromise to get collection costs into statute. We have one remaining issue. If the bank comes in and cures a notice of default, we have costs in statute that we cannot exceed and cannot expect to recover. This assumes the bank cured the notice of default. What if the bank does not cure within the 90-day window, which is the period the HOA cannot take action? If the HOA goes to notice of sale, it will incur the cost of publishing and posting. This can be expensive, $800 or $900 depending upon the publication or newspaper. We propose if the bank does not cure the notice of default until after the 90-day

period, the bank will reimburse the HOA $275 for the notice of sale and the amount the HOA paid for posting and publishing the notice.

Senator Harris:
I do not want to complicate the issue, but what happens when you have a partial cure? This happens when a 50 percent payment is made to keep the homeowner in the house longer, but it is not a full cure. Based on your proposed amendment, do we apply what has been received to the most postdated delinquency?

Mr. Gordon:
Yes. Gayle Kern, who has practiced HOA law for over 25 years, is here and she can give us some examples. In law, we must send a 60-day letter to inform homeowners who are behind in their payments that they have the opportunity to challenge this with the HOA board and the option to elect a payment plan. Senate Bill 306 says if the HOA has not filed a notice of default within 3 years, we lose our right to extinguish the first mortgage lien.

We are concerned with the 3-year period. If the HOAs are working with homeowners and it takes years for dues to get caught up, we would be forced to file the notices of default and get the banks involved. This is a disincentive for HOAs to work with homeowners over long periods of time. This outlines the notice of sale issue if we are forced to go all the way through the process to make sure HOAs get reimbursed.

The first two bullet points on page 2 of Exhibit H have been retracted.

Senate Bill 306 proposes that the HOA must record a notice of satisfaction or a notice of release once the superpriority lien has been paid. If the HOA is required to publish and record this notice and incurs costs, we propose a fair amount of reimbursement in an amount not to exceed $50. This would be included in the bill.

Another issue in the bill deals with the time period in which the bank pays the HOA. The bank must do so within 5 days before the sale; if that occurs, the HOA cannot proceed to sale for 2 days. We request the bill be amended to say 2 business days. Two days is not a lot of time to do something pretty substantial. If there is a weekend or holiday, 2 business days would be our preference.

In the case of a foreclosure, S.B. 306 contemplates a 60-day redemption period in which the bank or homeowner has the ability to satisfy the lien. We request the redeemer or the lender pay the cost the home was sold for and any lingering assessments still outstanding. For example, if there is a 60-day redemption period, the redeemer or lender must pay the HOA superpriority lien plus the additional 2 months of assessments. This will ensure revenue capture for other unit owners.

My final point relates to a situation in which the HOA must credit bid. This happens when the HOA goes forward with the foreclosure but has no buyer for the property. The HOA will credit bid what it is due and take title to the home.

The bill proposes only an investor or a third-party purchaser of the property at an HOA foreclosure sale. The redemption period makes clear that the HOA cannot get paid a second time. During the HOA foreclosure, an investor purchases the property and pays the HOA in full. The bank comes in and redeems, and the HOA does not get paid a second time, which is fair. If the HOA does a credit bid, it takes title to the property short of being paid. In this case, if the bank comes in and redeems the lien, the HOA needs to get paid the amount owed the association.

Gayle Kern (Community Associations Institute):
I have represented HOAs for over 25 years in northern Nevada. With respect to the noticing process, I agree notice is required and needed. I was appalled and surprised over concern of notice not being given. This is required by statute and must be done. I have no problem that our notice is triggered, and we give notice based upon the recorded records. If a lender records something with the Washoe County Recorder's Office and does an assignment, it shows up on our Trustee Sale Guarantee and notice is sent to all those places.

I cannot be bound by limiting my ability to proceed based on someone signing for a notice or getting a return receipt notification back from the post office. I have no control of this. I can control sending the notice and show I provided it. Sometimes the recipient does not return the receipt slip, and sometimes the post office does not return it. You also have a situation in which the lender has signed for the notice and we do not receive the receipt.

Chair Brower:
Do you agree the procedure we use in court for notification is good enough in this context?

Ms. Kern:
Yes. You can include protections to make sure notice is given to the necessary parties, but you cannot limit procedure based on confirmation the notice was received. We do not have control over receipt. I only have control over providing the notice.

Chair Brower:
Mr. Gordon and Ms. Kern, I hesitate to address this issue; however, from my perspective, we want to do several things by way of S.B. 306. We want to make sure HOAs get paid, we do not want to allow an unfair foreclosure vis-à-vis the rights of homeowners and we want to make sure the lender is treated fairly. There is another issue with respect to the lender: Why should the lender ever lose its first mortgage lien because the HOA is owed a couple of thousand dollars?

Ms. Kern:
From my standpoint, this is the proverbial hammer. I agree this should be a last resort, but when you say an association is owed a couple of thousand dollars, you must appreciate that might be a lot of money to the HOA's budget. That money gets distributed to the assessment-paying homeowners. I did not participate in or conduct an HOA foreclosure until approximately 5 years ago.

Chair Brower:
I did not know there was such a thing until a couple of sessions ago. It seemed so illogical to me when I first heard about this situation and wondered if it was right. How can the HOA foreclose on a home worth $500,000 because it is owed a few thousand dollars? I now know the state of the law, and I understand the rationale.

Ms. Kern:
I want the Committee to know when a property, such as a condominium, has an HOA, the common elements paid for with homeowner dues affects collateral. The lender only has a security interest in what we call "air space." The HOA and all the assessment-paying homeowners are paying for roofs, siding and a lot

of other things involved in that collateral. Assessments take care of more than just property values, it is far greater than that.

Chair Brower:
That makes sense. Mr. McMullen, your issue is a lender should not lose its first security interest without adequate notice and an opportunity to step in and cure the problem, even if it is not the bank's obligation to do so.

Mr. McMullen:
Yes. We have offered to pay costs associated with research needed to ensure HOAs get correct addresses for notification with a receipt for their records. This is one of the primary things we are asking for. People may not know that banks have moved significantly to put the world back in order. Another idea we had, but did not include in our proposed amendments, was service of process. We will pay the costs incurred up to the notice of default at the time we pay for the superpriority lien.

Chair Brower:
We have a lot of work to do on this bill, but the issues are narrowing.

Jon Sasser (Legal Aid Center of Southern Nevada):
I do not support S.B. 306 in its current form. I was included in the working group formed by Senators Ford and Hammond. At the first meeting of the working group, the primary focus was on the notice process, but the main issue was not being addressed. At issue are the concerns of the federal government and the ability for Nevadans to get loans. Mr. Pollard's testimony did not directly answer all my questions. First, will Nevadans have the ability to get loans if we continue to allow the first security interest to be extinguished?

Chair Brower:
Mr. Pollard said they would. He did not say Nevadans could not get loans if the bill, as presented by the sponsors, was passed.

Mr. Sasser:
I do not believe he was asked that exact question. I heard him say he did not think the extinguishment was the proper or appropriate approach. He had great reservations at the end of his testimony about the extinguishment, and it is a great concern to the FHFA. It gives pause to lenders as to whether they might lend in Nevada, and it would affect agency underwriting standards.

Chair Brower:
We can clarify that information before we move forward.

Mr. Sasser:
My suggestion is to put one line in S.B. 306 to state that the sale of an HOA nonjudicial foreclosure does not extinguish the first security interest. An amendment proposed by the mortgage bankers may be forthcoming.

Another issue is the inclusion of collection costs in the superpriority lien. Dealings between collection agencies and HOA management companies have led to a lot of the problems. The HOA management companies hand it off to collection companies with a guarantee they will get their 9 months back because of the superpriority lien. It does not matter how much it costs for collections. It could cost $5,000 to collect a $200 debt. This vague area in law has not been clarified by the Nevada Supreme Court. Choosing one side over another in statute continues the present system.

Some people ask why collection costs matter as long as the bank or investor pays them. It matters because 90 percent of the time, these cases do not go to a foreclosure sale. Either the homeowner comes up with the money after collection costs start running up or in some cases, banks steps in. Collection costs are paid by the homeowner most of the time, and only 10 percent of homes go to a foreclosure sale. If HOA collection costs remain in the bill, I cannot support it.

Pamela Scott (The Howard Hughes Corporation):
We support S.B 306 in its original form with Proposed Amendment 6077. We also support the proposed amendments discussed today. One sticking point for us is the confirmation of receipt. You cannot get that by using the postal service. In my hand are letters mailed to our office from attorneys with the green return receipt slip still attached because the post office does not always make you sign for the letter. The post office will leave these in mailboxes. I tested the process by mailing myself a letter with a return receipt request, and the post office representative left the letter without my signature. I do not see how we can be asked to do confirmation of receipt.

Marilyn Brainard:
I support S.B. 306 with the proposed amendments. I submitted my written testimony (Exhibit I). You have not yet heard from a homeowner, and we have a real stake in this fight.

Chair Brower:
Is Nevada unique in allowing the extinguishment of a first mortgage lien pursuant to an HOA foreclosure? It sounds like not all states do it that way.

Senator Ford:
No, we are not unique. Some states have adopted a uniform act that deals with this. The experts here today can answer that question. I had the idea to convene a group of individuals together to talk about how we could address this issue after watching the Nevada Supreme Court hearing. I asked Senator Hammond to cosponsor the bill. Exploring this issue has been an interesting journey. Initially, we wanted to make certain banks would not sit on their rights and take no action when given notice of unpaid dues by an HOA.

We talked to banks that indicated they were not getting proper notice, and the notice they did get did not include the amount owed. We talked about strengthening the notice provisions that require banks, within a specified amount of time, to respond. If no response is received, the superpriority lien kicks in, the Supreme Court decision applies and the bank loses the first lien.

It was never our intention to undo the superpriority lien component. This is where the working group started. What came into play was the issue of a bonafide purchaser and commercial reasonableness which avoids a $5,000 sale for a $500,000 home. The idea expanded and eventually became S.B. 306. Mr. McMullen is correct in stating that judgment by Committee will be needed. Someone needs to say "enough." I thought we were done with the bill when we got Proposed Amendment 6077 after subsequent conversations and the initial bill draft. This was the point when I reached out to FHFA to request a review of the language. The FHFA indicated if the bill was amended as suggested, the agency would support it. I presented the FHFA recommended changes to the working group and noted if the bill is amended further, we will run the risk of Mr. Sasser's concerns regarding Nevadans not receiving loans coming true. There is room for more conversation about this bill. The bill is in the hands of the Committee to decide which of these amendments will be adopted. I will offer my input, but I give the Committee the full context of the bill as it stands.

I recommend the bill be considered as is with Proposed Amendment 6077. If the Committee wants to entertain further amendments, you need to be aware of the FHFA concerns.

Senator Hammond:
One of the last things I said to the working group is we need to draft a bill and if not everyone agreed to all the amendments, they should be brought to the Committee for consideration. That is what you heard today. What you have before you are ideas. We already had Mr. Pollard telling us the FHFA is not in favor of some of the proposed amendments. You can tinker with something to the point that it is no longer what you want. I am afraid this could happen with S.B. 306. We have a bill, and we are ready to go forward with Proposed Amendment 6077.

Senator Kihuen:
Mr. Sasser was part of the working group on the bill. How do you feel about his proposed amendments?

Senator Ford:
I am not certain we can accommodate Mr. Sasser. He was involved in the working group the entire time. His changes do not take us where we want to go with this bill.

I was not in support of the redemption component we added to the bill because it defeated the purpose of having a bank come to the table early if all that was needed at the end was to give banks a right to come back and pay for a foreclosed home. I thought this would be sufficient enough incentive to address Mr. Sasser's concerns by offering an additional protection afforded homeowners that does not otherwise exist.

Chair Brower:
I will appoint myself as an ex officio member of the working group. That does not mean the working group must let me know when it meets, but I volunteer to help work on the bill over the next few days. I will close the hearing on S.B. 306 and open the hearing on S.B. 264.

SENATE BILL 264: Exempts spendthrift trusts from the application of the Uniform Fraudulent Transfer Act. (BDR 10-780)

Senator Mark Lipparelli (Senatorial District No. 6):
I will present S.B. 264 with Proposed Amendment 6259 (Exhibit J). The general idea behind the bill is to keep Nevada as competitive as we can be in the area of trusts.

Michael Alonso (Nevada Trust Companies Association):
We support S.B. 264. This bill provides clarification of statute. The bill clarifies that the provisions of the Uniform Fraudulent Transfer Act do not apply to transfers made to a spendthrift trust pursuant to the Spendthrift Trust Act of Nevada. The law refers to NRS 112.230 except as provided in NRS 166.170 which is not enough and too vague. We want to clarify language to make it clear that NRS 112 applies to spendthrift trusts only in the areas of statute of limitations and burden of proof.

Chair Brower:
The first place I go to when dealing with a trust issue in the legislative context is the Probate and Trust Law Section of the State Bar of Nevada. I am informed there are no objections from the Section with respect to this bill, which gives the Committee comfort.

Mark Dreschler (Premier Trust):
We are in support of S.B. 264. The bill provides clarification, and it does not expand or modify any language in existing law. Ambiguity in law puts Nevada at a disadvantage. The trust business is competitive nationwide; when it is said we are no longer advantaged, word gets around quickly which could result in loss of business.

Chair Brower:
Do you support the bill with Proposed Amendment 6259?

Mr. Dreschler:
Yes.

Gregory Crawford (Nevada Trust Companies Association; Alliance Trust Company):
I can speak to the fact that other jurisdictions have used the inconsistency between NRS 166 and NRS 112 against us. South Dakota, Delaware, Wyoming and Alaska are fellow states that are all strong competitors in the field of attracting out-of-state trust business. These states have used this issue against

us. The intent in Nevada has always been clear, but we are often dealing with practitioners who do not deal with Nevada law on a day-to-day basis. Clarification of existing law as intended by the Legislature will put us back in a more competitive position with other jurisdictions in the United States.

Chair Brower:
This bill is straightforward, and the Committee can process it this week.

Bob Dickerson:
I oppose S.B. 264. The Uniform Fraudulent Transfer Act was enacted in Nevada in 1987. It took the place of an earlier act, the Uniform Fraudulent Conveyance Act, which was enacted around 1918. The purpose of these Acts is to prevent fraudulent acts from occurring in Nevada. They prevent individuals from transferring assets to defraud creditors.

Senate Bill 264 exempts the Nevada Spendthrift Trust Act from the provisions of the Uniform Fraudulent Transfer Act. I do not see any justification or reason for doing this. Individuals may transfer assets to a self-settled spendthrift trust without meeting the requirements of the Uniform Fraudulent Transfer Act applying to the transfer. This allows individuals to transfer their entire estate. I see no reason why you would exempt this. If an honest person acting in good faith is transferring his or her assets to a trust, there should be no problem meeting the requirements of Nevada law with respect to fraudulent transfers. The Uniform Fraudulent Transfer Act prohibits any transfer that will delay, hinder or defraud a creditor. It contains a badge of fraud a court can look to in order to determine whether a transfer violates law. Exempting transfers to a self-settled spendthrift trust opens the door to fraud. Individuals acting in good faith should have no problem complying with law or having the law apply to them.

Senator Segerblom:
Two years ago, we had this same issue with respect to transferring assets away from a spouse. Does this bill impact that issue?

Mr. Dickerson:
No. The bill you are referring did not pass Committee. The purpose of that bill was to exempt alimony and child support obligations from self-settled spendthrift trusts. Alimony and child support obligations could be satisfied and honored by an individual who established the trust.

Senator Segerblom:
This is a different issue.

Mr. Dickerson:
Yes. The primary purpose of S.B. 264 is to change the statute of limitations from a 4-year limit that applies under the Uniform Fraudulent Transfer Act to make it clear the 2-year statute of limitations under NRS 166 applies to self-settled spendthrift trusts. I suggest it goes further than simply changing the statute of limitations. The bill strikes out the word "fraudulent," and it says provisions of NRS 112 do not apply to NRS 166. This is my concern. *Nevada Revised Statutes* 166 sets out the badges of fraud the court uses to determine whether a transfer will defraud creditors.

Mr. Alonso:
Is Mr. Dickerson referring to Proposed Amendment 6259?

Chair Brower:
He referenced the amendment. Mr. Dickerson, the Committee and the testifiers in Carson City have Proposed Amendment 6259. Do you have a copy?

Mr. Dickerson:
What I have appears to be the original bill draft. I do not see the amendment.

Chair Brower:
Testifiers use the word "amendment" when referring to the bill that seeks to change statute, not an amendment that seeks to change the bill. I think Mr. Alonso identified the problem. Mr. Dickerson, let us address the details of Proposed Amendment 6259 to S.B. 264 which may take care of your concerns about the bill.

Mr. Alonso:
Section 1 of the bill has been deleted. The only thing we are doing now is amending NRS 112.230 to delete the language that says, "Except as otherwise provided in NRS 166.170 … ." This language will be replaced with language that says, "This section does not apply to a claim for relief with respect to a transfer of property to a spendthrift trust subject to chapter 166 of NRS." The Legislative Counsel Bureau confirmed this is a clarification that makes no other changes. The terminology used with respect to deleting fraudulent transfers in section 3 has been removed from the bill.

Chair Brower:
Mr. Dickerson, though you do not have Proposed Amendment 6259, I recommend you review it and let the Committee know if you still have concerns.

Mr. Dickerson:
Is the sole reason for the bill to change the statute of limitations from 2 years to 4 years?

Mr. Alonso:
No. We are not changing the statute of limitations. If the limit is 2 years under NRS 166, that stays the same. If it is a 4-year limitation under NRS 112, that stays the same.

Chair Brower:
I will close the hearing on S.B. 264 and open the work session on S.B. 164 which has been added to today's work session. The Committee questioned if there was a problem with the previously presented language in the bill; however, we determined the bill is fine as originally drafted.

SENATE BILL 164: Revises provisions prohibiting certain discriminatory acts. (BDR 18-59)

Patrick Guinan (Policy Analyst):
We had S.B. 164 in the Committee a few days ago. It was scheduled for yesterday's work session, and we understood there was an amendment coming based on the Nevada Equal Rights Commission's concerns with language in the bill. The Commission and the bill sponsor have confirmed there is no need to make any changes. This bill updates language concerning discrimination throughout statutes. The bill is clean and ready to go with the sponsor's approval on a do pass vote, if that is the pleasure of the Committee.

Chair Brower:
The Legal Division of Legislative Counsel Bureau confirmed the bill language.

SENATOR FORD MOVED TO DO PASS S.B. 164.

SENATOR KIHUEN SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY. (SENATORS HAMMOND, HARRIS AND SEGERBLOM WERE ABSENT FOR THE VOTE.)

* * * * *

Chair Brower:
I will open the work session on S.B. 60.

SENATE BILL 60: Revises various provisions related to the Office of the Attorney General. (BDR 16-470)

Mr. Guinan:
I will read from the work session document on S.B. 60 (Exhibit K). With Chair Brower's support, there are proposed amendments from the Attorney General's Office as follows:

- Delete sections 6 through 8 regarding notification of rulings on constitutionality. Ongoing discussions with the involved parties indicate no legislative action needed at this time.

- Delete sections 12 through 15 of the bill regarding victim's services. The Attorney General elected to forgo reorganizing the Victim's Services unit pending an outside assessment of the unit's current configuration.

- Amend section 18 to provide a July 1 effective date for sections 1 through 5 and sections 10 through 11 to grant the Attorney General's Office authority over the Confidential Address Program and the Office of Military Legal Assistance beginning on that date instead of October 1.

Chair Brower:
I believe the proposed amendment is in order, but I do not have a copy.

Mr. Guinan:
The proposed amendment is in conceptual form as I read it to the Committee.

Chair Brower:
We do not have a mock-up of the proposed amendments?

Mr. Guinan:
No. The proposed amendments are in conceptual form.

Chair Brower:
The Committee will confirm the language when the mock-up is produced.

SENATOR KIHUEN MOVED TO AMEND AND DO PASS AS AMENDED S.B. 60 WITH THE CONCEPTUAL AMENDMENTS FROM THE ATTORNEY GENERAL'S OFFICE.

SENATOR FORD SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY. (SENATORS HAMMOND, HARRIS AND SEGERBLOM WERE ABSENT FOR THE VOTE.)

* * * * *

Chair Brower:
I will open the work session on S.B. 244.

SENATE BILL 244: Establishes requirements governing a contingent fee contract for legal services provided to the State of Nevada or an officer, agency or employee of the State. (BDR 18-658)

Mr. Guinan:
I will read from the work session document on S.B. 244 (Exhibit L). There are no amendments on the bill.

SENATOR ROBERSON MOVED TO DO PASS S.B. 244.

SENATOR KIHUEN SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY. (SENATORS HAMMOND, HARRIS AND SEGERBLOM WERE ABSENT FOR THE VOTE.)

* * * * *

Chair Brower:
I will open the work session on S.B. 329.

SENATE BILL 329: Revises provisions relating to partnerships. (BDR 7-784)

Mr. Guinan:
I will read from the work session document on S.B. 329 (Exhibit M). There is a proposed amendment submitted by Senator Lipparelli with the approval of Chair Brower. The amendment conceptually revises language in section 1, subsection 3 and section 2, subsection 6 such that the provisions of the bill will apply to "a" singular business development and only to such a development undertaken by a corporation or a limited-liability company. The amendment would also make the bill effective upon passage and approval rather than on October 1, as previously listed in the bill.

Chair Brower:
The original language was awkward, and the proposed amended language intends to remedy the problem. The various stakeholders agree the amendments work, and I have heard no objections.

> SENATOR ROBERSON MOVED TO AMEND AND DO PASS AS AMENDED S.B. 329 WITH THE CONCEPTUAL AMENDMENT FROM SENATOR LIPPARELLI.
>
> SENATOR KIHUEN SECONDED THE MOTION.
>
> THE MOTION CARRIED UNANIMOUSLY. (SENATORS HAMMOND, HARRIS AND SEGERBLOM WERE ABSENT FOR THE VOTE.)

* * * * *

Chair Brower:
I will open the work session on S.B. 444.

SENATE BILL 444: Revises provisions governing civil actions. (BDR 3-1137)

Mr. Guinan:
I will read from the work session document on S.B. 444 (Exhibit N). There is a proposed amendment from Todd Mason supported by Chair Brower. The amendment adds language regarding when a court should be required to allow discovery in these types of cases, provides that appeals may be taken and defines the word "plaintiff" for the purposes of this bill.

Chair Brower:
We learned lessons since last Session with the revisions of the Strategic Lawsuits Against Public Participation suits scheme. The bill intends to fix some perceived problems.

Senator Ford:
The proposed amendment adds new language to section 13 that says, "An appeal may be taken from the denial or grant of a special motion to dismiss." Does this contemplate a stay of the entire case during an appeal?

Chair Brower:
I believe that is intended to be an interlocutory appeal.

> SENATOR ROBERSON MOVED TO AMEND AND DO PASS AS AMENDED S.B. 444 WITH THE PROPOSED AMENDMENT FROM TODD MASON.
>
> SENATOR FORD SECONDED THE MOTION.
>
> THE MOTION CARRIED UNANIMOUSLY. (SENATORS HAMMOND, HARRIS AND SEGERBLOM WERE ABSENT FOR THE VOTE.)

* * * * *

Chair Brower:
I will open the work session on S.B. 446.

SENATE BILL 446: Revises provisions relating to businesses. (BDR 7-1088)

Mr. Guinan:
I will read from the work session document on S.B. 446 (Exhibit O). There are proposed amendments from Robert Kim with the support of Chair Brower. The amendments offer technical amendments to the bill. A handwritten mock-up of changes has been provided for consideration by the Committee.

Chair Brower:
This is the biennial cleanup bill from the Business Law Section of the State Bar of Nevada. The proposed amendments were reviewed with Mr. Kim at the time of the hearing.

SENATOR ROBERSON MOVED TO AMEND AND DO PASS AS AMENDED S.B. 446 WITH THE PROPOSED AMENDMENTS FROM ROBERT KIM.

SENATOR FORD SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY. (SENATORS HAMMOND, HARRIS AND SEGERBLOM WERE ABSENT FOR THE VOTE.)

* * * * *

Chair Brower:
I will open the work session on S.B. 464.

SENATE BILL 464: Revises criminal penalties for the consumption or possession of an alcoholic beverage by a person under 21 years of age. (BDR 15-651)

Mr. Guinan:
I will read from the work session document on S.B. 464 (Exhibit P). There is a proposed amendment from Chair Brower to prohibit the sale, possession or use of powdered alcohol. A violation of these prohibitions would constitute a misdemeanor.

Chair Brower:
This is the bill sponsored by the Nevada Youth Legislature. There is a minor amendment on the bill relating to powdered alcohol.

SENATOR KIHUEN MOVED TO AMEND AND DO PASS AS AMENDED S.B. 464 WITH THE PROPOSED AMENDMENT BY SENATOR BROWER PROHIBITING THE SALE, POSSESSION OR USE OF POWDERED ALCOHOL.

SENATOR ROBERSON SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY. (SENATORS HAMMOND, HARRIS AND SEGERBLOM WERE ABSENT FOR THE VOTE.)

* * * * *

Chair Brower:
I will bring the Committee's attention to S.B. 451, which relates to the Indigent Defense Fund. This bill was previously heard by the Committee and should be referred to the Senate Committee on Finance due to its fiscal impact.

SENATE BILL 451: Revises provisions relating to public defenders. (BDR 14-514)

SENATOR KIHUEN MOVED WITHOUT RECOMMENDATION TO REREFER S.B. 451 TO THE SENATE COMMITTEE ON FINANCE.

SENATOR FORD SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY. (SENATORS HAMMOND, HARRIS AND SEGERBLOM WERE ABSENT FOR THE VOTE.)

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Chair Brower:
I will close the work session and adjourn the meeting at 6:08 p.m.

RESPECTFULLY SUBMITTED:

_____
Lynette Jones,
Committee Secretary

APPROVED BY:

_____
Senator Greg Brower, Chair

DATE: _____

EXHIBIT SUMMARY				
Bill	**Exhibit**		**Witness or Agency**	**Description**
	A	2		Agenda
	B	6		Attendance Roster
S.B. 306	C	3	Real Property Law Section, State Bar of Nevada	Memorandum
S.B. 306	D	12	Senator Aaron D. Ford	Proposed Amendment 6077
S.B. 306	E	8	Federal Housing Finance Agency	Written Testimony
S.B. 306	F	4	Nevada Mortgage Lenders Association	Written Testimony
S.B. 306	G	5	Nevada Bankers Association	Proposed Amendments
S.B. 306	H	2	Community Associations Institute	Proposed Amendments
S.B. 306	I	5	Marilyn Brainard	Written Testimony; Statistical Review
S.B. 264	J	3	Senator Mark Lipparelli	Proposed Amendment 6259
S.B. 60	K	1	Patrick Guinan	Work Session Document
S.B. 244	L	1	Patrick Guinan	Work Session Document
S.B. 329	M	2	Patrick Guinan	Work Session Document
S.B. 444	N	2	Patrick Guinan	Work Session Document
S.B. 446	O	9	Patrick Guinan	Work Session Document
S.B. 464	P	2	Patrick Guinan	Work Session Document

Ex. 6

2015 Nevada Laws Ch. 266 (S.B. 306)

NEVADA 2015 SESSION LAWS

REGULAR SESSION OF THE 78TH LEGISLATURE (2015)

Additions are indicated by Text; deletions by
~~Text~~.
Vetoes are indicated by ~~Text~~;
stricken material by Text .

Ch. 266
S.B. No. 306
COMMON INTEREST COMMUNITIES—LIENS AND INCUMBRANCES—NOTICE

AN ACT relating to common-interest communities; revising provisions governing a unit-owners' association's lien on a unit for certain amounts due to the association; revising provisions governing the foreclosure of an association's lien; requiring the trustee under a deed of trust securing real property to provide a homeowners' association certain notice concerning the Foreclosure Mediation Program under certain circumstances; requiring certain financial institutions to provide certain contact information to the Division of Financial Institutions of the Department of Business and Industry; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Under existing law, a unit-owners' association has a lien on a unit for certain amounts due to the association and may foreclose its lien through a nonjudicial foreclosure sale. (NRS 116.3116–116.31168) Generally, the association's lien is not prior to a first security interest on the unit recorded before the date on which the amount sought to be enforced became delinquent. However, the association's lien is prior to the first security interest on the unit to the extent of certain maintenance and abatement charges and a certain amount of assessments for common expenses. The portion of the association's lien that is prior to the first security interest on the unit is commonly referred to as the "super-priority lien." (NRS 116.3116) In *SFR Investments Pool 1, LLC v. U.S. Bank*, 130 Nev. Adv. Op. 75, 334 P.3d 408 (2014), the Nevada Supreme Court held that the foreclosure of the super-priority lien by the association extinguishes the first security interest on the unit.

This bill amends various provisions governing the association's super-priority lien and the procedures required for an association to foreclose its lien. Section 1 of this bill authorizes a limited amount of the costs of enforcing the association's lien to be included in the super-priority lien. Section 1 also specifically states that an association, a member of the association's executive board, an officer or employee of the association or the community manager of the association is not required to be a licensed debt collection agency or contract with a licensed debt collection agency to collect amounts included in the association's lien until a notice and default and election to sell the unit to enforce the lien is recorded. Finally, section 1 specifically states that any payment of an amount included in the association's lien by the holder of a subordinate lien on the unit becomes a debt due from the unit's owner to the holder of the lien.

Sections 2–7 of this bill revise provisions governing the procedures for the foreclosure of the association's lien. Sections 2–4 revise provisions relating to the notice of the association's foreclosure required to be given to the holders of recorded security interests on the unit. Under section 3, an association is required to mail by certified mail, not later than 10 days after recording the notice of default and election to sell, a copy of the notice to each holder of a security interest recorded before the association recorded the notice. Section 4 similarly requires the association to mail by certified mail, not later than 10 days after recording

notice of the foreclosure sale of the unit, a copy of the notice of sale to each holder of a security interest recorded before the association recorded the notice of sale.Section 2 also: (1) specifically states that the mailing of the copy of the notice of default and election to sell and the copy of the notice of sale to each holder of a recorded security interest is a condition which must be satisfied before the association may sell the unit; and (2) requires the association to record an affidavit stating the name of each holder of a recorded security interest to whom a copy of the notice of default and election to sell and notice of sale was mailed and the address to which those notices were sent. Section 4 further requires the publishing, posting and giving of notice of the foreclosure sale of a unit by an association in a manner similar to the publishing, posting and giving of notice of the nonjudicial foreclosure sale of real property secured by a deed of trust.

Sections 5 and 6 revise provisions relating to the foreclosure sale of a unit by an association. Section 5 requires the sale to be conducted at the same location that a nonjudicial foreclosure sale of real property secured by a deed of trust must be conducted. Section 5 also provides that if the sale is postponed by oral proclamation, the sale must be postponed to a later date at the same time and location. However, if the date of sale has been postponed by oral proclamation three times, any new sale information must be provided by giving certain notice of the sale. Finally, section 5 requires the person conducting the sale to announce at the sale whether or not the super-priority lien has been satisfied.

Section 6 provides that if the holder of the first security interest pays the amount of the super-priority lien not later than 5 days before the date of sale, the foreclosure of the association's lien does not extinguish the first security interest. Section 6 also provides that after a sale of a unit to enforce the association's lien, the unit's owner or a holder of a security interest on the unit may redeem the unit by paying certain amounts to the purchaser within 60 days after the sale. If the unit's owner redeems the unit, the unit's owner is restored to his or her ownership of the unit subject to any security interest on the unit that existed at the time of the sale. If a holder of a security interest on the unit redeems the unit, that holder becomes the owner of the unit. Section 6 further provides that upon expiration of the redemption period, any failure to comply with the requirements of existing law for the foreclosure of the association's lien does not affect the rights of a bona fide purchaser or encumbrancer for value.

Existing law further provides that if a unit is subject to the Foreclosure Mediation Program, a unit-owners' association may not foreclose its lien on the unit until the trustee has recorded the required certificate. (NRS 107.086, 116.31162) Section 2 revises the language of existing law and specifies that a unit-owners' association may foreclose its lien on a unit that is subject to the Foreclosure Mediation Program if the unit's owner has failed to pay amounts that became due to the association during the pendency of the mediation. Section 8 of this bill requires the trustee under a deed of trust to notify the association that a unit is subject to the Foreclosure Mediation Program, and to notify the association that the trustee has received the required certificate from the Program.

Section 8.5 of this bill requires a financial institution that is a mortgagee or beneficiary of a deed of trust under certain residential mortgage loans to provide to the Division of Financial Institutions of the Department of Business and Industry the name and street address of a person to whom: (1) a borrower or a borrower's representative may send information and notices to facilitate a mediation under the Foreclosure Mediation Program; and (2) a unit-owners' association may mail notices concerning the association's lien. Under section 8.5, the Division is required to maintain this information on its Internet website and provide a prominent display of, or a link to, this information on the home page of its Internet website.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. NRS 116.3116 is hereby amended to read as follows:

<< NV ST 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 and any costs of

collecting a past due obligation charged pursuant to NRS 116.310313 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 ~~;~~ , except that a lien under this section is prior to a security interest described in this paragraph to the extent set forth in subsection 3; ~~and~~

(c) Liens for real estate taxes and other governmental assessments or charges against the unit or cooperative ~~. The lien is also~~ ; and

(d) Liens for any fee or charge levied pursuant to subsection 1 of NRS 444.520.

3. A lien under this section is 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 the~~ ;

(b) The unpaid amount of assessments, not to exceed an amount equal to 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,~~ the date on which the notice of default and election to sell is recorded pursuant to paragraph (b) of subsection 1 of NRS 116.31162; and

(c) The costs incurred by the association to enforce the lien in an amount not to exceed the amounts set forth in subsection 5,

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 the recording of a notice of default and election to sell pursuant to paragraph (b) of subsection 1 of NRS 116.31162 or the institution of ~~an~~ a judicial action to enforce the lien.

4. This ~~subsection~~ section does not affect the priority of mechanics' or materialmen's liens, or the priority of liens for other assessments made by the association.

~~3.~~ 5. The amount of the costs of enforcing the association's lien that are prior to the security interest described in paragraph (b)

of subsection 2 must not exceed the actual costs incurred by the association, must not include more than one trustee's sale guaranty and must not exceed:

(a) For a demand or intent to lien letter, $150.

(b) For a notice of delinquent assessment, $325.

(c) For an intent to record a notice of default letter, $90.

(d) For a notice of default, $400.

(e) For a trustee's sale guaranty, $400.

No costs of enforcing the association's lien, other than the costs described in this subsection, and no amount of attorney's fees may be included in the amount of the association's lien that is prior to the security interest described in paragraph (b) of subsection 2.

6. Notwithstanding any other provision of law, an association, or member of the executive board, officer, employee or unit's owner of the association, acting under the authority of this chapter or the governing documents of the association, or the community manager of the association, or any employee, agent or affiliate of the community manager, while engaged in the management of the common-interest community governed by the association, is not required to be licensed as a collection agency pursuant to chapter 649 of NRS or hire or contract with a collection agency licensed pursuant to chapter 649 to collect amounts due to the association in accordance with subsection 1 before the recording of a notice of default and election to sell pursuant to paragraph (b) of subsection 1 of NRS 116.31162.

7. The holder of the security interest described in paragraph (b) of subsection 2 or the holder's authorized agent may establish an escrow account, loan trust account or other impound account for advance contributions for the payment of assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 if the unit's owner and the holder of that security interest consent to the establishment of such an account. If such an account is established, payments from the account for assessments for common expenses must be made in accordance with the same due dates as apply to payments of such assessments by a unit's owner.

~~4.~~ 8. 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.

~~5.~~ 9. 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.

~~6.~~ 10. A lien for unpaid assessments is extinguished unless a notice of default and election to sell is recorded as required by paragraph (b) of subsection 1 of NRS 116.31162, or judicial proceedings to enforce the lien are instituted , within 3 years after the full amount of the assessments becomes due.

~~7.~~ 11. 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.

~~8.~~ 12. A judgment or decree in any action brought under this section must include costs and reasonable attorney's fees for the prevailing party.

~~9.~~ 13. 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.

~~10.~~ 14. 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.

~~11.~~ 15. In an action by an association to collect assessments or to foreclose a lien created under this section, the court may appoint a receiver to collect all rents or other income from the unit alleged to be due and owing to a unit's owner before commencement or during pendency of the action. The receivership is governed by chapter 32 of NRS. 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 NRS 116.3115.

16. Notwithstanding any other provision of law, any payment of an amount due to an association in accordance with subsection 1 by the holder of any lien or encumbrance on a unit that is subordinate to the association's lien under this section becomes a debt due from the unit's owner to the holder of the lien or encumbrance.

Sec. 2. NRS 116.31162 is hereby amended to read as follows:

<< NV ST 116.31162 >>

1. Except as otherwise provided in subsection 5 ~~or 6,~~ , 6 or 7, in a condominium, in a planned community, in a cooperative where the owner's interest in a unit is real estate under NRS 116.1105, or in a cooperative where the owner's interest in a unit is personal property under NRS 116.1105 and the declaration provides that a lien may be foreclosed under NRS 116.31162 to 116.31168, inclusive, the association may foreclose its lien by sale after all of the following occur:

(a) The association has mailed by certified or registered mail, return receipt requested, to the unit's owner or his or her successor in interest, at his or her address, if known, and at the address of the unit, a notice of delinquent assessment which states the amount of the assessments and other sums which are due in accordance with subsection 1 of NRS 116.3116, a description of the unit against which the lien is imposed and the name of the record owner of the unit.

(b) Not less than 30 days after mailing the notice of delinquent assessment pursuant to paragraph (a), the association or other person conducting the sale has executed and caused to be recorded, with the county recorder of the county in which the common-interest community or any part of it is situated, a notice of default and election to sell the unit to satisfy the lien which must contain the same information as the notice of delinquent assessment and which must also comply with the following:

(1) Describe the deficiency in payment.

(2) State the total amount of the deficiency in payment, with a separate statement of:

(I) The amount of the association's lien that is prior to the first security interest on the unit pursuant to subsection 3 of NRS 116.3116 as of the date of the notice;

(II) The amount of the lien described in sub-subparagraph (I) that is attributable to assessments based on the periodic budget adopted by the association pursuant to NRS 116.3115 as of the date of the notice;

(III) The amount of the lien described in sub-subparagraph (I) that is attributable to amounts described in NRS 116.310312 as of the date of the notice; and

(IV) The amount of the lien described in sub-subparagraph (I) that is attributable to the costs of enforcing the association's lien as of the date of the notice.

(3) State that :

(I) If the holder of the first security interest on the unit does not satisfy the amount of the association's lien that is prior to that first security interest pursuant to subsection 3 of NRS 116.3116, the association may foreclose its lien by sale and that the sale may extinguish the first security interest as to the unit; and

(II) If, not later than 5 days before the date of the sale, the holder of the first security interest on the unit satisfies the amount of the association's lien that is prior to that first security interest pursuant to subsection 3 of NRS 116.3116 and, not later than 2 days before the date of the sale, a record of such satisfaction is recorded in the office of the recorder of the county in which the unit is located, the association may foreclose its lien by sale but the sale may not extinguish the first security interest as to the unit.

(4) State the name and address of the person authorized by the association to enforce the lien by sale.

~~(3)~~ (5) Contain, in 14–point bold type, the following warning:

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

EVEN IF THE AMOUNT IS IN DISPUTE!

(c) The unit's owner or his or her successor in interest has failed to pay the amount of the lien, including costs, fees and expenses incident to its enforcement, for 90 days following the recording of the notice of default and election to sell.

(d) The unit's owner or his or her successor in interest, or the holder of a recorded security interest on the unit, has, for a period which commences in the manner and subject to the requirements described in subsection 3 and which expires 5 days before the date of sale, failed to pay the assessments and other sums that are due to the association in accordance with subsection 1 of NRS 116.3116.

(e) The association or other person conducting the sale has executed and caused to be recorded, with the county recorder of the county in which the common-interest community or any part of it is situated, an affidavit which states, based on the direct, personal knowledge of the affiant, the personal knowledge which the affiant acquired by a review of a trustee sale guarantee or a similar product or the personal knowledge which the affiant acquired by a review of the business records of the association or other person conducting the sale, which business records must meet the standards set forth in NRS 51.135, the following:

(1) The name of each holder of a security interest on the unit to which the notice of default and election to sell and the notice of sale was mailed, as required by subsection 2 of NRS 116.31163 and paragraph (d) of subsection 1 of NRS 116.311635; and

(2) The address at which the notices were mailed to each such holder of a security interest.

2. The notice of default and election to sell must be signed by the person designated in the declaration or by the association for that purpose or, if no one is designated, by the president of the association.

3. The period of 90 days described in paragraph (c) of subsection 1 begins on the first day following:

(a) The date on which the notice of default and election to sell is recorded; or

(b) The date on which a copy of the notice of default and election to sell is mailed by certified or registered mail, return receipt requested, to the unit's owner or his or her successor in interest at his or her address, if known, and at the address of the unit,

whichever date occurs later.

4. An association may not mail to a unit's owner or his or her successor in interest a letter of its intent to mail a notice of delinquent assessment pursuant to paragraph (a) of subsection 1, mail the notice of delinquent assessment or take any other action to collect a past due obligation from a unit's owner or his or her successor in interest unless ~~, not~~ :

(a) Not earlier than 60 days after the obligation becomes past due, the association mails to the address on file for the unit's owner:

~~(a)~~ (1) A schedule of the fees that may be charged if the unit's owner fails to pay the past due obligation;

~~(b)~~ (2) A proposed repayment plan; and

~~(c)~~ (3) A notice of the right to contest the past due obligation at a hearing before the executive board and the procedures for requesting such a hearing ~~.~~ ; and

(b) Within 30 days after the date on which the information described in paragraph (a) is mailed, the past due obligation has not been paid in full or the unit's owner or his or her successor in interest has not entered into a repayment plan or requested a hearing before the executive board. If the unit's owner or his or her successor in interest requests a hearing or enters into a repayment plan within 30 days after the date on which the information described in paragraph (a) is mailed and is unsuccessful at the hearing or fails to make a payment under the repayment plan within 10 days after the due date, the association may take any lawful action pursuant to subsection 1 to enforce its lien.

5. The association may not foreclose a lien by sale if the association has not mailed a copy of the notice of default and election to sell and a copy of the notice of sale to each holder of a security interest on the unit in the manner and subject to the requirements set forth in subsection 2 of NRS 116.31163 and paragraph (d) of subsection 1 of 116.311635.

6. 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.

~~6.~~ 7. The association may not foreclose a lien by sale if ~~:~~

~~(a) The unit is owner-occupied housing encumbered by a deed of trust;~~

~~(b) The beneficiary under the deed of trust, the successor in interest of the beneficiary or the trustee has recorded a notice of default and election to sell with respect to the unit pursuant to subsection 2 of NRS 107.080; and~~

~~(c) The~~ the association has received notice pursuant to NRS 107.086 that the unit is subject to foreclosure mediation pursuant to that section, unless:

(a) The trustee of record has ~~not~~ recorded the certificate provided to the trustee pursuant to subparagraph (1) or (2) of paragraph ~~(d)~~ (e) of subsection 2 of NRS 107.086 ~~. As used in this subsection, "owner-occupied housing" has the meaning ascribed to it in NRS 107.086.~~ ; or

(b) The unit's owner has failed to pay to the association any amounts enforceable as assessments pursuant to subsection 1 of NRS 116.3116 that become due during the pendency of foreclosure mediation pursuant to NRS 107.086, other than past due

obligations as described in subsection 10 of NRS 107.086.

Sec. 3. NRS 116.31163 is hereby amended to read as follows:

<< NV ST 116.31163 >>

The association or other person conducting the sale shall also mail, within 10 days after the notice of default and election to sell is recorded, a copy of the notice by ~~first-class~~ certified mail to:

1. Each person who has requested notice pursuant to NRS ~~107.090 or~~ 116.31168; and

2. ~~Any~~ Each holder of a recorded security interest encumbering the unit's owner's interest ~~who has notified the association, 30 days~~ which was recorded before the recordation of the notice of default , ~~of the existence of the security interest; and~~

~~3. A purchaser of the unit, if the unit's owner has notified the association, 30 days before the recordation of the notice, that the unit is the subject of a contract of sale and the association has been requested to furnish the certificate required by NRS 116.4109.~~ at the address of the holder that is provided pursuant to section 8.5 of this act on the Internet website maintained by the Division of Financial Institutions of the Department of Business and Industry.

Sec. 4. NRS 116.311635 is hereby amended to read as follows:

<< NV ST 116.311635 >>

1. The association or other person conducting the sale shall also, after the expiration of the ~~90 days~~ 90–day period described in paragraph (c) of subsection 1 of NRS 116.31162

and before selling the unit ~~:~~
~~(a) Give~~ , give notice of the time and place of the sale ~~in the manner and for a time not less than that required by law for the sale of real property upon execution, except that in lieu of following the procedure for service on a judgment debtor pursuant to NRS 21.130, service must be made on~~ by recording the notice of sale and by:

(a) Posting a similar notice particularly describing the unit, for 20 days consecutively, in a public place in the county where the unit is situated;

(b) Publishing a copy of the notice three times, once each week for 3 consecutive weeks, in a newspaper of general circulation in the county where the unit is situated;

(c) Notifying the unit's owner or his or her successor in interest as follows:

(1) A copy of the notice of sale must be mailed, on or before the date of first publication or posting, by certified or registered mail, return receipt requested, to the unit's owner or his or her successor in interest at his or her address, if known, and to the address of the unit; and

(2) A copy of the notice of sale must be served, on or before the date of first publication or posting, in the manner set forth in subsection 2; and

~~(b) Mail,~~

(d) Mailing, on or before the date of first publication or posting, a copy of the notice by certified ~~or registered~~ mail ~~, return receipt requested,~~ to:

(1) Each person entitled to receive a copy of the notice of default and election to sell notice under subsection 1 of NRS 116.31163;

(2) The holder of a ~~recorded~~ security interest ~~or the purchaser of the unit, if either of them has notified the association,~~ recorded before the mailing of the notice of sale ~~, of the existence of the security interest, lease or contract of sale, as applicable;~~ , at the address of the holder that is provided pursuant to section 8.5 of this act on the Internet website maintained by the Division of Financial Institutions of the Department of Business and Industry; and

(3) The Ombudsman.

2. In addition to the requirements set forth in subsection 1, a copy of the notice of sale must be served:

(a) By a person who is 18 years of age or older and who is not a party to or interested in the sale by personally delivering a copy of the notice of sale to an occupant of the unit who is of suitable age; or

(b) By posting a copy of the notice of sale in a conspicuous place on the unit.

3. Any copy of the notice of sale required to be served pursuant to this section must include:

(a) The amount necessary to satisfy the lien as of the date of the proposed sale; and

(b) The following warning in 14–point bold type:
WARNING! A SALE OF YOUR PROPERTY IS IMMINENT! UNLESS YOU PAY THE AMOUNT SPECIFIED IN THIS NOTICE BEFORE THE SALE DATE, YOU COULD LOSE YOUR HOME, EVEN IF THE AMOUNT IS IN DISPUTE. YOU MUST ACT BEFORE THE SALE DATE. IF YOU HAVE ANY QUESTIONS, PLEASE CALL (name and telephone number of the contact person for the association). IF YOU NEED ASSISTANCE, PLEASE CALL THE FORECLOSURE SECTION OF THE OMBUDSMAN'S OFFICE, NEVADA REAL ESTATE DIVISION, AT (toll–free telephone number designated by the Division) IMMEDIATELY.

4. Proof of service of any copy of the notice of sale required to be served pursuant to this section must consist of:

(a) A certificate of mailing which evidences that the notice was mailed through the United States Postal Service; or

(b) An affidavit of service signed by the person who served the notice stating:

(1) The time of service, manner of service and location of service; and

(2) The name of the person served or, if the notice was not served on a person, a description of the location where the notice was posted on the unit.

Sec. 5. NRS 116.31164 is hereby amended to read as follows:

<< NV ST 116.31164 >>

1. The sale must be conducted in accordance with the provisions of this section.

2. If the holder of the security interest described in paragraph (b) of subsection 2 of NRS 116.3116 satisfies the amount of the association's lien that is prior to its security interest not later than 5 days before the date of sale, the sale may not occur unless a record of such satisfaction is recorded in the office of the county recorder of the county in which the unit is located not later than 2 days before the date of sale.

3. The sale must be ~~conducted~~ made between the hours of 9 a.m. and 5 p.m. and:

(a) If the unit is located in a county whose population is less than 100,000, at the courthouse in the county in which the ~~common-interest community~~ unit ~~or part of it~~ is ~~situated, and~~ located.

(b) If the unit is located in a county whose population is 100,000 or more, at the public location in the county designated by the governing body of the county to conduct a sale of real property pursuant to NRS 107.080.

4. The sale may be conducted by the association, its agent or attorney, or a title insurance company or escrow agent licensed to do business in this State . ~~, except that the sale may be made at the office of the association if the notice of the sale so provided, whether the unit is located within the same county as the office of the association or not.~~

5. The association or other person conducting the sale may from time to time postpone the sale by such advertisement and notice as it considers reasonable or, without further advertisement or notice, by proclamation made to the persons assembled at the time and place previously set and advertised for the sale ~~.~~

~~2.~~ , except that:

(a) If the sale is postponed by oral proclamation, the sale must be postponed to a later date at the same time and location; and

(b) If such a date has been postponed by oral proclamation three times, any new sale information must be provided by notice as provided in NRS 116.311635.

6. On the day of sale , ~~originally advertised or to which the sale is postponed,~~ at the time and place specified in the notice , ~~or postponement,~~ the person conducting the sale ~~may~~ :

(a) Shall state to the persons assembled for the sale whether or not the holder of the security interest described in paragraph (b) of subsection 2 of NRS 116.3116 has satisfied the amount of the association's lien that is prior to that first security interest pursuant to subsection 3 of NRS 116.3116.

(b) May sell the unit at public auction to the highest cash bidder. Except as otherwise provided in this subsection, the person conducting the sale or any entity in which that person holds an interest may not become a purchaser at the sale. Unless otherwise provided in the declaration or by agreement, the association may purchase the unit and hold, lease, mortgage or convey it. The association may purchase by a credit bid up to the amount of the unpaid assessments and any permitted costs, fees and expenses incident to the enforcement of its lien.

~~3.~~ 7. After the sale, the person conducting the sale shall ~~:~~

~~(a) Make, execute and, after payment is made, deliver to the purchaser, or his or her successor or assign, a deed without warranty which conveys to the grantee all title of the unit's owner to the unit;~~

~~(b) Deliver a copy of the deed to the Ombudsman within 30 days after the deed is delivered to the purchaser, or his or her successor or assign;~~ :

(a) Comply with the provisions of subsection 2 of NRS 116.31166; and

~~(c)~~ (b) Apply the proceeds of the sale for the following purposes in the following order:

(1) The reasonable expenses of sale;

(2) 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 the declaration, reasonable attorney's fees and other legal expenses incurred by the association;

(3) Satisfaction of the association's lien;

(4) Satisfaction in the order of priority of any subordinate claim of record; and

(5) Remittance of any excess to the unit's owner.

Sec. 6. NRS 116.31166 is hereby amended to read as follows:

<< NV ST 116.31166 >>

1. Every sale of a unit pursuant to NRS 116.31162 to 116.31168, inclusive, vests in the purchaser the title of the unit's owner subject to the right of redemption provided by this section. If the holder of the security interest described in paragraph (b) of subsection 2 of NRS 116.3116 satisfies the amount of the association's lien that is prior to its security interest not later than 5 days before the date of sale, the sale of the unit does not extinguish that security interest to any extent.

2. After the sale conducted pursuant to NRS 116.31164, the person conducting the sale shall:

(a) Give to the purchaser a certificate of the sale containing:

(1) A particular description of the unit sold;

(2) The price bid for the unit;

(3) The whole price paid; and

(4) A statement that the unit is subject to redemption; and

(b) Record a copy of the certificate in the office of the county recorder of the county in which the unit or part of it is located.

3. A unit sold pursuant to NRS 116.31162 to 116.31168, inclusive, may be redeemed by the unit's owner whose interest in the unit was extinguished by the sale, or his or her successor in interest, or any holder of a recorded security interest that is subordinate to the lien on which the unit was sold, or that holder's successor in interest. The unit's owner whose interest in the unit was extinguished, the holder of the recorded security interest on the unit or a successor in interest of those persons may redeem the property at any time within 60 days after the sale by paying :

(a) The purchaser the amount of his or her purchase price, with interest at the rate of 1 percent per month thereon in addition, to the time of redemption, plus:

(1) The amount of any assessment, taxes or payments toward liens which were created before the purchase and which the purchaser may have paid thereon after the purchase, and interest on such amount;

(2) If the purchaser is also a creditor having a prior lien to that of the redemptioner, other than the association's lien under which the purchase was made, the amount of such lien, and interest on such amount; and

(3) Any reasonable amount expended by the purchaser which is reasonably necessary to maintain and repair 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; and

(b) If the redemptioner is the holder of a recorded security interest on the unit or the holder's successor in interest, the amount of any lien before his or her own lien, with interest, but the association's lien under which the unit was sold is not required to be so paid as a lien.

4. Notice of redemption must be served by the person redeeming the unit on the person who conducted the sale and on the person from whom the unit is redeemed, together with:

(a) If the person redeeming the unit is the unit's owner whose interest in the unit was extinguished by the sale or his or her successor in interest, a certified copy of the deed to the unit and, if the person redeeming the unit is the successor of that unit's owner, a copy of any document necessary to establish that the person is the successor of the unit's owner.

(b) If the person redeeming the unit is the holder of a recorded security interest on the unit or the holder's successor in interest:

(1) An original or certified copy of the deed of trust securing the unit or a certified copy of any other recorded security interest of the holder.

(2) A copy of any assignment necessary to establish the claim of the person redeeming the unit, verified by the affidavit of that person, or that person's agent, or of a subscribing witness thereto.

(3) An affidavit by the person redeeming the unit, or that person's agent, showing the amount then actually due on the lien.

5. If the unit's owner whose interest in the unit was extinguished by the sale redeems the property as provided in this section:

(a) The effect of the sale is terminated, and the unit's owner is restored to his or her interest in the unit, subject to any security interest on the unit that existed at the time of sale; and

(b) The person to whom the redemption amount was paid must execute and deliver to the unit's owner a certificate of redemption, acknowledged or approved before a person authorized to take acknowledgements of conveyances of real property, and the certificate must be recorded in the office of the recorder of the county in which the unit or part of the unit is situated.

6. If the holder of a recorded security interest redeems the unit as provided in this section and the period for a redemption set forth in subsection 3 has expired, the person conducting the sale shall:

(a) Make, execute and, if the amount required to redeem the unit is paid to the person from whom the unit is redeemed, deliver to the person who redeemed the unit or his or her successor or assign, a deed without warranty which conveys to the person who

redeemed the unit all title of the unit's owner to the unit; and

(b) Deliver a copy of the deed to the Ombudsman within 30 days after the deed is delivered to the person who redeemed the unit, or his or her successor or assign.

7. If no redemption is made within 60 days after the date of sale, the person conducting the sale shall:

(a) Make, execute and, if payment is made, deliver to the purchaser, or his or her successor or assign, a deed without warranty which conveys to the purchaser all title of the unit's owner to the unit; and

(b) Deliver a copy of the deed to the Ombudsman within 30 days after the deed is delivered to the purchaser, or his or her successor or assign.

8. The recitals in a deed made pursuant to ~~NRS 116.31164~~ subsection 6 or 7 of:

(a) Default, the mailing of the notice of delinquent assessment, and the mailing and recording of the notice of default and election to sell;

(b) The elapsing of the ~~90 days; and~~ 90–day period set forth in paragraph (c) of subsection 1 of NRS 116.31162;

(c) The ~~giving~~ recording, mailing, publishing and posting of the notice of sale ~~,~~ ;

(d) The failure to pay the assessments and other sums which are due in accordance with subsection 1 of NRS 116.3116 before the expiration of the period described in paragraph (d) of subsection 1 of NRS 116.31162; and

(e) The recording of the affidavit required to be recorded pursuant to paragraph (e) of subsection 1 of NRS 116.31162,

are conclusive proof of the matters recited.
~~2. Such a~~

9. A deed containing ~~those~~ the recitals set forth in subsection 8 is conclusive against the unit's former owner, his or her heirs and assigns, and all other persons. The receipt for the purchase money contained in such a deed is sufficient to discharge the purchaser from obligation to see to the proper application of the purchase money.

~~3. The sale of a unit pursuant to NRS 116.31162, 116.31163 and 116.31164 vests in the purchaser the title of the unit's owner without equity or right of redemption.~~

10. Upon the expiration of the redemption period set forth in subsection 3, any failure to comply with the provisions of NRS 116.3116 to 116.31168, inclusive, does not affect the rights of a bona fide purchaser or bona fide encumbrancer for value.

Sec. 7. NRS 116.31168 is hereby amended to read as follows:

<< NV ST 116.31168 >>

1. ~~The provisions of NRS 107.090 apply to the foreclosure of an association's lien as if a deed of trust were being foreclosed. The request must identify the lien by stating the names of the unit's owner and the common-interest community.~~

~~2. An association may, after recording a notice of default and election to sell, waive the default and withdraw the notice or any proceeding to foreclose. The association is thereupon restored to its former position and has the same rights as though the notice had not been recorded.~~ A person with an interest or any other person who is or may be held liable for any amounts which are the subject of the association's lien pursuant to NRS 116.3116 or the servicer of a loan secured by a deed of trust or mortgage on real property which is subject to such lien desiring a copy of a notice of default and election to sell or notice of sale under the association's lien may record in the office of the county recorder of the county in which any part of the real property is situated an acknowledged request for a copy of the notice of default and election to sell or the notice of sale. The request must:

(a) State the name and address of the person requesting copies of the notices;

(b) State a legal description of the unit in which the person has an interest or the assessor's parcel number of that unit; and

(c) The names of the unit's owner and the common-interest community.

2. The association or other person authorized to record the notice of default and election to sell shall, within 10 days after the notice is recorded and mailed pursuant to NRS 116.31162, cause to be deposited in the United States mail an envelope, registered or certified, return receipt requested and with postage prepaid, containing a copy of the notice, addressed to each person who has recorded a request for a copy of the notice.

3. The association or other person authorized to make the sale shall, at least 20 days before the date of sale, cause to be deposited in the United States mail an envelope, registered or certified, return receipt requested and with postage prepaid, containing a copy of the notice of time and place of sale, addressed to each person described in subsection 2.

4. As used in this section, “person with an interest” means any person who has or claims any right, title or interest in, or lien or charge upon, a unit being foreclosed pursuant to NRS 116.31162 to 116.31168, inclusive.

Sec. 8. NRS 107.086 is hereby amended to read as follows:

<< NV ST 107.086 >>

1. Except as otherwise provided in this subsection, in addition to the requirements of NRS 107.085, the exercise of the power

of sale pursuant to NRS 107.080 with respect to any trust agreement which concerns owner-occupied housing is subject to the provisions of this section. The provisions of this section do not apply to the exercise of the power of sale if the notice of default and election to sell recorded pursuant to subsection 2 of NRS 107.080 includes an affidavit and a certification indicating that, pursuant to NRS 107.130, an election has been made to use the expedited procedure for the exercise of the power of sale with respect to abandoned residential property.

2. The trustee shall not exercise a power of sale pursuant to NRS 107.080 unless the trustee:

(a) Includes with the notice of default and election to sell which is mailed to the grantor or the person who holds the title of record as required by subsection 3 of NRS 107.080:

(1) Contact information which the grantor or the person who holds the title of record may use to reach a person with authority to negotiate a loan modification on behalf of the beneficiary of the deed of trust;

(2) Contact information for at least one local housing counseling agency approved by the United States Department of Housing and Urban Development;

(3) A notice provided by the Mediation Administrator indicating that the grantor or the person who holds the title of record will be enrolled to participate in mediation pursuant to this section if he or she pays to the Mediation Administrator his or her share of the fee established pursuant to subsection 11; and

(4) A form upon which the grantor or the person who holds the title of record may indicate an election to waive mediation pursuant to this section and one envelope addressed to the trustee and one envelope addressed to the Mediation Administrator, which the grantor or the person who holds the title of record may use to comply with the provisions of subsection 3;

(b) In addition to including the information described in paragraph (a) with the notice of default and election to sell which is mailed to the grantor or the person who holds the title of record as required by subsection 3 of NRS 107.080, provides to the grantor or the person who holds the title of record the information described in paragraph (a) concurrently with, but separately from, the notice of default and election to sell which is mailed to the grantor or the person who holds the title of record as required by subsection 3 of NRS 107.080;

(c) Serves a copy of the notice upon the Mediation Administrator; ~~and~~

(d) If the owner-occupied housing is located within a common-interest community, notifies the unit-owners' association of the common-interest community, not later than 10 days after mailing the copy of the notice of default and election to sell as required by subsection 3 of NRS 107.080, that the exercise of the power of sale is subject to the provisions of this section; and

(e) Causes to be recorded in the office of the recorder of the county in which the trust property, or some part thereof, is situated:

(1) The certificate provided to the trustee by the Mediation Administrator pursuant to subsection 4 or 7 which provides that no mediation is required in the matter; or

(2) The certificate provided to the trustee by the Mediation Administrator pursuant to subsection 8 which provides that mediation has been completed in the matter.

3. If the grantor or the person who holds the title of record elects to waive mediation, he or she shall, not later than 30 days after service of the notice in the manner required by NRS 107.080, complete the form required by subparagraph (4) of paragraph (a) of subsection 2 and return the form to the trustee and the Mediation Administrator by certified mail, return receipt requested. If the grantor or the person who holds the title of record does not elect to waive mediation, he or she shall, not later than 30 days after the service of the notice in the manner required by NRS 107.080, pay to the Mediation Administrator his or her share of the fee established pursuant to subsection 11. Upon receipt of the share of the fee established pursuant to subsection 11 owed by the grantor or the person who holds title of record, the Mediation Administrator shall notify the trustee, by certified mail, return receipt requested, of the enrollment of the grantor or person who holds the title of record to participate in mediation pursuant to this section and shall assign the matter to a senior justice, judge, hearing master or other designee and schedule the matter for mediation. The trustee shall notify the beneficiary of the deed of trust and every other person with an interest as defined in NRS 107.090, by certified mail, return receipt requested, of the enrollment of the grantor or the person who holds the title of record to participate in mediation. If the grantor or person who holds the title of record is enrolled to participate in mediation pursuant to this section, no further action may be taken to exercise the power of sale until the completion of the mediation.

4. If the grantor or the person who holds the title of record indicates on the form described in subparagraph (4) of paragraph (a) of subsection 2 an election to waive mediation or fails to pay to the Mediation Administrator his or her share of the fee established pursuant to subsection 11, as required by subsection 3, the Mediation Administrator shall, not later than 60 days after the Mediation Administrator receives the form indicating an election to waive mediation or 90 days after the service of the notice in the manner required by NRS 107.080, whichever is earlier, provide to the trustee a certificate which provides that no mediation is required in the matter.

5. Each mediation required by this section must be conducted by a senior justice, judge, hearing master or other designee pursuant to the rules adopted pursuant to subsection 11. The beneficiary of the deed of trust or a representative shall attend the mediation. The grantor or his or her representative, or the person who holds the title of record or his or her representative, shall attend the mediation. The beneficiary of the deed of trust shall bring to the mediation the original or a certified copy of the deed of trust, the mortgage note and each assignment of the deed of trust or mortgage note. If the beneficiary of the deed of trust is represented at the mediation by another person, that person must have authority to negotiate a loan modification on behalf of the beneficiary of the deed of trust or have access at all times during the mediation to a person with such authority.

6. If the beneficiary of the deed of trust or the representative fails to attend the mediation, fails to participate in the mediation in good faith or does not bring to the mediation each document required by subsection 5 or does not have the authority or access to a person with the authority required by subsection 5, the mediator shall prepare and submit to the Mediation Administrator a petition and recommendation concerning the imposition of sanctions against the beneficiary of the deed of trust or the representative. The court may issue an order imposing such sanctions against the beneficiary of the deed of trust or the representative as the court determines appropriate, including, without limitation, requiring a loan modification in the manner determined proper by the court.

7. If the grantor or the person who holds the title of record is enrolled to participate in mediation pursuant to this section but fails to attend the mediation, the Mediation Administrator shall, not later than 30 days after the scheduled mediation, provide to the trustee a certificate which states that no mediation is required in the matter.

8. If the mediator determines that the parties, while acting in good faith, are not able to agree to a loan modification, the mediator shall prepare and submit to the Mediation Administrator a recommendation that the matter be terminated. The Mediation Administrator shall, not later than 30 days after submittal of the mediator's recommendation that the matter be terminated, provide to the trustee a certificate which provides that the mediation required by this section has been completed in the matter.

9. Upon receipt of the certificate provided to the trustee by the Mediation Administrator pursuant to subsection 4, 7 or 8, if the property is located within a common-interest community, the trustee shall , not later than 10 days after receipt of the certificate, notify the ~~unit-owner's~~ unit-owners' association ~~organized under NRS 116.3101~~ of the existence of the certificate.

10. During the pendency of any mediation pursuant to this section, a unit's owner must continue to pay any obligation, other than any past due obligation.

11. The Supreme Court shall adopt rules necessary to carry out the provisions of this section. The rules must, without limitation, include provisions:

(a) Designating an entity to serve as the Mediation Administrator pursuant to this section. The entities that may be so designated include, without limitation, the Administrative Office of the Courts, the district court of the county in which the property is situated or any other judicial entity.

(b) Ensuring that mediations occur in an orderly and timely manner.

(c) Requiring each party to a mediation to provide such information as the mediator determines necessary.

(d) Establishing procedures to protect the mediation process from abuse and to ensure that each party to the mediation acts in good faith.

(e) Establishing a total fee of not more than $400 that may be charged and collected by the Mediation Administrator for mediation services pursuant to this section and providing that the responsibility for payment of the fee must be shared equally by the parties to the mediation.

12. Except as otherwise provided in subsection 14, the provisions of this section do not apply if:

(a) The grantor or the person who holds the title of record has surrendered the property, as evidenced by a letter confirming the surrender or delivery of the keys to the property to the trustee, the beneficiary of the deed of trust or the mortgagee, or an authorized agent thereof; or

(b) A petition in bankruptcy has been filed with respect to the grantor or the person who holds the title of record under chapter 7, 11, 12 or 13 of Title 11 of the United States Code and the bankruptcy court has not entered an order closing or dismissing the case or granting relief from a stay of foreclosure.

13. A noncommercial lender is not excluded from the application of this section.

14. The Mediation Administrator and each mediator who acts pursuant to this section in good faith and without gross negligence are immune from civil liability for those acts.

15. As used in this section:

(a) “Common-interest community” has the meaning ascribed to it in NRS 116.021.

(b) “Mediation Administrator” means the entity so designated pursuant to subsection 11.

(c) “Noncommercial lender” means a lender which makes a loan secured by a deed of trust on owner-occupied housing and which is not a bank, financial institution or other entity regulated pursuant to title 55 or 56 of NRS.

(d) “Obligation” has the meaning ascribed to it in NRS 116.310313.

(e) “Owner-occupied housing” means housing that is occupied by an owner as the owner's primary residence. The term does not include vacant land or any time share or other property regulated under chapter 119A of NRS.

(f) “Unit-owners' association” has the meaning ascribed to it in NRS 116.011.

(g) “Unit's owner” has the meaning ascribed to it in NRS 116.095.

Sec. 8.5. Chapter 657 of NRS is hereby amended by adding thereto a new section to read as follows:

<< NV ST 657. >>

1. A bank, credit union, savings bank, savings and loan association, thrift company or other financial institution which is licensed, registered or otherwise authorized to do business in this State and which is the mortgagee or beneficiary of a deed of trust under a residential mortgage loan shall provide to the Division of Financial Institutions the name, street address and any other contact information of a person to whom:

(a) A borrower or a representative of a borrower must send any document, record or notification necessary to facilitate a mediation conducted pursuant to NRS 40.437 or 107.086.

(b) A unit-owners' association must send any notice required to be given pursuant to NRS 116.3116 to 116.31168, inclusive.

2. The Division of Financial Institutions shall maintain on its Internet website the information provided to the Division pursuant to subsection 1 and provide a prominent display of, or a link to, the information described in subsection 1, on the home page of its Internet website.

3. As used in this section:

(a) “Borrower” means a person who is a mortgagor or grantor of a deed of trust under a residential mortgage loan.

(b) "Residential mortgage loan" means a loan which is primarily for personal, family or household use and which is secured by a mortgage or deed of trust on owner-occupied housing as defined in NRS 107.086.

Sec. 9. 1. Subsections 1 to 6, inclusive, of NRS 116.31162 and NRS 116.31163, as amended by sections 2 and 3 of this act, respectively, apply only to a notice of default and election to sell that is recorded pursuant to paragraph (b) of subsection 1 of NRS 116.31162, as amended by section 2 of this act, on or after October 1, 2015.

2. Subsection 7 of NRS 116.31162 and NRS 107.086, as amended by sections 2 and 8 of this act, respectively, apply if a notice of default and election to sell is recorded pursuant to NRS 107.080, on or after October 1, 2015.

3. NRS 116.311635 and 116.31164, as amended by sections 4 and 5 of this act, respectively, apply only if a notice of sale is recorded pursuant to NRS 116.311635, as amended by section 4 of this act, on or after October 1, 2015.

4. NRS 116.31166, as amended by section 6 of this act, applies only to a sale of a unit pursuant to NRS 116.31162 to 116.31168, inclusive, as amended by sections 2 to 7, inclusive, of this act, respectively, which occurs on or after October 1, 2015.

Approved by the Governor May 27, 2015.

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