(t) May exercise any other powers necessary and proper for the governance and operation of the association.

- Section 1 of NRS 116.3116 defines the lien an association has. Under NRS 116.3116(1) - associations have a lien on units consisting of: (1) Construction penalties; (2) Assessments; and (3) Penalties, fees, charges, late charges, fines and interest permitted by NRS 116.3102 (1)(j) to (n)
- Section 2 of NRS 116.3116 sets out the lien's priority. Subsection 2(b) says the lien is subordinate to the first security, but after subsection 2(c), the language [highlighted in green] allows for part of the association's lien to be prior to the first security.
- The Division interprets this language to allow for two parts of the lien described in Subsection 1 to be <u>prior to</u> the first secured: (1) Costs pursuant to NRS 116.310312 (which are typically called abatement charges); and (2) 9 months of assessments as reflected in the association's budget.
- The 9 months of assessments is a "look back period" from the association's "action to enforce the lien."
- This statute having come from the Uniform Common Interest Ownership Act was written for a judicial foreclosure process, hence the term "action." But since Nevada does not require a judicial foreclosure process, the Division interprets this language to mean <u>any action pursuant to the non-judicial foreclosure process,</u> i.e. the mailing of the notice of delinquent assessment under NRS 116.31162.
- An association could do a judicial foreclosure process, but they are not required to.

Issues with NRS 116.3116:

1. Can anything other than regular assessments (monthly assessments based on the periodic budget) be part of the super priority lien?
   - Is there a cap to the super priority lien?
   - How does the regulation in NAC 645.470 on costs of collecting fit in?
2. Can an association's foreclosure of its super priority lien extinguish the first security interest?
   - Is the language in NRS 116.3116 sufficient?
   - Is the language describing the foreclosure process under NRS 116.31162 to 116.31168, inclusive sufficient to extinguish a first security?

1. Can anything other than regular assessments be part of the super priority lien?

This issue comes down to whether or not the language in NRS 116.3116(2)(c) [highlighted in green] includes collection costs for an association, and if so, is there a cap on the total super priority lien. The Division, as previously explained, reads this language to apply only to assessments provided in the association's budget that is limited to 9 months of regular monthly assessments.

Collection costs are not assessments provided in an association budget. The language of NRS 116.3116(2)(c) does not provide any mechanism for including collection costs within the priority lien.

Even more important to note, costs of collection are not referenced in the language of NRS 116.3116(1) that defines the association's lien. ***If costs of collection are not part of the lien, they cannot be part of the super priority portion of the lien.***

The concept of "costs of collecting" was first introduced to NRS 116 in 2009 with the adoption of NRS 116.310313. As is clear from the language of NRS 116.310313 an association may charge a unit's owner, but it does not say the charge can be liened on a unit.

NRS 116.310313 Collection of past due obligation; charge of reasonable fee to collect.

1. An association may charge a unit's owner reasonable fees to cover the costs of collecting any past due obligation. The Commission shall adopt regulations establishing the amount of the fees that an association may charge pursuant to this section.
2. The provisions of this section apply to any costs of collecting a past due obligation charged to a unit's owner, regardless of whether the past due obligation is collected by the association itself or by any person acting on behalf of the association, including, without limitation, an officer or employee of the association, a community manager or a collection agency.
3. As used in this section:

(a) "Costs of collecting" includes any fee, charge or cost, by whatever name, including, without limitation, any collection fee, filing fee, recording fee, fee related to the preparation, recording or delivery of a lien or lien rescission, title search lien fee, bankruptcy search fee, referral fee, fee for postage or delivery and any other fee or cost that an association charges a unit's owner for the investigation, enforcement or collection of a past due obligation. The term does not include any costs incurred by an association if a lawsuit is filed to enforce any past due obligation or any costs awarded by a court.

(b) "Obligation" means any assessment, fine, construction penalty, fee, charge or interest levied or imposed against a unit's owner pursuant to any provision of this chapter or the governing documents.

(Added to NRS by 2009, 2795)

(emphasis added)

NRS 116.310313 applies to the association's collection of any past due "obligation" as defined in the statute. It includes the collection of all amounts due to the association from an owner, i.e. fines and penalties, not merely assessments. The Commission for Common-Interest Communities and Condominium Hotels adopted NAC 116.470 with the authority provided in NRS 116.310313. It became effective May 5, 2011 on "the amount of the fees that an association may charge pursuant to this section."

NAC 116.470 Fees and costs for collection of past due obligations of unit's owner. (NRS 116.310313, 116.615)

1. Except as otherwise provided in subsection 5, to cover the costs of collecting any past due obligation of a unit's owner, an association or a person acting on behalf of an association to collect a past due obligation of a unit's owner may not charge the unit's owner fees in connection with a notice of delinquent assessment ***pursuant to paragraph (a) of subsection 1 of NRS 116.31162*** which exceed a total of $1,950, plus the costs and fees described in subsections 3 and 4.
2. An association or a person acting on behalf of an association to collect a past due obligation of a unit's owner may not charge the unit's owner fees in connection with a notice of delinquent assessment ***pursuant to paragraph (a) of subsection 1 of NRS 116.31162*** which exceed the following amounts:

(a) Demand or intent to lien letter…..	$150	
(b) Notice of delinquent assessment lien.....	325	
(c) Intent to notice of default letter.....	90	
(d) Notice of default....	400	
(e) Intent to notice of sale letter.....		90
(f) Notice of sale.....		275
(g) Intent to conduct foreclosure sale.....	25	
(h) Conduct foreclosure sale.....	125	
(i) Prepare and record transfer deed.....	125	

(j) Payment plan agreement - One-time set-up fee..30
(k) Payment plan breach letter..... 25
(l) Release of notice of delinquent assessment lien..30
(m) Notice of rescission fee..... 30
(n) Bankruptcy package preparation and monitoring..... 100
(o) Mailing fee per piece for demand or intent to lien letter,
notice of delinquent assessment lien, notice of default and notice of sale..... 2
(p) Insufficient funds fee..... 20
(q) Escrow payoff demand fee..... 150
(r) Substitution of agent document fee..... 25
(s) Postponement fee..... 75
(t) Foreclosure fee..... 150

3. If, in connection with an activity described in subsection 2, any costs are charged to an association or a person acting on behalf of an association to collect a past due obligation by a person who is not an officer, director, agent or affiliate of the community manager of the association or of an agent of the association, including, without limitation, the cost of a trustee's sale guarantee and other title costs, recording costs, posting and publishing costs, sale costs, mailing costs, express delivery costs and skip trace fees, the association or person acting on behalf of an association may recover from the unit's owner the actual costs incurred without any increase or markup.
4. If an association or a person acting on behalf of an association is attempting to collect a past due obligation from a unit's owner, the association or person acting on behalf of an association may recover from the unit's owner:
(a) Reasonable management company fees which may not exceed a total of $200; and
(b) Reasonable attorney's fees and actual costs, without any increase or markup, incurred by the association for any legal services which do not include an activity described in subsection 2.
5. If an association or a person acting on behalf of an association to collect a past due obligation of a unit's owner is engaging in the activities set forth in NRS 116.31162 to 116.31168, inclusive, with respect to more than 25 units owned by the same unit's owner, the association or person acting on behalf of an association may not charge the unit's owner fees to cover the costs of collecting a past due obligation which exceed a total of $1,950 multiplied by the number of units for which such activities are occurring, as reduced by an amount set forth in a resolution adopted by the executive board, plus the costs and fees described in subsections 3 and 4.
6. For a one-time period of 15 business days immediately following a request for a payoff amount from the unit's owner or his or her agent, no fee to cover the cost of collecting a past due obligation may be charged to the unit's owner, except for the fee described in paragraph (q) of subsection 2 and any other fee to cover any cost of collecting a past due obligation which is imposed because of an action required by statute to be taken within that 15-day period.
7. As used in this section, "affiliate of the community manager of the association or of an agent of the association" means any person who controls, is controlled by or is under common control with a community manager or such agent. For the purposes of this subsection:
(a) A person "controls" a community manager or agent if the person:
(1) Is a general partner, officer, director or employer of the community manager or agent;
(2) Directly or indirectly or acting in concert with one or more other persons, or through one or more subsidiaries, owns, controls, holds with power to vote or holds proxies representing, more than 20 percent of the voting interest in the community manager or agent;
(3) Controls in any manner the election of a majority of the directors of the community manager or agent; or
(4) Has contributed more than 20 percent of the capital of the community manager or its agent.
(b) A person "is controlled by" a community manager or agent if the community manager or agent:
(1) Is a general partner, officer, director or employer of the person;
(2) Directly or indirectly or acting in concert with one or more other persons, or through one or more subsidiaries, owns, controls, holds with power to vote or holds proxies representing, more than 20 percent of the voting interest in the person;
(3) Controls in any manner the election of a majority of the directors of the person; or
(4) Has contributed more than 20 percent of the capital of the person.
(c) Control does not exist if the powers described in this subsection are held solely as security for an obligation and are not exercised.
(Added to NAC by Comm'n for Common-Interest Communities & Condo. Hotels by R199-09, eff. 5-5-2011)
(emphasis added)

The regulation in NAC 116.470 cannot expand the statute; the regulation only establishes fees that can be charged pursuant to NRS 116.301313. There is confusion over whether the association's lien can include costs of collecting as a result of this regulation. The Division's position is that this regulation is limited to the authority granted by the statue; the statute does not allow an association to lien for costs of collecting.

The Commission's authority in NRS 116.310313 was to adopt a regulation establishing the fees that could be charged pursuant to NRS 116.310313. To make the costs of collecting part of an association's lien, NRS 116.310313 would have to say those costs can be part of the lien and that would have to be incorporated into NRS 116.3116.

When NRS 116.310313 was adopted in 2009, the Nevada Legislature also adopted NRS 116.310312. These costs in NRS 116.310312 – typically referred to as abatement charges – are specifically made part of the association's lien in NRS 116.310313 and they are incorporated into NRS 116.3116(1) by addition to NRS 116.3102(1)(j). If costs of collecting past due assessments are intended to be part of the super priority, lien specific language needs to be added to NRS 116.3116. It is not sufficient to refer simply to "costs of collecting" in NRS 116.3116, because as defined in NRS 116.310313, those costs apply to the collection of more than just assessments. For example, they apply to fines and penalties. Generally, a lien for fines cannot be foreclosed by an association – and would certainly not be part of the super priority lien.

2. Can an association's foreclosure of its super priority lien extinguish the first security interest?

The super priority lien comes into play in two situations – when the association forecloses ahead of a first security and when a first security forecloses ahead of the association. If the first secured forecloses its lien ahead of the association, the amount of the super priority lien would remain a lien on the unit. When the association forecloses before the first security, the issue is whether the first security is extinguished. The Division believes the purpose of the super priority lien is to give associations leverage over a first security. For that reason, the Division takes the position that the association's foreclosure of its super priority lien would extinguish the first secured if the first secured does not pay the priority lien amount before the sale.

While the Division believes an association's foreclosure should be able to extinguish a first secured, the Division also recognizes problems with the current law making that conclusion uncertain. For example, NRS 116.3116 comes from the Uniform Common Interest Ownership Act which was written to apply to a judicial foreclosure process. Nevada does not require that associations follow a judicial foreclosure process, which leads to confusion regarding the meaning of certain words within NRS 116.3116. Additionally, the foreclosure statutes (NRS 116.31162 to 116.31168, inclusive) do not mandate notice to the first secured unless the lender previously requested such notice. While the Division believes notice to the first secured is commonplace for association foreclosures, the absence of a required notice in the law is a problem. Ultimately, the state of the current law will be for the courts to decide.

It is preferred that the law be absolutely clear as to the effect of the association's foreclosure. If the law is clear that an association's foreclosure would extinguish a first secured, associations would be more likely to receive payment from a lender making a foreclosure by the association

unnecessary. And in the unlikely event that a lender would ignore an association's foreclosure action, the sale by an association would be more likely to generate a sales price far greater than the amount of the super priority lien. In that event, the lender would receive the excess up to the amount of its deed of trust.

In a case out of Washington (Summerhill Village Homeowners Association v Roughley et al, 166 Wash.App. 625, 270 P.3d 639) (289 P.3d 645), an association's foreclosure did in fact extinguish a first security. Under Washington law, however, an association must follow a judicial foreclosure process in order to extinguish the first secured. Under Washington State law, an association could foreclose non-judicially, but it would not extinguish the first secured. A judicial foreclosure process would ensure adequate notice to the lender and allow them to participate in the process. It would also reflect in the record whether or not the lender maintained its secured status by paying the super priority lien amount. In order to generate a fair market value, the buyer needs to know whether the lender has paid the super priority lien. This would ensure an appropriate sales price at the sale.

EXHIBIT 4

UNIFORM COMMON INTEREST OWNERSHIP ACT

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS NINETY-FIRST YEAR
IN MONTEREY, CALIFORNIA
JULY 30-AUGUST 6, 1982

WITH PREFATORY NOTE AND COMMENTS

UNIFORM COMMON INTEREST OWNERSHIP ACT (1982)

ARTICLE 1

GENERAL PROVISIONS

Part I

Definitions and Other General Provisions

Section

Part II

APPLICABILITY

ARTICLE 2

CREATION, ALTERATION, AND TERMINATION OF COMMON INTEREST COMMUNITIES

ARTICLE 3

MANAGEMENT OF THE COMMON INTEREST COMMUNITY

ARTICLE 4

PROTECTION OF PURCHASERS

[OPTIONAL]

ARTICLE 5

ADMINISTRATION AND REGISTRATION OF COMMON INTEREST COMMUNITIES

UNIFORM COMMON INTEREST OWNERSHIP ACT (1982)

PREFATORY NOTE

The Uniform Common Interest Ownership Act (UCIOA) was adopted at the 1982 Annual Meeting of the National Conference of Commissioners on Uniform State Laws.

The explosive rise in land costs during the 1960s and 1970s, coupled with the desire of many consumers to own housing and recreational amenities which they could not afford except when owned with others, led to an extraordinary development of various forms of shared or "common" ownership of real estate. The three most common forms of common ownership have been condominiums, cooperatives, and so-called "planned unit developments," or cluster housing projects. Each of these forms typically includes creation of a mandatory owners association to manage and maintain common amenities, while separate portions of the real estate—units—are occupied for individual use.

Title to the common amenities, or common elements, typically rests in varying entities depending on the form of ownership—they are owned on an undivided interest basis by the unit owners in condominiums, while the association "owns" the common elements in the case of cooperatives and PUDS. Similarly, legal title to the units lies with the unit owners in condominiums and PUDS, but with the association in the case of cooperatives. In all forms, however, the beneficial interest in both the common elements and the units lies with the unit owners, while management of the common elements is performed by the association.

While this common scheme is shared by all 3 forms, the legal consequences flowing from the choice of form differ substantially. Typically, condominiums are a highly regulated form of ownership under statute, often with consumer protection provisions in the statute. Cooperatives and PUDS are significantly less regulated. Moreover, when comparing laws between states, the statutes or common law governing condominiums, cooperatives, and planned communities use varying and sometimes inappropriate terminology, and differ in numerous details, all of which make it difficult for a national lender to assess the appropriateness of project documents and of financing arrangements in those states. Finally, the varying statutes, and case law creating different "bundles of rights" for purchasers of common interest communities in the various states, make it difficult for the increasingly mobile consumer to become educated in this very complex area.

UCIOA represents the culmination of the Conference's 9-year effort to offer comprehensive legislation to the States which provides a common structural and regulatory scheme equally applicable to all three forms of common ownership.

DEVELOPMENT OF THE ACT

Condominiums

The first Uniform Act in the field was the Uniform Condominium Act (UCA), adopted by the Conference in 1977.

All states have statutes which provide for the creation of condominiums and establish some rules concerning their governance. The first statute in the United States was adopted in 1958 in Puerto Rico, and many present state statutes are patterned after that 1958 statute. As the condominium form of ownership became widespread, however, many states realized that these early statutes were inadequate to deal with the growing condominium industry. In particular, many states perceived a need for additional consumer protection, as well as a need for more flexibility in the creation and use of condominiums. As a result, some states have enacted more detailed and comprehensive "second generation" statutes. Many actual or potential problems, however, involving such matters as termination of condominiums, eminent domain, insurance, and the rights and obligations of lenders upon foreclosure of a condominium project, had not been satisfactorily addressed by any existing condominium statute. Moreover, the statutes differ widely from state to state. The Uniform Condominium Act was drafted primarily to resolve those various problems.

Planned Communities

The Uniform Planned Community Act (UPCA) was adopted at the 1980 Annual Meeting of the Conference.

While the historical development of condominiums can be traced to early statutory enactments at the state level supported by the conveyancing bar and national lending institutions, planned communities, historically, developed as a zoning concept at the local level. As single family subdivisions were increasingly supplanted in land planning theory by "clustering" to enhance the availability of shared open space, local governments required a zoning mechanism responsive to the implications of this new concept. That device, frequently, was the "planned unit development" or PUD zone, in which cluster housing could be built, at the same or greater density than the land in question would support as single family homes on individual lots. This zoning device typically permitted local zoning authorities wide discretion in reviewing and approving designs for the dwelling units as well as the common facilities.

The growing acceptance of PUD zoning techniques by local governments in turn created new interest in an old form of real estate ownership: the multi-unit residential "planned community" served by common area facilities owned and operated by a homeowners' association. Although such developments are remarkably similar to condominiums, they have operated for years under the common law without the regulatory burdens and consumer protection benefits applicable to condominiums.

The homeowner associations that administer such common law planned communities

often perform exactly the same functions as the condominium associations that administer statutory condominium regimes. They derive their powers from a declaration of covenants, conditions and restrictions (CC&R declaration) which is recorded at the beginning of the project and which relies for its enforceability on the state common law governing covenants which "run with the land." Not surprisingly, large portions of such CC&R declarations are indistinguishable from condominium declarations. The only basis on which CC&R regimes are exempted from state and local condominium regulation is that title to the common areas is held in the name of the homeowners' association instead of being divided among the unit owners as tenants in common.

These common-law homeowner association regimes take many forms. They include not only planned residential developments, which follow the classic models described in the Homes Association Handbook promulgated in 1962 by the Urban Land Institute and which inspired FHA From 1400, but also various forms of cooperative ownership based on corporate forms, some real estate, some trust, and many other combinations of real and personal property ownership. In addition, new communities now are being formed which contain multiple layers of community associations having, at different levels, condominium, PUD or master association governance in as many combinations as there are draftsmen and problems to be solved.

Each of these multi-owner forms involve all of the important issues of consumer protection and association management, and many of the complex title matters, such as termination and eminent domain, which had been addressed by the Conference in the condominium field through the Uniform Condominium Act. Ironically, however, while all of those questions are of equal importance in these forms of multiple ownership, and while various states have begun to address these problems for condominiums, almost no legislative attention has focused on planned communities, except to the extent that they are swept up in general home warranty statutes, or addressed on an *ad hoc* basis by local zoning officials.

The Conference was also mindful of the increasing and understandable inclination of developers, in the fact of changing condominium legislation, to choose these alternative forms of developing multi-owner projects. This avoidance process acknowledged the often superior multi-owner arrangements possible under a homeowner association structure that avoids fractionalizing ownership of the common elements. the process also represents, however, an economic decision by developers to avoid, when possible, additional costs imposed by condominium legislation in the form of disclosure, escrow requirements, or restricted practices. The Conference believed that the states should have available for their consideration a uniform act which reflected the same public policies as are contained the Uniform Condominium Act. In this way, a state could extend the same public polices reflected in UCA to this very common form of real estate development. This need for parallelism whenever appropriate was a major factor in the drafting of the Act as finally adopted.

The result of this process was a comprehensive Act which closely paralleled UCA, and thus would yield the same consumer protections, regulatory structure, and administrative benefits

to unit owners in most multi-owner developments, regardless of how title to the common elements had been treated.

The 1980 UCA Amendments

As a result of the legislative process in the various states considering UCA from 1977 to 1980, and after review of UCA by the Drafting Committee on UPCA, a substantial number of amendments to the 1977 UCA were proposed by the Conference.

Many of these amendments were adopted at the 1980 annual meeting of the Conference, and were included in the current version of UCA. Most of those amendments were of a minor, non-substantial nature; they were intended to resolve insignificant technical questions, or to clarify the meaning of provisions susceptible to misinterpretation. A few amendments were adopted which resulted in more significant changes, either on particular matters of substance, or in the use of terms throughout the Act which simplified the structure and readability of the Act.

A second category of changes resulted from a decision of the Conference at its 1978 annual meeting that the Condominium and Planned Community Acts should contain identical provisions wherever possible, in order to facilitate the future consolidation of the two Acts. This required a large number of textual changes with no substantive effect.

Real Estate Cooperatives

One year after adoption of UPCA and the UCA amendments, the Model Real Estate Cooperative Act (MRECA) was adopted at the 1981 Annual Meeting of the Conference. It closely tracked its two predecessor Acts, since consolidation of the three Acts was anticipated by the Conference. Accordingly, MRECA, like the other Acts, was designed principally to insure that, to the extent practicable and consistent with the differences inherent in the various forms of ownership, consumers, developers, and lenders would be able to identify a coherent and consistent pattern of rights and obligations applicable to all "common interest" developments, whether organized as condominiums, planned communities or cooperatives.

That Act contains comprehensive provisions designed to provide a unified and modern law applicable to the cooperative form of ownership of real estate. The Act has no applicability to the many cooperatives formed for such purposes as commodity marketing or consumer services. Moreover, while principally applicable to the ownership of residential real estate, a common form of ownership in many jurisdictions, the Act contemplates that, in appropriate cases, it may but need not be used for industrial or commercial real estate as well.

Real estate cooperatives are a very common form of apartment ownership in several jurisdictions; in other states, however, they are virtually unknown, save in areas where they have been created pursuant to a variety of low income housing programs sponsored by the United States Department of Housing and Urban Development. Although cooperatives are similar in a

number of ways to condominiums and other forms of multiply owned real estate regimes, they have operated for years under the corporate law without the benefit of specific statutory enablement, and in virtually all states, without the regulatory burdens and consumer protection benefits available to condominiums.

As with planned communities, the associations that administer such cooperatives often perform exactly the same functions as condominiums. They typically derive their powers from a declaration of covenants, conditions and restrictions or some familiar form of instruments, be it in an offering plan, bylaws of the corporation, or a proprietary lease between the corporation which holds title to the property, and the tenants of that corporation who in fact hold the beneficial interest in the corporation and the property which it owns. Commonly, but by no means uniformly, the instruments which create the cooperative form of ownership are not recorded, and the enforceability of the instrument depends principally on the law of landlord and tenant, state corporate trust law, or other law peculiar to the form under which the cooperative was organized. Not surprisingly, large portions of the instruments which create the cooperative are indistinguishable from similar provisions in condominium or planned community declarations, since the instruments are obliged to resolve many of the same issues which arise in those forms of ownership.

Each of these multi-owner forms involve all of the important issues of consumer protection and association management, and many of the complex title matters, such as termination and eminent domain, which had been addressed by the Conference in the condominium field through the Uniform Condominium Act and the planned community field by the Uniform Planned Community Act. Ironically, however, as in the case of planed communities, while all of those questions are of equal importance in these forms of multiple ownership, and while various states have begun to address these problems for condominiums, almost no legislative attention has been focused on cooperatives.

THE UNDERLYING CONCEPT OF UCIOA

Nearly without exception, UCIOA achieves the goal of uniformity among all three forms of ownership simply by consolidating the three prior Acts of the Conference and adding a very few generic definitions. The principal new definition is "common interest community."

Because of the use of consistent definitions and policies in the three Acts preceding UCIOA, consolidation of the three in the merged Act was a relatively simple task. The section numbering system of UCIOA is entirely parallel with the other 3 Acts, and the language of UCIOA tracks, as applicable, with the cognate sections of those 3 Acts. Differences in result between the 3 Acts are preserved where appropriate. At the same time, during the drafting of UCIOA, in a few instances, it became clear that some differences in result were of form rather than legitimate substance. In those cases, the substantive result of one or more of the 3 Acts was changed to reflect a policy generally applicable in all forms.

The result is that a state wishing to consider legislation in the commn interest ownership field has a range of choices from which to select. Many states will wish to adopt comprehensive legislation, providing maximum flexibility and certainty to all developers, lenders, and title insurers, while at the same time providing all unit purchasers and their associations a uniform level of disclosure, warranty protection, and other rights. In those states, the consolidated Act is a workable and desirable long-term solution. Other states may wish simply to adopt a modern condominium statute to replace an existing but plainly outdated, statutory structure. In those states, UCA alone is the obvious choice. Finally, in states where existing "second" or "third" generation condominium statutes are seen as satisfactory, but a need for additional certainty and structure is desirable for planned communities or cooperatives, the 2 Acts governing those forms of ownership are available. Following adoption of one of the 3 constituent Acts, it would be very feasible, by a few carefully considered amendments, to adopt UCIOA and thereby extend coverage to include all forms of ownership in the field.

the early stages of project development, to pay all of the expenses of the common interest community himself rather than assessing each unit individually. Such a situation might arise, for example, where a declarant owns most of the units in the project and wishes to avoid building the costs of each unit separately and crediting payment to each unit. It might also arise in the case of a declarant who, although willing to assume all expenses of the common interest community, is unwilling to make payments for replacement reserves or for other expenses which he expects will ultimately be part of the association's budget. Subsection (a) grants the declarant such flexibility while at the same time providing that once an assessment is made against any unit, all units, including those owned by the declarant, must be assessed for their full portion of the common expense liability.

2. Under subsection (c), the declaration may provide for assessment on a basis other than the allocation made in Section 2-107 as to limited common elements, other expenses benefiting less than all units, insurance costs, and utility costs.

3. If additional units are added to a common interest community after a judgment has been entered against the association, the new units are not assessed any part of the judgment debt. Since unit owners will know the assessment, and since such unpaid judgment assessments would affect the price paid by purchasers of units, it would be complicated and unnecessary to fairness to reallocate judgment assessments when new units are added.

4. Subsection (f) refers to those instances in which various provisions of this Act require that common expense liabilities be reallocated among the units of a common interest community by amendment to the declaration. These provisions include Section 1-107 (Eminent Domain), Section 2-106(d) (expiration of certain leases), Section 2-110 (Exercise of Development Rights) and Section 2-113(b) (subdivision of units).

§ 3-116. Lien for Assessments

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[(4) In the case of foreclosure under [insert reference to state power of sale

statute], the association shall give reasonable notice of its action to all lien holders of the unit whose interest would be affected.]

[(k) In a cooperative, if the unit owner's interest in a unit is real estate (Section 1-105):

(1) The association, upon non-payment of assessments and compliance with this subsection, may sell that unit at a public sale or by private negotiation, and at any time and place. Every aspect of the sale, including the method, advertising, time, place, and terms must be reasonable. The association shall give to the unit owner and any lessees of the unit owner reasonable written notice of the time and place of any public sale or, if a private sale is intended, or the intention of entering into a contract to sell and of the time after which a private disposition may be made. The same notice must also be sent to any other person who has a recorded interest in the unit which would be cut off by the sale, but only if the recorded interest was on record 7 weeks before the date specified in the notice as the date of any public sale or 7 weeks before the date specified in the notice as the date after which a private sale may be made. The notices required by this subsection may be sent to any address reasonable in the circumstances. Sale may not be held until 5 weeks after the sending of the notice. The association may buy at any public sale and, if the sale is conducted by a fiduciary or other person not related to the association, at a private sale.

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

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

(i) the reasonable expenses of sale;

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

(iii) satisfaction of the association's lien;

(iv) satisfaction in the order of priority of any subordinate claim of record; and

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

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

(5) At any time before the association has disposed of a unit in a cooperative or entered into a contract for its disposition under the power of sale, the unit owners or the holder of any subordinate security interest may cure the unit owner's default and prevent sale or other

disposition by tendering the performance due under the security agreement, including any amounts due because of exercise of a right to accelerate, plus the reasonable expenses of proceeding to foreclosure incurred to the time of tender, including reasonable attorney's fees of the creditor.]

COMMENT

1. To ensure prompt and efficient enforcement of the association's lien for unpaid assessments, such liens should enjoy statutory priority over most other liens. Accordingly, subsection (b) provides that the association's lien takes priority over all other liens and encumbrances except those recorded prior to the recordation of the declaration, those imposed for real estate taxes or other governmental assessments or charges against the unit, and first security interests recorded before the date the assessment became delinquent. However, as to prior first security interests the association's lien does have priority for 6 months' assessments based on the periodic budget. A significant departure from existing practice, the 6 months' priority for the assessment lien strikes an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of lenders. As a practical matter, secured lenders will most likely pay the 6 months' assessments demanded by the association rather than having the association foreclose on the unit. If the lender wishes, an escrow for assessments can be required. Since this provision may conflict with the provisions of some state statutes which forbid some lending institutions from making loans not secured by first priority liens, the law of each state should be reviewed and amended when necessary.

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

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

2. Units may be part of two common interest communities. For example, a large real estate development may consist of one or more condominiums which are also part of a larger planned community. In that case, the planned community association might assess the condominium units for the general maintenance expenses of the planned community and the condominium association would assess for the direct maintenance expenses of the building itself. In such a situation, subsection (c) provides that unpaid liens of the two associations have equal

priority regardless of the relative time of creation of the two regimes and regardless of the time the assessments were made or became delinquent.

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

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

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

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

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

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

property. Article 9 foreclosure is currently used in foreclosing security interests in mobile homes, and has been accepted in the various states as a permissible method of foreclosure in that housing area without serious challenge.

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

§ 3-117. Other Liens

(a) In a condominium or planned community:

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

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

(3) Whether perfected before or after the creation of the common interest community, if a lien, other than a deed of trust or mortgage (including a judgment lien or lien attributable to work performed or materials supplied before creation of the common interest community), becomes effective against two or more units, the unit owner of an affected unit may

EXHIBIT 5

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December 7, 2012

Senator Scott Hammond
8408 Gracious Pine Avenue
Las Vegas, NV 89143-4608

Dear Senator Hammond:

You have asked this office certain questions relating to the foreclosure of liens under chapter 116 of NRS, the chapter which governs common-interest communities in this State. We will answer each of your questions separately below.

DISCUSSION

1. What ownership interest is obtained by the purchaser of real property that is foreclosed pursuant to NRS 116.31162 to 116.31168, inclusive, considering the language set forth in NRS 116.31164?

The provisions of NRS 116.31162 to 116.31168, inclusive, govern the foreclosure of a lien held by the association of a common-interest community. NRS 116.31164 sets forth the procedure for conducting the sale of real property by an association pursuant to the foreclosure of a lien on that property. With respect to the distribution and use of the proceeds of such a sale and the delivery of the property after the sale, subsection 3 of NRS 116.31164 provides:

> 3. 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; and
>
> (c) 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.

(Emphasis added). Additionally, subsection 3 of NRS 116.31166 provides that "[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."

In considering a provision of NRS, we are guided by several rules of statutory construction employed by the Nevada Supreme Court. As a general rule of statutory construction, a court presumes that the plain meaning of statutory language reflects a full and complete statement of the Legislature's intent. Villanueva v. State, 117 Nev. 664, 669 (2001). Therefore, when the plain meaning of statutory language is clear and unambiguous on its face, a court generally will apply the plain meaning of the statutory language and will not search for any meaning beyond the language of the statute itself. Erwin v. State, 111 Nev. 1535, 1538-39 (1995); McKay v. Bd. of Supervisors, 102 Nev. 644, 648 (1986) (words in a statute "should be given their plain meaning unless this violates the spirit of the act").

Applying this rule of statutory construction stated above, the plain language of subsection 3 of NRS 116.31164 provides that when property is sold pursuant to an association's foreclosure of a lien, the purchaser obtains a deed without warranty which conveys to the purchaser, as the grantee of the warranty made, executed and delivered by the person conducting the sale, all title held by the previous owner.[1] In addition, subsection 3 of NRS 116.31166 provides that the interest vested in the purchaser is that of the previous owner's title without equity or right of redemption. Thus, these two provisions of NRS clearly and unambiguously establish that when real property is sold pursuant to the foreclosure of a lien on the property held by an association, the purchaser acquires the entirety of the title held by the previous owner of the property, and such title is not subject to any claim of equity or right of redemption by the previous owner.

2. Does the ownership interest obtained by the purchaser of real property that is foreclosed pursuant to NRS 116.31162 to 116.31168, inclusive, survive a subsequent foreclosure on a security interest, other than an association lien, on the same property?

The order of distribution of proceeds of a sale of real property made pursuant to an association's foreclosure of a lien on the property is set forth in subsection 3 of NRS 116.31164. The order of priority for satisfying a security interest other than an association lien on such property is also set forth in subsection 3 of NRS 116.31164. Subsection 3 of NRS 116.31164 provides that proceeds from the sale of a property must be applied to "[s]atisfaction in the order

[1] A deed without warranty, unlike a warranty deed which contains a covenant of title, may carry with it the risk of a defect in the title. 13. M.L.P. 2d Deeds § 3 (2012) (citing Corbin on Contracts § 587).

of priority of any subordinate claim of record" but only after those proceeds are first applied to: (1) the reasonable expenses of the sale; (2) the reasonable expenses of securing, maintaining and preparing the property for sale; and (3) the satisfaction of the association's lien.

Significantly, subsection 1 and 2 of NRS 116.31166 also provide that:

> 1. The recitals in a deed made pursuant to NRS 116.31164 of:
> (a) Default, the mailing of the notice of delinquent assessment, and the recording of the notice of default and election to sell;
> (b) The elapsing of the 90 days; and
> (c) The giving of notice of sale,
>
> are conclusive proof of the matters recited.
>
> 2. Such a deed containing those recitals 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.

(Emphasis added).

Based on the plain language of subsection 2 of NRS 116.31166, the receipt for the purchase money contained in a deed without warranty delivered to a purchaser pursuant to NRS 116.31164 that includes the recitals described in subsection 1 of NRS 116.31166 serves to discharge the purchaser from any obligation to ensure the proper application of the purchase money paid by the purchaser.

In the event there are insufficient proceeds to satisfy a security interest, the holder of that security interest may be able to seek recourse by pursuing a deficiency judgment against the person who was the owner of the property at the time of sale under chapter 40 of NRS.[2] However, assuming the purchaser of the property obtains a deed containing the proper recitals described in subsection 1 of NRS 116.31166 and the receipt for purchase money described in subsection 2 of NRS 116.31166, there are no other applicable statutory provisions that would otherwise authorize the holder of a security interest to whom the previous owner of the property was obligated to seek a judgment against the purchaser of the property for any deficiency resulting from the distribution of proceeds. Accordingly, the ownership interest of a purchaser who obtains title through a deed properly containing the information described above is not subject to any claim made by the holder of a security interest who forecloses on an obligation after the purchase is made pursuant to NRS 116.31164.

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[2] NRS 40.451 to 40.463, inclusive, establish procedures for the award of a deficiency judgment, and NRS 40.4631 to 40.4639, inclusive, set forth provisions relating to actions by holders of junior real mortgages after a foreclosure sale. It should be noted, however, that pursuant to Assembly Bill No. 471 of the 2009 Legislative Session (Ch. 310, Statutes of Nevada 2009, at p. 1328-31), a deficiency judgment on an obligation secured by a mortgage, deed of trust or other encumbrance on or after October 1, 2009, may not be awarded against a homeowner if certain criteria are met.

3. Can any part of an ownership interest vested in the purchaser of real property that is foreclosed pursuant to NRS 116.31162 to 116.31168, inclusive, be extinguished by a subsequent foreclosure on a security interest, other than an association lien, on the same property?

As explained above, any recourse sought by the holder of a security interest to whom the previous owner of the property was obligated is properly made against that previous owner and not the purchaser of the property. Therefore, no part of an ownership interest vested in the purchaser may be extinguished by a foreclosure on a security interest to which the previous owner was obligated that occurs after the purchaser obtains title to the property under NRS 116.31164.

SUMMARY

Based on the reasoning set forth above, it is the opinion of this office that: (1) the purchaser of real property sold pursuant to the foreclosure of an association lien under the provisions of NRS 116.31162 to 116.31168, inclusive, obtains all title belonging to the previous owner; and (2) if certain recitals and the receipt for purchase money are properly contained in the deed conveying such title to the purchaser, the purchaser is discharged from any obligation relating to the application of proceeds from the sale of the property to satisfy the claims described in NRS 116.31164, including any claim that may be made by the holder of an interest secured by the same property but to whom the previous owner, and not the purchaser, was obligated.

If you have any further questions regarding this matter, please do not hesitate to contact this office.

Very truly yours,

Brenda J. Erdoes
Legislative Counsel

By _____
J. Daniel Yu
Principal Deputy Legislative Counsel

Bradley A. Wilkinson
Chief Deputy Legislative Counsel

DY:dtm
Encl.
Ref No. 121205882833
File No. OP_Hammond121205154959

EXHIBIT 6

ORD
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DISTRICT COURT

CLARK COUNTY, NEVADA

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

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

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

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

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

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

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

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

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

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

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///

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IT IS SO ORDERED.

DISTRICT COURT JUDGE

June 2, 2011
Date

OK

Submitted by:

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EXHIBIT 7

Honorable Linda B. Riegle
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

In re: SERGIO GONZALEZ LAURA GONZALEZ, Debtor.	Case No. BK-S-11-12044 LBR Chapter 7 **ORDER GRANTING** *MOTION TO SELL ASSETS OF THE ESTATE FREE AND CLEAR OF LIENS AND ENCUMBRANCES AND TO SURCHARGE PROCEEDS OF SALE - REAL PROPERTY* *[5705 VICTORIA REGINA, LAS VEGAS, NV 89139]* Hearing Held: November 19, 2012 at 9:30 a.m.

ORDER GRANTING

MOTION TO SELL ASSETS OF THE ESTATE FREE AND CLEAR OF LIENS AND ENCUMBRANCES AND TO SURCHARGE PROCEEDS OF SALE - REAL PROPERTY
[5705 VICTORIA REGINA, LAS VEGAS, NV 89139]

On the date and at the time set forth above, a hearing was held before the Honorable Linda B. Riegle, Bankruptcy Court Judge, District of Nevada, in the above-captioned chapter 7 case of Sergio and Laura Gonzalez ("Debtor") upon the "*Motion to Sell Assets of the Estate Free and Clear of Liens and Encumbrances and to Surcharge Proceeds of Sale - Real Property, located at 5705 Victoria Regina, Las Vegas, NV 89139*" ("Motion") filed by David Rosenberg ("Trustee"). Appearing on behalf of himself was the Trustee, also appearing in opposition was Sherry A. Moore, Esq. on behalf of Bank of America, N.A., all other appearances are as set forth in the recorded transcript of the hearing on the Motion and having given due consideration to the Motion, the declarations, and other evidence submitted in support of the Motion, and for other

good cause shown, the Court hereby finds, as a matter of fact, and concludes, as a matter of law, that:

1. This Court has jurisdiction pursuant to 28 U.S.C. §§ 157 and 1334 to approve the sale of the property located at **5705 VICTORIA REGINA, LAS VEGAS, NV 89139** ("Property") which is the subject of the Motion free and clear of those liens, encumbrances, claims and interests identified in this order ("Order"), and to authorize the Trustee on behalf of the estate in the above-captioned case ("Estate") to enter into and perform in accordance with the Residential Purchase Agreement and HUD-1 (together, the "Agreement") dated December 24, 2011, including the modifications thereto, if any, set forth in the record of the hearing on the Motion. The Motion is a core proceeding pursuant to 28 U.S.C. §§ 157(b)(2)(A), (N), and (O). The statutory predicates for the relief requested in the Motion are 11 U.S.C. §§ 105 and 363, and Federal Rules of Bankruptcy Procedure ("Bankruptcy Rules") 2002, 6004 and 9014.

2. All objections, if any, to the Motion and to the approval of the Agreement, including the transactions contemplated thereby, have been withdrawn, resolved or overruled.

3. The Property is situated in the County of Clark, State of Nevada,

LOT FORTY-SIX (46) IN BLOCK FOUR (4) OF CACTUS HILLS ESTATES II, AS SHOWN BY MAP THEREOF ON FILE IN BOOK 135 OF PLATS, PAGE 58, AND AS AMENDED BY CERTIFICATE OF AMENDMENT RECORDED MAY 21,2007 IN BOOK 20070521 AS DOCUMENT NO. 0001486 IN THE OFFICE OF THE COUNTY RECORDER OF CLARK COUNTY, NEVADA

4. Record title to the Property is vested in the Debtor (the "Record Owner").

5. As set forth in the declarations of service filed with this Court in connection with the Motion, notice of the hearing on the approval of the Motion (the "Notice") was duly served on (a) the Debtor and Debtor's counsel, (b) all creditors and interested parties, (c) each entity known to the Trustee to assert a lien, encumbrance or other interest in, or claim to, the Property to be affected by this Order, and (d) the Office of the United States Trustee, all in accordance with Bankruptcy Rules 2002(a)(2), 2002(c)(I), 2002(i), 2002(k), 6004(a) and 6004(c). Each entity known to the Trustee to assert a lien, encumbrance, claim or other interest in or to the Property to be affected by this Order was also served with a complete copy of the Motion, and all supporting declarations and pleadings filed by the Trustee in connection with the Motion.

6. The Notice complied in all respects with the requirements of the Bankruptcy Code and the Bankruptcy Rules; fully and adequately described the relief requested in the Motion and

set forth the means by which the Motion, and all supporting declarations and pleadings filed by the Trustee in connection with the Motion, could be obtained promptly by a party in interest; provided fair and reasonable notice under the circumstances of this case with respect to the deadlines and procedures for objecting to the relief requested in the Motion; and set forth the time, date and place for the hearing on the Motion. The Court believes that such notice was sufficient to allow any interested parties the opportunity weigh in on the Motion and participate in the sale hearing. As such, the Court finds adequate notice of the sale has, under the particular circumstances of the case, been given.

7. The Property is allegedly subject to the liens, encumbrances and other interests of record as set forth in a preliminary report/title commitment (the "Title Report"), attached hereto as Exhibit "A", including, without limitation, the following:

A claim of lien for $1,428.74 by Alessi & Koenig, LLC as Agent for Cactus Hills Homeowners Association, recorded on August 11, 2011, as Document No. 201108110003286 of Official Records.

A deed of trust for $452,892.00 in favor of Bank of America, N.A., dated September 27, 2007, and recorded on October 4, 2007 in Book 20071004, Document No. 0002572, of Official Records.

A judgment in the amount of $360.00 per month, PLUS INTERESTS AND COSTS, and any other amounts due, in favor of Pablo Alejandro Gonzalez Parada and Caesar Gonzalez-Parada by Nevada State Welfare Division, Case No. D-180215, recorded May 9, 1996, in Book 960509, as Document No. 01221 of Official Records.

A claim of and notice of judgment lien for $16,737.37, by Aargon Collection Agency, recorded July 3, 2008, in Book 20080703, as Document No. 0003389, of Official Records.

A judgment in the amount of $1,101.25, PLUS INTEREST AND CORSTS, and any other amounts due, in favor of Capital One Bank (U.S.A.), N.A., Case No. 08C-055793, recorded June 16, 2009, in Book 20090616, as Document No. 0002412, of Official Records.

A judgment in the amount of $325.00 per month, and $20,224.00 for child support arrearages PLUS INTERESTS AND COSTS, in favor of Ana Patino, Case No. R137248, recorded August 21, 2009, as Document No. 20090821000734, of Official Records.

8. Based on the moving papers, the Trustee has satisfied the requirements for a sale free and clear of all liens and interests (including, but not limited to, those liens listed above in ¶7) pursuant to § 363(f)(2) and § 363(f)(5).

9. Pursuant to NRS 116.3116(2), an HOA lien based on HOA 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 ("super-priority lien") is superior to the first security interest on the Property.

10. Because of its super-priority lien, Cactus Hills Homeowners Association (the "HOA") has the right to foreclose by consenting to sell the Property through the bankruptcy Trustee's sale.

11. The HOA consented to the bankruptcy Trustee's sale of the Property.

12. Pursuant to NRS 116.3116(2), any security interest in the Property held by Bank of America, N.A. is junior to the HOA's super-priority lien.

13. Bank of America, N.A. had not paid off the HOA's super-priority lien as of the date of the hearing on the Motion.

14. Because it is a junior lienholder that did not cure a superior lien, Bank of America, N.A. can be compelled under Nevada law to accept a money judgment and need not consent to the bankruptcy Trustee's sale of the Property.

15. The Trustee has engaged in fair and reasonable marketing, advertising and other sale efforts and procedures in connection with the sale of the Property, which efforts and procedures have enabled the Estate to obtain a fair and reasonable price for the Property under the circumstances of this case. In connection with the proposed sale, the Trustee has complied with all sale procedures established or required by this Court.

16. The highest and best offer to purchase the Property was the one received from Terry Pushnick ("Buyer") to buy the Property for a purchase price of $225,000.00 ("Purchase Price") on the terms and conditions set forth in the Agreement.

17. The Buyer is unrelated to the Debtor and the Trustee. The Agreement was negotiated, proposed, and entered into by the parties without collusion, in good faith, and from arm's-length bargaining positions. Neither the Trustee nor the Buyer have engaged in any conduct that would cause or permit the Agreement, or the transactions contemplated thereby, to be invalidated or avoided under 11 U.S.C. § 363(n). Accordingly, upon consummation of the

sale transaction contemplated by the Agreement, the Buyer will be a buyer in "good faith" within the meaning of 11 U.S.C. § 363(m), and, as such, is entitled to the protections afforded thereby.

18. The terms and conditions of the sale transaction as provided for in the Agreement are fair and reasonable; entry into the Agreement on behalf of the Estate is a sound exercise of the Trustee's reasonable business judgment; and, the sale transaction contemplated by the Agreement is in the best interests of creditors, interest holders and the Estate.

19. The Trustee originally asked the Court to waive the fourteen-day stay period provided by Rule 6004(h). The Court does not agree that the sale transaction should be closed prior to expiration of the fourteen-day stay period. Accordingly, the Court makes a finding that it denies the waiver of Rule 6004(h).

20. Based on the record in this case, the findings of fact and conclusions of law set forth above and stated on the record pursuant to Bankruptcy Rules 9014 and 7052, and good cause appearing therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

A. The Motion is granted as set forth herein.

IT IS FURTHER ORDERED THAT:

B. Pursuant to NRS 116.3116(2)(c), an HOA lien based on HOA assessment which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien is superior to the first security interest on the Property and therefore, the HOA has right to foreclose upon its lien by consenting to the bankruptcy Trustee's sale of the Property;

C. The terms, conditions, and transactions contemplated by the Agreement are hereby approved in all respects, and the Trustee is hereby authorized under 11 U.S.C §§ 105(a); 363(b) or (c); and 363 (f) and (m) to sell the Property free and clear of those liens, claims, encumbrances and interests set forth below to the Buyer on the terms and conditions provided in the Agreement and Motion. The Court approves—in its entirety—the Trustee's Motion to Sell Assets of the Estate Free and Clear of Liens and Encumbrances, as well as Trustee's Substitution of Buyer provision, which allows the Trustee to assign the Buyer's purchase rights under the RPA to a substitute buyer ("Substitute Buyer"). The Substitute Buyer may then exercise those

purchase rights and, like a back-up bidder, close escrow on the Property without the need for the Trustee to seek Court approval for what is substantially the same sale;

D. The Trustee is hereby authorized, empowered, and directed to (1) perform under, consummate, and implement the Agreement, (2) execute all additional instruments and documents that may be reasonably necessary or desirable to implement the Agreement and the transactions contemplated thereby, (3) take all further actions as may be necessary or appropriate for the purposes of assigning, transferring, granting, conveying, encumbering or transferring the Debtor's property as contemplated by the Agreement, and (4) take such other and further steps as are contemplated by the Agreement or reasonably required to fulfill the Trustee's obligations under the Agreement, all without further order of the Court. The Trustee is hereby authorized to execute all documents in connection with the sale transaction approved hereby;

E. The sale of the Property shall be free and clear of all ownership interests and all predecessors and successors in interest; any unrecorded equitable or legal interests in the Property asserted by any person or entity, or their respective predecessors and successors in interest, unless such interests would be superior to the rights of the Trustee under 11 U.S.C. § 544(a)(3); the claims or interests asserted by any person or entity, or their respective predecessors and successors in interest, against the Estate which do not constitute liens against or interests in the Property; and the claims or interests asserted by any person or entity, or their respective predecessors and successors in interest, evidenced by the liens, encumbrances and interests of record as set forth in Exhibit "A" (including, without limitation, those listed in ¶7);

F. Except as authorized for payment hereby, each lien, encumbrance or interest identified above shall attach, as adequate protection to the holder thereof pursuant to 11 U.S.C. § 363(e), to the net proceeds of sale (the "Proceeds"), after (i) payment of all costs of sale, and (ii) satisfaction of those liens and encumbrances authorized for payment hereby, with the same extent, validity and priority, if any, as such lien, encumbrance, or interest now has with respect to the Property, subject to any and all defenses, offsets, counterclaims and/or other rights of any party relating thereto;

G. The Trustee is hereby authorized to pay directly from the escrow all amounts due which are provided for in the Agreement;

H. The Trustee is hereby authorized to pay all other reasonable and customary escrow fees, recording fees, title insurance premiums, and closing costs necessary and proper to conclude the sale of the Property;

I. At the close of escrow of the sale approved by this Order, the Trustee is authorized to pay from the sale proceeds a broker's commission in an amount equal to 6% of the purchase price;

J. The Court authorizes the escrow agent, at the closing, to disburse all remaining Proceeds to the Trustee. The Court has required Bank of America to demonstrate why it is entitled to any of the Proceeds, and the Trustee may not pay Bank of America until the Court issues an order directing the Trustee to distribute the Proceeds (the "Order on Proceeds");

K. This Court shall and hereby does retain jurisdiction to (1) enforce and implement the terms and provisions of the Agreement, all amendments thereto, any waivers and consents thereunder, and any other supplemental documents or agreements executed in connection therewith; (2) compel delivery and payment of the consideration provided for under the Agreement; (3) resolve any disputes, controversies or claims arising out of or relating to the Agreement; and (4) interpret, implement, and enforce the provisions of this Order;

L. The Court has not agreed to waive the provisions of Rule 6004(h) of the Federal Rules of Bankruptcy Procedure, meaning this Order will not be effective immediately upon entry;

M. The Court finds that adequate notice of the sale has, under the particular circumstances of the case, been given. The Court believes that such notice was sufficient to allow any interested parties the opportunity weigh in on the Motion and participate in the sale hearing;

N. Over the ninety (90) days following entry of this Order, either: a) a secured party in interest may demonstrate to the Trustee that said lienholder has a valid claim to the Proceeds; or b) the Trustee may file an adversary complaint to determine the priority, extent, validity, and existence of liens against the Proceeds;

O. The Court approves the Trustee's Motion to Surcharge Proceeds of Sale Subject to Liens and authorizes the Trustee, pursuant to 11 U.S.C. § 506(c), to surcharge the Proceeds to pay any necessary and reasonable expenses incurred by the bankruptcy estate for the sale of the Property and Distribution of Proceeds (including all actions to investigate and/or determine

validity of liens on the Property), including but not limited to Chapter 7 trustee fees and expenses, attorney's fees and expenses, real estate agent fees and expenses, and accountant fees and expenses. The costs and expenses that have been incurred and will be incurred by the bankruptcy estate to sell the Property will directly benefit any and all parties holding any liens on this Property and are reasonable and necessary cost pursuant to 11 U.S.C. § 506(c);

P. The Trustee's commission shall equal the reasonable costs which Bank of America would otherwise have to incur to foreclose on the Property, not to exceed the maximum allowable Trustee's commission under 11 U.S.C. § 326(a)(computed on all monies distributed by the Trustee, including payments to holders of secured claims). Bank of America will be responsible for presenting the Court with evidence demonstrating what its reasonable costs to foreclose would have been, after which the Trustee will have an opportunity to respond. Ultimately, the Court will make a final determination as to the amount of the Trustee's compensation, which will be reflected in the Order on Proceeds.

Q. Pursuant to 11 U.S.C. § 363(m), absent a stay of this Order pending appeal, the reversal or modification on appeal of this Order, or any provision thereof, shall not affect the validity of the sale transaction approved hereby which is consummated prior to such stay, reversal or modification on appeal; and

R. The validity of the sale approved hereby shall not be affected by the appointment of a trustee or successor trustee, the dismissal of the above-captioned case, or its conversion to another chapter under title 11 of the United States Code.

IT IS SO ORDERED.

Date: December 11, 2012

Respectfully Submitted by:
/s/ David A. Rosenberg
DAVID A. ROSENBERG
U.S. BANKRUPTCY TRUSTEE

ALTERNATIVE METHOD RE: RULE 9021

____ The Court has waived the requirement of approval under LR 9021(b)(1).

____ No Parties appeared or filed written objections.

_X_ I have delivered a copy of this proposed order to all counsel who appeared at the hearing, any unrepresented parties who appeared at the hearing, and any trustee

appointed in this case, and each has approved or disapproved this order, or failed to respond, as indicated below:

APPROVE / DISAPPROVE / (NO RESPONSE)

SHERRY A. MOORE, ESQ.
Attorney for: Bank of America, N.A.

___ I certify that this is a case under Chapter 7 or 13, that I have served a copy of this order with the motion pursuant LR 9014(g), and that no party has objected to the form or content of the order.

EXHIBIT 8

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CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * *

MARTIN CENTENO Plaintiff, vs. MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.; RECONTRUST COMPANY, N.A.; BANK OF AMERICA, N.A., et al., Defendant(s).	Case No. A660999 Dept. No. XXIX **DECISION AND ORDER**

This matter came before the Court on July 11, 2012, on Plaintiff's Motion for Preliminary Injunction and Defendant's Motion to Expunge Lis Pendens and on August 22, 2012 for the continued hearing on those Motions and Defendant's Motion to Dismiss Complaint; Martin Centeno, ("Centeno"), appeared in Proper Person; Kevin, Hahn, Esq., of the law firm of Malcolm Cisneros appeared on behalf of Defendants; , and the Court having heard oral argument, having reviewed the Motion for Preliminary Injunction, Motion to Expunge Lis Pendens and the Motion to Dismiss Complaint; Opposition

SUSAN SCANN
DISTRICT JUDGE
DEPT XXIX
LAS VEGAS, NV 89155

thereto and Reply, being fully advised in the premises and good cause appearing therefore,

THE COURT FINDS the following:

These motions turn on the interpretation of NRS 116.3116. The relevant portion of the statute reads:

> NRS 116.3116 Liens against units for assessments. [Effective through December 31, 2011.]
>
> 1. The association has a lien on a unit for … any assessment levied against that unit … from the time the …assessment becomes due…
>
> 2. A lien under this section is prior to all other liens and encumbrances on a unit except: …
>
> (b) A first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent or, in a cooperative, the first security interest encumbering only the unit's owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent; and
>
> (c) Liens for real estate taxes and other governmental assessments or charges against the unit or cooperative.
>
> **The lien is also prior to all security interests described in paragraph (b) to the extent of any charges incurred by the association on a unit pursuant to NRS 116.310312 and to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien,** …

The Homeowner's Association ("HOA") foreclosed on its entire lien. The Plumeria Trust purchased the property at that sale. Centeno subsequently obtained a 15% ownership interest in the property from Plumeria. Centeno argues that because the super priority portion of the lien was foreclosed, the entire first deed of trust was extinguished by the sale under the common law rule that the foreclosure of a senior lien eliminates all junior liens from the property. The state of Washington's Condominium Act, chapter 64.34 RCW, contains a very similar statute. Washington case law holds that a foreclosure by the Association extinguishes the first trust deed because of the super

priority. *Summerhill Vill. Homeowners Ass'n v. Roughley*, No. 66455-7-1, __ P.2d __ (Wash. Ct. App. February 21, 2012) (hereinafter *"Summerhill"*).

Defendants argue that NRS 116.3116 should be read to interpret the word "lien" at the end of the quoted section above to refer only to a foreclosure of the first trust deed. With that interpretation, the first trust deed holder ("the Bank") would be required to pay the nine months of dues after it completes its sale.

To reach this conclusion, the bank urges the Court to use the following rules in interpreting NRS 116.3116:

> … if a statute "is ambiguous, the plain meaning rule of statutory construction" is inapplicable, and the drafter's intent "becomes the controlling factor in statutory construction." An ambiguous statutory provision should also be interpreted in accordance "with what reason and public policy would indicate the legislature intended." Additionally, we "construe statutes to give meaning to all of their parts and language, and this court will read each sentence, phrase, and word to render it meaningful within the context of the purpose of the legislation." Further, no part of a statute should be rendered meaningless and its language "should not be read to produce absurd or unreasonable results." *Harris Assoc. v. CCSD*, 119 Nev. 638, 642, 81 P.3d 532 (2003).

At first blush, there does appear to be an ambiguity in the statute concerning the identity of the "lien" referenced at the end of (c) quoted above. An inquiry into the legislative history provided no guidance as to this claimed ambiguity. *See, e.g.*, Exh. D, *Minutes of the Assemb. Comm. on Judiciary: AB 221,* 66th Leg. Sess. (Nev. March 20, 1991). However, logically, the lien referred to at the end of the quote is the same one referenced at the beginning: the lien of the HOA. The Washington statute clarifies this by explicitly naming each type of foreclosure proceeding, which includes the HOA lien.

Summerhill, at p. 4. The Bank further argues that unless its interpretation is followed a part of the statute will be negated, namely NRS 116.3116(2)(b). The statute itself answers this challenge in (c): "**The lien is also prior to all security interests described in paragraph (b)…**"

As further support, the comments to the applicable section of the Uniform Common Interest Ownership Act–the very same act Nevada relied on in forming NRS 116 *et seq.*–specifically warns that failing to consider the existence of an HOA's super priority lien may lead to serious consequences:

> As a practical matter, secured lenders will most likely pay the 6 months' assessments demanded by the association rather than having the association foreclose on the unit.

UNIF. COMMON INTEREST OWNERSHIP ACT § 3-116 cmt. (1982) (emphasis added).

Defendants concede in argument that the HOA could separately foreclose on the super priority portion after the Bank becomes the owner and take title free of the first Trust Deed if the super priority is not paid. This concession acknowledges the super priority's superior position over the first trust deed.

The plain language of the statute supports Centeno's argument that he owns 15% of the property free and clear of the Bank's lien. Accordingly, Plaintiff's Complaint states a claim for relief and the Defendants' Motions to Dismiss under NRCP 12(b)(b) is **Denied**. The Motion to Expunge Plaintiff's Lis Pendens is also **Denied.** This is not a final determination of the issues because the Bank's defenses have neither been raised nor considered.

SUSAN SCANN
DISTRICT JUDGE
DEPT XXIX
LAS VEGAS, NV 89155

Centeno has failed to include an indispensible party, the Plumeria Trust, which owns 85% of the property. The Court has raised this deficiency with Centeno at more than one previous hearing in this case. NRCP 19 governs this issue.

> RULE 19. JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION
>
> (a) Persons to Be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff.

Unless this party is joined, the Court finds that Centeno is not likely to succeed on the merits to quiet title to the entire property and that the hardship to the Bank outweighs that of Centeno. Unless the Plumeria Trust becomes a party in the action no later September 27, 2012, the Court will enter an order denying Centeno's Motion for Preliminary Injunction and Expunging his Lis Pendens.

Dated this 12th day of September, 2012.

SUSAN SCANN,
DISTRICT JUDGE

Certificate of Service

I hereby certify that on or about the date signed, this document was copied through e-mail, or a copy of this Order was placed in the attorney's folder in the Clerk's Office or mailed to the proper party as follows:

Malcolm Cisneros – Kevin Hahn, ESQ.

Martin Centeno
P. O. Box 70033
Las Vegas, NV 89170

Prestine Alexander
Judicial Executive Assistant

EXHIBIT 9

United States District Court
District of Nevada (Las Vegas)
CIVIL DOCKET FOR CASE #: 2:12-cv-00949-KJD-NJK

Diakonos Holdings LLC v. MTC Financial Inc. et al
Assigned to: Judge Kent J. Dawson
Referred to: Magistrate Judge Nancy J. Koppe
Demand: $75,000
Case in other court: Ninth Circuit, 13-15470
8th Judicial District, Clark County, NV, A-12-661854-C
Cause: 28:1332 Diversity-Petition for Removal

Date Filed: 06/05/2012
Date Terminated: 02/11/2013
Jury Demand: None
Nature of Suit: 220 Real Property: Foreclosure
Jurisdiction: Diversity

Plaintiff

Diakonos Holdings LLC
Trustee
on behalf of
Coventry Green Trust

represented by **Ryan D Hastings**
Leach Johnson Song & Gruchow
8945 W. Russell Road
Las Vegas, NV 89148
702-538-9074
Fax: 702-538-9113
Email: rhastings@leachjohnson.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Sean L. Anderson
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Defendant

Countrywide Home Loans, Inc.

represented by **Kevin Hahn**
Malcolm & Cisneros
2112 Business Center Drive, 2nd Floor
Irvine, CA 92612
949-252-9400
Fax: 949-252-1032
Email: kevin@mclaw.org
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

MTC Financial Inc.
doing business as
Trustee Corps

represented by **Michael E Sullivan**
Robison Belaustegui Sharp & Low
71 Washington Street
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Email: msullivan@rbsllaw.com
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ATTORNEY TO BE NOTICED

Richard J. Reynolds
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949 863-3363
Fax: 949 863-3350
Email: rreynolds@bwslaw.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Bank of America Inc.

represented by **Kevin Hahn**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Mortgage Electronic Registration Systems, Inc.

represented by **Kevin Hahn**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
06/05/2012	1	PETITION FOR REMOVAL from 8th Judicial District Court, Clark County, NV, Case Number A-12-661854-C, (Filing fee $ 350 receipt number 0978-2394424), filed by MTC FINANCIAL INC. dba TRUSTEE CORPS. Proof of service due by 9/13/2012. Certificate of Interested Parties due by 6/15/2012. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I, # 10 Exhibit J, # 11 Civil Cover Sheet) (Reynolds, Richard) (Entered: 06/05/2012)
06/05/2012	2	CERTIFICATE of Interested Parties filed by MTC FINANCIAL INC. dba TRUSTEE CORPS. There are no known interested parties other than those participating in the case. (Reynolds, Richard) (Entered: 06/05/2012)
06/05/2012	3	STATEMENT of Corporate Disclosure by Defendant MTC FINANCIAL INC. dba TRUSTEE CORPS. (Reynolds, Richard) (Entered: 06/05/2012)
06/06/2012		Case assigned to Judge Kent J. Dawson and Magistrate Judge Robert J. Johnston. (SLR) (Entered: 06/06/2012)

06/06/2012	4	NOTICE PURSUANT TO LOCAL RULE IB 2-2: In accordance with 28 USC § 636(c) and FRCP 73, the parties in this action are provided with a link to the "AO 85 Notice of Availability, Consent, and Order of Reference - Exercise of Jurisdiction by a U.S. Magistrate Judge" form on the Court's website - www.nvd.uscourts.gov. **Consent forms should NOT be electronically filed.** Upon consent of all parties, counsel are advised to manually file the form with the Clerk's Office. **(no image attached)** (SLR) (Entered: 06/06/2012)
06/06/2012	5	MINUTE ORDER IN CHAMBERS of the Honorable Judge Kent J. Dawson, on 6/6/2012. Statement regarding removed action is due by 6/24/2012. Joint Status Report regarding removed action is due by 7/9/2012. (Copies have been distributed pursuant to the NEF - SLR) (Entered: 06/06/2012)
06/06/2012	6	(1st Notice) NOTICE: of Non-Compliance with Special Order 109: that **Ryan D Hastings** is in violation of Special Order 109 and Local Rule IA 10-1. After review of the Courts records, we could not find any record of you being admitted to practice before this Court and that you have not registered for CM/ECF. You are required to become a member of the U.S. District Court's Bar prior to registering for the Courts Case Management and Electronic Case Filing (CM/ECF) program and the electronic service of pleadings. Upon completion of the admission requirements, please visit the Courts website **www.nvd.uscourts.gov,** then select CM/ECF Info, to register the Attorney(s). **(no image attached)** (RFJ) (Entered: 06/06/2012)
06/12/2012	7	ANSWER to Complaint re 1 Petition for Removal,, filed by MTC Financial Inc.. Certificate of Interested Parties due by 6/22/2012. Discovery Plan/Scheduling Order due by 7/27/2012.(Reynolds, Richard) (Entered: 06/12/2012)
06/12/2012	8	CERTIFICATE of Interested Parties filed by Diakonos Holdings LLC. There are no known interested parties other than those participating in the case. (Anderson, Sean) (Entered: 06/12/2012)
06/19/2012	9	STATEMENT RE: REMOVAL filed by Defendant MTC Financial Inc.. (Reynolds, Richard) (Entered: 06/19/2012)
06/20/2012	10	AMENDED COMPLAINT *for Quiet Title and Declaratory Relief* against All Defendants, filed by Diakonos Holdings LLC. Adds new parties. Proof of service due by 10/18/2012. (Anderson, Sean) (Entered: 06/20/2012)
07/03/2012	11	PROPOSED SUMMONS to be issued, filed by Plaintiff Diakonos Holdings LLC. (Attachments: # 1 Summons)(Anderson, Sean) (Entered: 07/03/2012)
07/03/2012	12	ANSWER to 10 Amended Complaint filed by MTC Financial Inc..(Reynolds, Richard) (Entered: 07/03/2012)
07/05/2012	13	Summons Issued as to Bank of America, Inc., Mortgage Electronic Registration Systems, Inc. re 10 Amended Complaint. (SLR) (Entered: 07/05/2012)
07/05/2012	14	STATUS REPORT RE: REMOVAL filed by Plaintiff Diakonos Holdings LLC. (Anderson, Sean) (Entered: 07/05/2012)
07/12/2012	15	PROPOSED SUMMONS to be issued *to Countrywide Home Loans, Inc.*, filed by

		Plaintiff Diakonos Holdings LLC. (Hastings, Ryan) (Entered: 07/12/2012)
07/13/2012	16	Summons Issued as to Countrywide Home Loans, Inc.. (ECS) (Entered: 07/13/2012)
07/16/2012	17	MOTION to Dismiss Amended Complaint; filed by Defendants Bank of America, Inc., Countrywide Home Loans, Inc., Mortgage Electronic Registration Systems, Inc.. Responses due by 8/2/2012. Certificate of Interested Parties due by 7/26/2012. Discovery Plan/Scheduling Order due by 8/30/2012. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5 - 8)(Hahn, Kevin) Modified text on 7/17/2012 (SRK). (Entered: 07/16/2012)
07/16/2012	18	REQUEST for Judicial Notice re 17 MOTION to Dismiss ; by Defendants Bank of America, Inc., Countrywide Home Loans, Inc., Mortgage Electronic Registration Systems, Inc.. (Hahn, Kevin) (Entered: 07/16/2012)
07/16/2012	19	CERTIFICATE of SERVICE re 17 MOTION to Dismiss, 18 Request for Judicial Notice ; by Defendants Bank of America, Inc., Countrywide Home Loans, Inc., Mortgage Electronic Registration Systems, Inc.. (Hahn, Kevin) Event type corrected on 7/17/2012 (SRK). (Entered: 07/16/2012)
07/17/2012		NOTICE of Docket Correction to 19 Declaration: **ERROR**: Wrong event selected. **CORRECTION**: Court modified entry as 19 CERTIFICATE of SERVICE, which is located under the "Initial Pleadings and Service" section, then "Service of Process" category. **(no image attached)**(SRK) (Entered: 07/17/2012)
07/20/2012	20	JOINDER to 17 MOTION to Dismiss Amended Complaint ; filed by Defendant MTC Financial Inc. (Reynolds, Richard) (Entered: 07/20/2012)
08/02/2012	21	STIPULATION FOR EXTENSION OF TIME (First Request) to Respond to 17 Motion to Dismiss Amended Complaint filed by Plaintiff Diakonos Holdings LLC. (Anderson, Sean) (Entered: 08/02/2012)
08/03/2012	22	ORDER ON STIPULATION Granting 21 Stipulation For An Extension of Time to Respond to 17 MOTION to Dismiss Amended Complaint. Responses due by 8/9/2012. Signed by Judge Kent J. Dawson on 8/3/2012. (Copies have been distributed pursuant to the NEF - SLR) (Entered: 08/06/2012)
08/09/2012	23	RESPONSE to 17 MOTION to Dismiss Amended Complaint, filed by Plaintiff Diakonos Holdings LLC. Replies due by 8/19/2012. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I, # 10 Exhibit J, # 11 Exhibit K, # 12 Exhibit L, # 13 Exhibit M, # 14 Exhibit N, # 15 Exhibit O)(Anderson, Sean) (Entered: 08/09/2012)
08/09/2012	24	Counter MOTION to Remand to State Court by Plaintiff Diakonos Holdings LLC. Responses due by 8/26/2012. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I, # 10 Exhibit J, # 11 Exhibit K, # 12 Exhibit L, # 13 Exhibit M, # 14 Exhibit N, # 15 Exhibit O)(Anderson, Sean) (Entered: 08/09/2012)
08/27/2012	25	RESPONSE to 24 Counter MOTION to Remand to State Court, filed by Defendant MTC Financial Inc.. Replies due by 9/6/2012. (Reynolds, Richard) (Entered: 08/27/2012)
08/30/2012	26	STIPULATION FOR EXTENSION OF TIME (First Request) For Scheduling Rule 26(f) Conference and Subsquent Circulation of Discovery Plan and Scheduling Order

		filed by Plaintiff Diakonos Holdings LLC. (Anderson, Sean) (Entered: 08/30/2012)
09/06/2012	27	REPLY to Response to 24 Counter MOTION to Remand to State Court filed by Plaintiff Diakonos Holdings LLC. (Anderson, Sean) (Entered: 09/06/2012)
09/07/2012	28	ORDER ON STIPULATION Denying 26 Stipulation to Continue Time for Scheduling Rule 26(F) Conference and Subsequent Circulation of Discovery Plan and Scheduling Order. The Parties are to proceed with the submission of a discovery plan and scheduling order as required by LR 26-1. Signed by Magistrate Judge Robert J. Johnston on 9/7/2012. (Copies have been distributed pursuant to the NEF - SLR) (Entered: 09/07/2012)
10/10/2012	29	PROPOSED Discovery Plan/Scheduling Order filed by Plaintiff Diakonos Holdings LLC. (Anderson, Sean) (Entered: 10/10/2012)
10/25/2012	30	SCHEDULING ORDER Denying 29 Proposed Discovery Plan and Scheduling Order. Discovery due by 12/31/2012. Motions due by 1/31/2013. Proposed Joint Pretrial Order due by 1/31/2013. Signed by Magistrate Judge Robert J. Johnston on 10/25/2012. (Copies have been distributed pursuant to the NEF - SLR) (Entered: 10/25/2012)
10/31/2012	31	Interim STATUS REPORT by Plaintiff Diakonos Holdings LLC. (Anderson, Sean) (Entered: 10/31/2012)
12/11/2012	32	STIPULATION FOR EXTENSION OF TIME (First Request) re: Discovery Deadlines by Plaintiff Diakonos Holdings LLC. (Hastings, Ryan) (Entered: 12/11/2012)
12/13/2012	33	STIPULATION FOR EXTENSION OF TIME (First Request) re: Discovery Deadlines by Plaintiff Diakonos Holdings LLC. (Hastings, Ryan) (Entered: 12/13/2012)
12/21/2012	34	ORDER ON STIPULATION Granting 33 Stipulation to Extend Deadlines. Discovery due by 3/1/2013. Motions due by 4/1/2013. Proposed Joint Pretrial Order due by 4/30/2013. Signed by Magistrate Judge Robert J. Johnston on 12/21/12. (Copies have been distributed pursuant to the NEF - MMM) (Entered: 12/21/2012)
12/21/2012	35	MINUTE ORDER IN CHAMBERS of the Honorable Judge Kent J. Dawson, on 12/21/2012. The Court Orders Defendants to file a reply to Plaintiff's opposition (#23) to Defendants' Motion to Dismiss(#17). Defendants' reply is due no later than January 13, 2013. Defendants should address Summerhill Village Homeowners Ass'n v. Roughley in their reply. **(no image attached)** (Copies have been distributed pursuant to the NEF - TKF) (Entered: 12/21/2012)
01/07/2013	36	MINUTE ORDER IN CHAMBERS of the Honorable Chief Judge Robert C. Jones, on 1/7/2013. IT IS ORDERED that this case is reassigned to Magistrate Judge Nancy J. Koppe for all further proceedings. Magistrate Judge Robert J. Johnston no longer assigned to case. All further documents must bear the correct case number 2:12-CV-0949 KJD-NJK. **(no image attached)** (Copies have been distributed pursuant to the NEF - ECS) (Entered: 01/07/2013)
01/11/2013	37	REPLY to Response to 17 MOTION to Dismiss Amended Complaint and JOINDER to Response to 24 Counter MOTION to Remand to State Court filed by Defendants Bank of America Inc., Countrywide Home Loans, Inc., Mortgage Electronic Registration Systems, Inc. (Attachments: # 1 Certificate of Service)(Hahn, Kevin) (Entered: 01/11/2013)
01/14/2013	38	REPLY to Response to 17 MOTION to Dismiss Amended Complaint and 24 Counter

		MOTION to Remand to State Court filed by Defendant MTC Financial Inc. (Attachments: # 1 Exhibit A, B, C, and D)(Reynolds, Richard) (Entered: 01/14/2013)
01/17/2013	39	NOTICE of Change of Address by Richard J. Reynolds. (Reynolds, Richard) (Entered: 01/17/2013)
02/11/2013	40	ORDER Granting 17 Motion to Dismiss. Denying 24 Counter-Motion to Remand to State Court. Signed by Judge Kent J. Dawson on 2/11/2013. (Copies have been distributed pursuant to the NEF - SLR) (Entered: 02/11/2013)
02/11/2013	41	CLERK'S JUDGMENT in favor of Bank of America Inc., Countrywide Home Loans, Inc., MTC Financial Inc., Mortgage Electronic Registration Systems, Inc. and against Diakonos Holdings LLC. Signed by Clerk of Court, Lance S. Wilson on 2/11/2013. (Copies have been distributed pursuant to the NEF - SLR) (Entered: 02/11/2013)
02/14/2013	42	MOTION to Substitute Attorney on behalf of Defendant MTC Financial Inc. (Reynolds, Richard) (Entered: 02/14/2013)
02/15/2013		NOTICE of Docket Correction to 42 NOTICE of Change of Attorney. **CORRECTION**: Document filed using the wrong event by attorney Richard Reynolds. **CORRECTION**: Court modified event as 42 MOTION to Substitute Attorney. **(no image attached)**(ASB) (Entered: 02/15/2013)
02/15/2013	43	ORDER Granting 42 Motion to Substitute Attorney Burke, Williams & Sorensen, LLP in place and stead of Turner, Reynolds, Greco, & O'Hara for MTC Financial, Inc. Signed by Magistrate Judge Nancy J. Koppe on 2/15/2013. (Copies have been distributed pursuant to the NEF - SLR) (Entered: 02/19/2013)
03/11/2013	44	MOTION to Amend/Correct 41 Clerk's Judgment,. by Plaintiff Diakonos Holdings LLC. Responses due by 3/28/2013. (Attachments: # 1 Exhibit, # 2 Exhibit, # 3 Exhibit)(Hastings, Ryan) (Entered: 03/11/2013)
03/13/2013	45	NOTICE OF APPEAL as to 40 Order on Motion to Dismiss, Order on Motion to Remand to State Court by Plaintiff Diakonos Holdings LLC. Filing fee $ 455, receipt number 0978-2738840. E-mail notice (NEF) sent to the US Court of Appeals, Ninth Circuit. (Attachments: # 1 Exhibit)(Hastings, Ryan) (Entered: 03/13/2013)
03/14/2013	46	ORDER for Time Schedule as to 45 Notice of Appeal, filed by Diakonos Holdings LLC. **USCA Case Number 13-15470**. (MMM) (Entered: 03/15/2013)
03/28/2013	47	RESPONSE to 44 MOTION to Amend/Correct 41 Clerk's Judgment,. , filed by Defendant MTC Financial Inc.. Replies due by 4/7/2013. (Reynolds, Richard) (Entered: 03/28/2013)
03/28/2013	48	RESPONSE to 44 MOTION to Amend/Correct 41 Clerk's Judgment,. , filed by Defendants Bank of America Inc., Countrywide Home Loans, Inc., Mortgage Electronic Registration Systems, Inc.. Replies due by 4/7/2013. (Hahn, Kevin) (Entered: 03/28/2013)
04/08/2013	49	REPLY to Response to 44 MOTION to Amend/Correct 41 Clerk's Judgment,. filed by Plaintiff Diakonos Holdings LLC. (Anderson, Sean) (Entered: 04/08/2013)
04/10/2013	50	ORDER of USCA, Ninth Circuit, as to 45 Notice of Appeal, filed by Diakonos Holdings LLC. **USCA Case Number 13-15470**. The notice of appeal is therefore ineffective until entry of the order disposing of the last such motion outstanding.

		Accordingly, proceedings in this court shall be held in abeyance pending the district court's resolution of the pending motion. (MMM) (Entered: 04/12/2013)

TAB 29

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DISTRICT COURT

CLARK COUNTY, NEVADA

SFR INVESTMENTS POOL 1, LLC a Nevada limited liability company,

Plaintiff,

vs.

U.S. BANK, N.A., a national banking association as Trustee for the Certificate Holders of Wells Fargo Asset Securities Corporation, Mortgage Pass-Through Certificates, Series 2006-AR4 and LUCIA PARKS, an individual, DOES I through X; and ROE CORPORATIONS I through X, inclusive,

Defendants.

Case No. A-13-678814-C

Dept. No. XVIII

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28rd day of May, 2013, pursuant to NRCP 5(b), I served via first class U.S. Mail, postage prepaid, the **Opposition to U.S. Bank, N.A.'s Motion to Dismiss**, filed on May 24, 2013 to the following parties:

Chelsea A. Crowton, Esq.
WRIGHT, FINLAY & ZAK, LLP
5532 South Fort Apache Road, Suite 110
Las Vegas, NV 89148
Attorney for U.S. Bank, N.A.

/s/ Andrew M. David
An Employee of Howard Kim & Associates

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Case No. 63614

In the Supreme Court of Nevada

Electronically Filed
Jan 03 2014 08:59 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

SFR INVESTMENTS POOL 1, LLC, a Nevada limited liability company,

Appellant,

U.S. BANK, N.A., a national banking association as Trustee for the Certificate Holders of Wells Fargo Asset Securities Corporation, Mortgage Pass-Through Certificates, Series 2006-AR4, a Nevada non-profit corporation,

Respondent.

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable SUSAN SCANN, District Judge
District Court Case No. A-13-678814-C

JOINT APPENDIX, VOLUME IV

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SFR Investments Pool 1, LLC

ALPHABETICAL INDEX

Vol.	Tab	Date Filed	Document	Bates Number
2	14	4/29/2013	Affidavit of Service [Lucia Parks]	JA226 – JA227
1	6	4/1/2013	Affidavit of Service [U.S. Bank, N.A.]	JA035
1	7	4/1/2013	Affidavit of Service [U.S. Bank, N.A.]	JA036
1	8	4/3/2013	Affidavit of Service [U.S. Bank, N.A.]	JA037
1	11	4/19/2013	Answer to Complaint for Quiet Title and Injunctive Relief	JA054 – JA062
1	3	3/27/2013	Application for Temporary Restraining Order on Order Shortening Time and Motion for Preliminary Injunction	JA014 – JA028
2	17	5/2/2013	Certificate of Mailing [Defendant, U.S. Bank, N.A.'s, Motion to Expunge Lis Pendens and Motion to Dismiss]	JA255 – JA256
5	31	5/30/2013	Certificate of Mailing [Defendant, U.S. Bank, N.A.'s, Reply in Support of the Motion to Dismiss with Prejudice the Plaintiff's Complaint]	JA757 – JA758
5	39	6/27/2013	Certificate of Service [Motion to Alter or Amend Judgment]	JA875 – JA876
4	29	5/28/2013	Certificate of Service [Opposition to U.S. Bank, N.A.'s Motion to Dismiss]	JA657
3	24	5/14/2013	Certificate of Service [Reply in Support of Motion for Preliminary Injunction]	JA493 – JA494

6	44	7/24/2013	Certificate of Service [Reply in Support of Motion to Alter or Amend Judgment and Notice of Errata]	JA1008 – JA1009
5	33	5/31/2013	Certificate of Service [Supplement to Opposition to Motion to Dismiss]	JA790
1	1	3/22/2013	Complaint for Quiet Title and Injunctive Relief	JA001 – JA011
3	26	5/17/2013	Court Minutes	JA501 – JA502
2	15	4/30/2013	Defendant, U.S. Bank, N.A.'s, Motion to Dismiss with Prejudice the Plaintiff's Complaint	JA228 – JA247
2	16	4/30/2013	Defendant, U.S. Bank, N.A.'s, Motion to Expunge Lis Pendens	JA248 – JA254
6	41	7/17/2013	Defendant, U.S. Bank, N.A.'s, Opposition to the Plaintiff's Motion to Alter or Amend Judgment	JA879 – JA893
5	30	5/29/2013	Defendant, U.S. Bank, N.A.'s, Reply in Support of the Motion to Dismiss with Prejudice the Plaintiff's Complaint	JA658 – JA756
1	13	4/25/2013	Defendant, U.S. Bank, N.A.'s, Request for Judicial Notice in Support of the Response to the Plaintiff's Motion for Preliminary Injunction	JA088 – JA225
1	12	4/25/2013	Defendant, U.S. Bank, N.A.'s, Response to the Plaintiff's Motion for Preliminary Injunction	JA063 – JA087
2	19	5/9/2013	Exhibits in Support of Application for Temporary Restraining Order on Order Shortening Time and Motion for Preliminary Injunction	JA263 – JA374

5	38	6/26/2013	Motion to Alter or Amend Judgment	JA811 – JA874
5	40	7/12/2013	Notice of Appeal	JA877 – JA878
5	35	6/11/2013	Notice of Entry of Order [Denying Plaintiff's Motion for Preliminary Injunction]	JA795 – JA801
5	37	6/12/2013	Notice of Entry of Order [for Dismissal and Cancellation of Notice of Pendency of Action]	JA805 – JA810
6	48	9/25/2013	Notice of Entry of Order [Granting in Part and Denying in Part Plaintiff's Motion to Alter or Amend Judgment]	JA1019 – JA1023
2	18	5/3/2013	Notice of Entry of Order [Temporary Restraining Order Enjoining Sale and Order Setting Briefing Schedule for Preliminary Injunction]	JA257 – JA262
6	45	7/24/2013	Notice of Errata	JA1010 – JA1011
2	22	5/14/2013	Notice of Joinder in Defendant U.S Bank, N.A.'s Motion to Expunge Lis Pendens	JA381 – JA384
2	21	5/14/2013	Notice of Joinder in Defendant, U.S. Bank N.A.'s Motion to Dismiss with Prejudice the Plaintiff's Complaint	JA378 – JA380
2	20	5/14/2013	Notice of Joinder in Plaintiff's Motion for Preliminary Injunction	JA375 – JA377
1	2	3/22/2013	Notice of Lis Pendens	JA012 – JA013
1	9	4/10/2013	Notice of Petition for Removal	JA038 – JA046
1	5	3/28/2013	Notice of Posting and Acceptance of Bond	JA032 – JA034
1	10	4/17/2013	Notice of Remand	JA047 – JA053

3	25	5/15/2013	Opposition to Motion to Expunge Lis Pendens	JA495 – JA500
4	28	5/24/2013	Opposition to U.S. Bank, N.A.'s Motion to Dismiss	JA507 – JA656
5	34	6/10/2013	Order Denying Plaintiff's Motion for Preliminary Injunction	JA791 – JA794
5	36	6/11/2013	Order for Dismissal and Cancellation of Notice of Pendency of Action	JA802 – JA804
6	47	9/25/2013	Order Granting in Part and Denying in Part Plaintiff's Motion to Alter or Amend Judgment	JA1017 – JA1018
6	51	8/5/2013	Recorder's Transcript of Proceedings [Motion to Alter or Amend Judgment heard on July 30, 2013]	JA1055 – JA1059
6	50	8/5/2013	Recorder's Transcript of Proceedings [Motion to Dismiss and Motion to Expunge Lis Pendens heard on June 4, 2013]	JA1046 – JA1054
3	27	5/23/2013	Reply in Support of Defendant, U.S. Bank, N.A.'s, Motion to Expunge Lis Pendens	JA503 – JA506
3	23	5/14/2013	Reply in Support of Motion for Preliminary Injunction	JA385 – JA492
6	43	7/23/2013	Reply in Support of Motion to Alter or Amend Judgment	JA901 – JA1007
6	42	7/18/2013	Response and Opposition to Plaintiff's Motion to Alter or Amend Judgment; and Joinder in Defendant US Bank's Opposition	JA894 – JA900
5	32	5/31/2013	Supplement to Opposition to Motion to Dismiss	JA759 – JA789

6	46	7/29/2013	Supplement to Response and Opposition to Plaintiff's Motion to Alter or Amend Judgment; and Joinder in Defendant US Bank's Opposition	JA1012 – JA1016
1	4	3/28/2013	Temporary Restraining Order Enjoining Sale and Order Setting Briefing Schedule for Preliminary Injunction	JA029 – JA031
6	49	5/29/2013	Transcript of Proceedings [Motions heard on May 16, 2013]	JA1024 – JA1045

CHRONOLOGICAL INDEX

Vol.	Tab	Date Filed	Document	Bates Number
1	1	3/22/2013	Complaint for Quiet Title and Injunctive Relief	JA001 – JA011
	2	3/22/2013	Notice of Lis Pendens	JA012 – JA013
	3	3/27/2013	Application for Temporary Restraining Order on Order Shortening Time and Motion for Preliminary Injunction	JA014 – JA028
	4	3/28/2013	Temporary Restraining Order Enjoining Sale and Order Setting Briefing Schedule for Preliminary Injunction	JA029 – JA031
	5	3/28/2013	Notice of Posting and Acceptance of Bond	JA032 – JA034
	6	4/1/2013	Affidavit of Service [U.S. Bank, N.A.]	JA035
	7	4/1/2013	Affidavit of Service [U.S. Bank, N.A.]	JA036
	8	4/3/2013	Affidavit of Service [U.S. Bank, N.A.]	JA037
	9	4/10/2013	Notice of Petition for Removal	JA038 – JA046
	10	4/17/2013	Notice of Remand	JA047 – JA053
	11	4/19/2013	Answer to Complaint for Quiet Title and Injunctive Relief	JA054 – JA062
	12	4/25/2013	Defendant, U.S. Bank, N.A.'s, Response to the Plaintiff's Motion for Preliminary Injunction	JA063 – JA087

1	13	4/25/2013	Defendant, U.S. Bank, N.A.'s, Request for Judicial Notice in Support of the Response to the Plaintiff's Motion for Preliminary Injunction	JA088 – JA225
2	14	4/29/2013	Affidavit of Service [Lucia Parks]	JA226 – JA227
	15	4/30/2013	Defendant, U.S. Bank, N.A.'s, Motion to Dismiss with Prejudice the Plaintiff's Complaint	JA228 – JA247
	16	4/30/2013	Defendant, U.S. Bank, N.A.'s, Motion to Expunge Lis Pendens	JA248 – JA254
	17	5/2/2013	Certificate of Mailing [Defendant, U.S. Bank, N.A.'s, Motion to Expunge Lis Pendens and Motion to Dismiss]	JA255 – JA256
	18	5/3/2013	Notice of Entry of Order [Temporary Restraining Order Enjoining Sale and Order Setting Briefing Schedule for Preliminary Injunction]	JA257 – JA262
	19	5/9/2013	Exhibits in Support of Application for Temporary Restraining Order on Order Shortening Time and Motion for Preliminary Injunction	JA263 – JA374
	20	5/14/2013	Notice of Joinder in Plaintiff's Motion for Preliminary Injunction	JA375 – JA377
	21	5/14/2013	Notice of Joinder in Defendant, U.S. Bank N.A.'s Motion to Dismiss with Prejudice the Plaintiff's Complaint	JA378 – JA380
	22	5/14/2013	Notice of Joinder in Defendant U.S Bank, N.A.'s Motion to Expunge Lis Pendens	JA381 – JA384
3	23	5/14/2013	Reply in Support of Motion for Preliminary Injunction	JA385 – JA492

3	24	5/14/2013	Certificate of Service [Reply in Support of Motion for Preliminary Injunction]	JA493 – JA494
	25	5/15/2013	Opposition to Motion to Expunge Lis Pendens	JA495 – JA500
	26	5/17/2013	Court Minutes	JA501 – JA502
	27	5/23/2013	Reply in Support of Defendant, U.S. Bank, N.A.'s, Motion to Expunge Lis Pendens	JA503 – JA506
4	28	5/24/2013	Opposition to U.S. Bank, N.A.'s Motion to Dismiss	JA507 – JA656
	29	5/28/2013	Certificate of Service [Opposition to U.S. Bank, N.A.'s Motion to Dismiss]	JA657
5	30	5/29/2013	Defendant, U.S. Bank, N.A.'s, Reply in Support of the Motion to Dismiss with Prejudice the Plaintiff's Complaint	JA658 – JA756
	31	5/30/2013	Certificate of Mailing [Defendant, U.S. Bank, N.A.'s, Reply in Support of the Motion to Dismiss with Prejudice the Plaintiff's Complaint]	JA757 – JA758
	32	5/31/2013	Supplement to Opposition to Motion to Dismiss	JA759 – JA789
	33	5/31/2013	Certificate of Service [Supplement to Opposition to Motion to Dismiss]	JA790
	34	6/10/2013	Order Denying Plaintiff's Motion for Preliminary Injunction	JA791 – JA794
	35	6/11/2013	Notice of Entry of Order [Denying Plaintiff's Motion for Preliminary Injunction]	JA795 – JA801

5	36	6/11/2013	Order for Dismissal and Cancellation of Notice of Pendency of Action	JA802 – JA804
	37	6/12/2013	Notice of Entry of Order [for Dismissal and Cancellation of Notice of Pendency of Action]	JA805 – JA810
	38	6/26/2013	Motion to Alter or Amend Judgment	JA811 – JA874
	39	6/27/2013	Certificate of Service [Motion to Alter or Amend Judgment]	JA875 – JA876
	40	7/12/2013	Notice of Appeal	JA877 – JA878
6	41	7/17/2013	Defendant, U.S. Bank, N.A.'s, Opposition to the Plaintiff's Motion to Alter or Amend Judgment	JA879 – JA893
	42	7/18/2013	Response and Opposition to Plaintiff's Motion to Alter or Amend Judgment; and Joinder in Defendant US Bank's Opposition	JA894 – JA900
	43	7/23/2013	Reply in Support of Motion to Alter or Amend Judgment	JA901 – JA1007
	44	7/24/2013	Certificate of Service [Reply in Support of Motion to Alter or Amend Judgment and Notice of Errata]	JA1008 – JA1009
	45	7/24/2013	Notice of Errata	JA1010 – JA1011
	46	7/29/2013	Supplement to Response and Opposition to Plaintiff's Motion to Alter or Amend Judgment; and Joinder in Defendant US Bank's Opposition	JA1012 – JA1016
	47	9/25/2013	Order Granting in Part and Denying in Part Plaintiff's Motion to Alter or Amend Judgment	JA1017 – JA1018

6	48	9/25/2013	Notice of Entry of Order [Granting in Part and Denying in Part Plaintiff's Motion to Alter or Amend Judgment]	JA1019 – JA1023
	49	5/29/2013	Transcript of Proceedings [Motions heard on May 16, 2013]	JA1024 – JA1045
	50	8/5/2013	Recorder's Transcript of Proceedings [Motion to Dismiss and Motion to Expunge Lis Pendens heard on June 4, 2013]	JA1046 – JA1054
	51	8/5/2013	Recorder's Transcript of Proceedings [Motion to Alter or Amend Judgment heard on July 30, 2013]	JA1055 – JA1059

TAB 28

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Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

SFR INVESTMENTS POOL 1, LLC a Nevada limited liability company,

Plaintiff,

vs.

U.S. BANK, N.A., a national banking association as Trustee for the Certificate Holders of Wells Fargo Asset Securities Corporation, Mortgage Pass-Through Certificates, Series 2006-AR4, a Nevada non-profit corporation and LUCIA PARKS, an individual, DOES I through X; and ROE CORPORATIONS I through X, inclusive,

Defendants.

Case No.: A-13-678814-C

Dept. No.: XVIII

OPPOSITION TO U.S. BANK, N.A.'S MOTION TO DISMISS

Hearing Date: June 4, 2013
Hearing Time: 8:15 a.m.

Plaintiff SFR INVESTMENTS POOL 1, LLC ("SFR"), by and through its counsel, opposes US BANK, N.A., a national banking association as Trustee for the Certificate Holders of Wells Fargo Asset Securities Corporation, Mortgage Pass-Through Certificates, Series 2006-AR4's ("U.S. Bank or "Defendant") Motion to Dismiss ("Motion"). This opposition is based on the pleadings and papers on file herein, the following memorandum of points and authorities, and any oral argument this Court should entertain at the hearing on this matter.

/ / /

HOWARD KIM & ASSOCIATES
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

U.S. Bank cannot continue with its judicial foreclosure and its motion to dismiss should be denied because it failed to cure the HOA super-priority lien on the Property before the HOA foreclosed. Before any lender loaned money or recorded a first security interest on the Property, the HOA had perfected lien. An HOA Lien is perfected and noticed when the HOA is formed and the HOA's declaration of CC&Rs is recorded. An HOA Lien has priority over all encumbrances and liens on a property except those recorded before the HOA was formed and tax and other governmental liens. A first security interest may obtain priority over an HOA Lien by satisfying portions of the HOA Lien representing charges for abatement and 9 months of common assessments. U.S. Bank did not do so in this case and its interest was extinguished by the HOA's foreclosure.

U.S. Bank's borrower has been delinquent on her HOA assessments since 2012 and has not paid her mortgage on the property located at 2270 Nashville Avenue, Henderson, Nevada 89052, APN: 178-19-712-012 (the "Property") since before February, 2010. Rather than requiring the borrower to pay the HOA assessments or paying itself as allowed by the deed of trust, U.S. Bank sat back and let the HOA assessments flounder. U.S. Bank waited *over three years* to move forward with foreclosure and only did so after the HOA foreclosed on its lien. Plaintiff is a bona fide purchaser that relied on the provisions of NRS 116.3116 that give an HOA lien super priority over a first security interest. NRS 116.3116(2) was enacted so that assessment-paying homeowners in an HOA community would not have to provide a private bailout to their delinquent neighbors or banks, like U.S. Bank, who refuse to step up and take care of their collateral.[1]

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[1] For a comprehensive overview of how and why HOA super priority liens were established James Winokur's *Meaner Lienor Community Associations: The Super Priority Lien and Related Reforms Under the Uniform Common Interest Ownership Act*, 27 WAKE FOREST L. REV. 353, 366-69 (1992) (attached as **Exhibit 1**). Published shortly after the Legislature adopted the Uniform Common Ownership Interest Act ("UCIOA") in 1991, *Meaner Lienor* is considered the definitive law review article on the UCIOA. It is cited by almost every article that deals with the UCIOA and has been referenced multiple times by the Nevada Real Estate Division in its advisory opinions. Plaintiff requests judicial notice of its attachments which are publicly-available documents.

Although NRS 116.3116(2) was adopted over 20 years ago, the Nevada Supreme Court has not yet been required to weigh in on how and under what circumstances the foreclosure of an HOA's super-priority lien affects a bank's first security interest. The current economic climate, along with the failure of banks to either enforce their deeds of trust or to maintain the community by covering the HOA's common assessments has forced struggling HOAs to foreclose on their liens to survive. This relatively new phenomenon of HOA foreclosures of the super-priority lien has brought the interpretation of the 22 year old statute to the forefront and to this court. The fact that for decades, the HOAs rarely exercised their power to foreclose has created the misconception that either the super priority lien does not exist or the HOA cannot foreclose on its super priority lien. However, the passage of time did not diminish the HOAs statutory authority to enforce its lien through foreclosure.

Despite the lack of a Nevada Supreme Court opinion regarding the HOA's super priority lien, this court is not without guidance. The Nevada Real Estate Division, the agency the Nevada Supreme Court recognizes as charged with interpreting NRS 116 and issuing advisory opinions on the HOAs super priority lien, has issued an advisory opinion directly on point. The Legislative Counsel Bureau agrees with the Real Estate Division that when an HOA forecloses its lien that contains super priority amounts, any first deed of trust is extinguished, along with any other junior security interest.

Plaintiff, a Nevada small business, is a bona fide purchaser that relied on the provisions of NRS 116.3116 that give an HOA lien super priority over a first security interest.[2] By virtue of its bonafide purchaser status, Plaintiff has stated a valid claim for quiet title, injunctive relief and unjust enrichment. As such, this court should deny Defendant's Motion to Dismiss, based upon the allegations in the complaint given the plain language of NRS 116.3116, and especially when properly harmonized with the abatement lien provisions in NRS 116.310312.

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——————————— (continued)

[2] SFR is investing in the community, cleaning up properties, taking care of HOA assessments, paying taxes and providing a valuable service that allows many Nevada residents to remain in their homes with an affordable rent.

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II. SUMMARY OF FACTS

SFR acquired the real property commonly known as 2270 Nashville Avenue, Henderson, Nevada 89052, Parcel No. 178-19-712-012 (the "Property") on March 1, 2013 by successfully bidding on the Property at a publicly-held foreclosure auction in accordance with NRS 116.3116, *et. seq.* ("HOA foreclosure sale"). The HOA foreclosure deed was recorded on March 6, 2013. *See* Plaintiff's Application for Temporary Restraining Order on Order Shortening Time and Motion for Preliminary Injunction ("TRO Motion") at Exhibit 1. As recited in the HOA Foreclosure Deed, the HOA foreclosure sale complied with all requirements of law, including but not limited to, the elapsing of 90 days, 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. **Defendant had notice of the HOA foreclosure sale but failed to act to preserve its rights.**

Parks obtained title to the Property in January of 2006. Shortly thereafter, Wells Fargo recorded a deed of trust against the Property. *See* TRO Motion at Exhibit 6. The beneficial interest in the First Deed of Trust appears to have been transferred to U.S. Bank through one of two assignments recorded in July of 2010 or June of 2012. *See* TRO Motion at Exhibits 7 and 8. Before the recorded assignment of the deed of trust to U.S. Bank and before it was substituted as trustee, National Default Servicing Corporation ("NDSC") recorded a Notice of Default and Election to Sell against the Property on or about February 24, 2010 for amounts due as of November 1, 2009. *See* TRO Motion at Exhibit 9.

After recording but not following through on two Notices of Trustee's Sale in 2010 and 2011, on or about March 11, 2013, NDSC, recorded another Notice of Trustee's Sale stating that the Property would be sold at a public auction pursuant to the terms of the First Deed of Trust on March 26, 2013 at 10:00 a.m. *See* Notices of Sale, attached as TRO Motion at Exhibits 10, 11, and 12. Upon information and belief, U.S. Bank failed to comply with all of the notice requirements of NRS 107.080 including mailing a copy of the Notice of Trustee's Sale to Plaintiff.

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On March 22, 2013, Plaintiff initiated the above-captioned action by filing a Complaint seeking to quiet title in its favor, a declaration that Defendants have no right, title or interest in the Property, and a preliminary and a permanent injunction preventing Defendant U.S. Bank from continuing foreclosure proceedings on the Property.

III. LEGAL ARGUMENT

A. Legal Standard on a Motion to Dismiss

When reviewing a motion to dismiss under NRCP 12(b)(5) for failure to state a claim, Nevada courts will "regard all factual allegations in the complaint as true and draw all inferences in favor of the nonmoving party." *See Stockmeier v. Nevada Dept. of Corr. Psychological Review Panel*, 124 Nev. 313, 316, 183 P.3d 133, 135 (2008). "A complaint will not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff could prove no set of facts which, if accepted by the trier of fact, would entitle him or her to relief." *Simpson v. Mars Inc.*, 113 Nev. 188, 190, 929 P.2d 966, 967 (1997); *see also Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008).

"Actions for declaratory relief are governed by the same liberal pleading standards that are applied in other civil actions." *See Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 846, 858 P.2d 1258, 1260-61 (1993). "The formal sufficiency of a claim is governed by NRCP 8(a), which requires only that the claim, 'shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief to which he deems himself entitled.' *See id.* (*quoting* NRCP 8(a)).

Here, Plaintiff's complaint contains sufficient factual allegations survive a motion to dismiss for failure to state a claim. As such, this court should deny Defendant's Motion to Dismiss. In the alternative, this Court should allow Plaintiff leave to amend pursuant to NRCP 15(a) rather than dismiss the complaint.

B. This Case Should Not Be Dismissed Because Plaintiff's Complaint Contains Sufficient Factual Allegations To Survive A Motion To Dismiss

1. *An HOA Lien with Super Priority Amounts Extinguishes a First Security Interest*

Defendant correctly states that "when a statute is clear on its face, a Court may not go

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beyond the language of the statute in determining the legislature's intent," but then goes on to cite only a portion of NRS 116.3116(2) to support its proposition that the entire HOA Lien was junior to U.S. Bank's deed of trust. Motion, 5:23-24. Because there is no binding authority on this issue, this Court should perform a statutory analysis, beginning with the plain language of NRS 116, to test Defendant's claim that its security interest could not have been extinguished by the HOA non-judicial foreclosure sale.

Pursuant to NRS 116.3116(1), an HOA has a statutory lien against a unit owner's real property for delinquent assessments. The recordation of the HOA's Declaration of Covenants, Conditions and Restriction (the "Declaration") "constitutes record notice and perfection of the lien." NRS 116.3116(4). As such, "[n]o further recordation of any claim for assessments [under 116.3116] is required." *Id.*

In addition to automatic perfection and notice, a lien for delinquent assessments is entitled to priority over virtually all security interests in the Property, **including a first security interest**,

> to the extent of any charges incurred by the association on a unit pursuant to NRS 116.310312 **and** to the extent of the assessments of 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 Nevada Legislature gave HOAs the power to non-judicially foreclose in NRS 116.31162(1) by following the procedures set forth in NRS 116.31162-31168. Nothing in NRS 116.3116(2) limits the HOA's ability to foreclose on the super priority portions of its lien or requires a first security interest holder to foreclose before an HOA can collect the super priority amounts from the first security interest holder.

In describing what title passed to the purchaser after an HOA foreclosure, the Nevada Legislature used the exact same language in NRS 116.31166(3) as is found in NRS 107.080(5) to describe the type of title passed to a purchaser at a bank foreclosure sale:

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NRS 116.31166(3)	NRS 107.080(5)
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**.	Every sale made under the provisions of this section and other sections of this chapter **vests in the purchaser the title of the grantor and any successors in interest without equity or right of redemption.**

Both an HOA foreclosure and a bank foreclosure vest title of the previous homeowner in the purchaser "without equity or right of redemption."[3] Further, it is axiomatic that the foreclosure of a superior security interest in real property extinguishes all junior interests. *See Erikson Construction Co. v. Nevada Nat. Bank*, 89 Nev. 350, 352, 513 P.2d 1236, 1238 (1973).

Neither NRS 116 nor NRS 107.080 state that foreclosure of the superior interest extinguishes all junior liens and transfers absolute title to the purchaser. But when a statute states that the foreclosure of superior lien vests in the purchaser title of the previous homeowner without equity or right of redemption, there may as well be bolded and capital letters stating that all junior liens are extinguished and the previous homeowner, together with junior lien holders have no claim to the property. Here, the HOA Lien included amounts that were superior to first security interest. The HOA foreclosure extinguished the first security interest and vested title in Plaintiff subject only to any tax liens or encumbrances recorded before the HOA was formed.

2. *Abatement Charges + 9 Months Delinquent Assessments Make Up the Super Priority Portion of an HOA Lien: NRS 116.3116 Must Be Harmonized with Abatement Provisions found in NRS 116.310312.*

Because the super priority provisions of NRS 116.3116 directly incorporate the abatement provisions found in NRS 116.310312, the plain language of NRS 116.3116 must be

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[3] According to the Nevada Supreme Court,

sales without equity or right of redemption vest the purchaser with absolute title:

> [T]he law authorizing the mortgagee to sell is, in our opinion, so thoroughly settled that it cannot now admit of a question. Such being the right of the mortgagee, it follows as a necessary consequence that the purchaser from him obtains an absolute legal title as complete, perfect and indefeasible as can exist or be acquired by purchase; and a sale, upon due notice to the mortgagor, whether at public or private sale, forecloses all equity of redemption as completely as a decree of court. *In re Grant*, 303 B.R. 205, 209 (Bankr. D. Nev. 2003) (quoting *Bryant v. Carson River Lumbering Co.*, 3 Nev. 313, 317–18 (1867)) (emphasis added).

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read in conjunction with the language found in NRS 116.310312.[4]

Consistent with the super priority provision in NRS 116.3116(2), NRS 116.310312 allows an HOA to have a super-priority lien that may be non-judicially foreclosed for maintenance or abatement costs:

> 4. The association may order that the costs of any maintenance or abatement conducted pursuant to subsection 2 or 3, including, without limitation, reasonable inspection fees, notification and collection costs and interest, be charged against the unit. The association shall keep a record of such costs and interest charged against the unit and has a lien on the unit for any unpaid amount of the charges. **The lien may be foreclosed under NRS 116.31162 to 116.31168, inclusive.**
>
> 5. A lien described in subsection 4 bears interest from the date that the charges become due at a rate determined pursuant to NRS 17.130 until the charges, including all interest due, are paid.
>
> 6. Except as otherwise provided in this subsection, **a lien described in subsection 4 is prior and superior to all liens, claims, encumbrances and titles other than the liens described in paragraphs (a) and (c) of subsection 2 of NRS 116.3116**. If the federal regulations of the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien, the period during which the lien is prior and superior to other security interests shall be determined in accordance with those federal regulations. Notwithstanding the federal regulations, the period of priority of the lien must not be less than the 6 months immediately preceding the institution of an action to enforce the lien.

NRS 116.310312(4)-(6) (emphasis added).

U.S. Bank's interpretation of NRS 116.3116 that an HOA can never extinguish a first security interest through the non-judicial foreclosure of an HOA lien with super priority amounts renders the last sentence in NRS 116.310312(4) meaningless. Alternatively, U.S. Bank's interpretation would require the same words in the same sentence of NRS 116.3116(2) to have two completely different meanings: **"<u>also prior</u> to all security interests described in paragraph (b)"** when referring "to the extent of any charges incurred by the association on a unit pursuant to NRS 116.310312" would mean that an HOA has a super priority lien that is can foreclose and extinguish a first security interest. At the same time, "to the extent of the

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[4] Nevada courts "'will interpret a rule or statute in harmony with other rules and statutes,'" *Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 418, 132 P.3d 1022, 1028 (2006) (*quoting Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 993, 860 P.2d 720, 723 (1993)); s*ee also Leven v. Frey*, 123 Nev. 399, 405, 168 P.3d 712, 716 (2007) ("[T]his court considers the statute's multiple legislative provisions as a whole ... [and will] not render any part of a statute meaningless.").

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assessments for common expenses" would mean that the HOA is only entitled to be paid 9 months of assessments when a first security interest forecloses. This result was not intended by the Legislature.[5]

An HOA's lien includes two amounts entitled to super priority: charges for abatement and 9 months of common assessments. As shown above, the Legislature intended that both parts may be foreclosed and both parts could extinguish a first security interest. As such, Plaintiff is entitled to injunctive relief.

3. *The Legislature Knows How to Limit HOA Foreclosures; It Did Not Do So in NRS 116.3116.*

If the Nevada legislature intended that super priority amounts could never be foreclosed, extinguishing any first security interest, it could have included a provision similar to NRS 116.31162(4) that prohibits an HOA from foreclosing on a lien based on a fine or penalty for violation of the CC&Rs:

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[5] The priority language for delinquent assessments has been part of NRS 116.3116(2) since it was first adopted in 1991. *See* 1991 Nev. Stat., ch. 245, § 100, at 567-568. In 2009, the Legislature passed, and the governor signed into law, A.B. 361 as amended which became NRS 116.310312. *See* A.B. 361 as enrolled.

NRS 116.310312 was intended to provide HOAs with the power to enter the grounds of a unit to abate nuisances and to lien for the costs of abatement. In establishing an abatement lien's priority, the statute, in pertinent part, provides that **"[e]xcept as otherwise provided in this subsection, a lien described in subsection 4 is prior and superior to all liens, claims, encumbrances and titles other than the liens described in paragraphs (a) and (c) of subsection 2 of NRS 116.3116."** NRS 116.310312(6). The Legislature purposefully chose to borrow the language from NRS 116.3116 to establish an abatement lien's priority. *See* A.B. 361, Sec. 1, Subsec. 6.

When questioned about the provision that became 116.310312(6) during the Senate Judiciary Committee's hearing on A.B. 361, Michael Buckley, Chairman of the Commission for Common-Interest Communities and Condominium-Hotels, stated that "the intent was to follow the language in NRS 116.3116. . . ." Hearing on A.B. 361, before the Senate Judiciary Comm., 75th Leg. (Nev. May 11, 2009) (Assemblyman Richard McArthur, proponent of AB 361, stated that he "deferred a lot to Mr. Buckley in his technical changes [to the bill]." Hearing on A.B. 361 Before the Senate Judiciary Comm., 75th Leg. (Nev. May 6, 2009), at p. 18) During the hearings, the Committee Chair noted that he had received an e-mail asking why subsection (b) was not included in the types of interests to which the abatement lien would not be prior to, because **"[o]therwise, the HOA lien will take precedence over the first security interest lien."** *Id.* The Legislature went on to specifically exclude subsection (b), thereby allowing the abatement charges to have super-priority over the first security interest. The Legislature knew that foreclosing on the abatement lien could extinguish the first security interest as a junior lien, **just like an assessment lien.** As discussed above, it also added language to NRS 116.3116(2) to harmonize the two statutes. The Legislature provided that the HOA super priority abatement amounts, like the super-priority assessment amounts, could be foreclosed by sale. *See* A.B. 361, as enrolled, at Sec. 1, Subsec. 4 ("The lien may be foreclosed under NRS 116.31162 to 116.31168 inclusive.").

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> **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.

The Nevada legislature put no such limitation on the super-priority lien. Nothing in NRS 116.3116, the legislative history, or the comments to the UCIOA mentions the foreclosure of a first deed of trust as being required for the HOA to obtain priority over a first security interest holder or prohibits foreclosure of a super priority lien.

4. *The Nevada Real Estate Division's Interpretation of NRS 116.3116 Supports Extinguishment of the First Security Interest*

In August of 2012, the Nevada Supreme Court recognized that the Nevada Real Estate Division of the Department of Business and Industry is responsible for interpreting NRS 116 and issuing advisory opinions relating to the extent and priority of the HOA super-priority lien. *See State, Bus. & Indus. v. Nev. Ass'n Servs.*, 128 Nev. Adv. Op. 34, 2012 WL 3127275 at 4 (Nev. Aug. 2, 2012)("We therefore determine that the plain language of the statutes requires that the CCICCH and the Real Estate Division, and no other commission or division, interpret NRS Chapter 116.")

The Nevada Supreme Court has also stated that courts generally give "great deference" to an agency's interpretation of a statute that the agency is charged with enforcing. *State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 293 (2000); *see also Dutchess Business Services v. Nev. State Bd. Of Pharmacy*, 124 Nev. 701, 709 (2008) (stating that it "defer[s] to an agency's interpretation of its governing statutes or regulations if the interpretation is within the language of the statute.").

In December 12, 2012, the Real Estate Division issued an advisory opinion directly on point. The Real Estate Division explained the extent of the statutorily-defined super-priority lien, along with the ramifications if a holder of a first security interest failed to cure it prior to an HOA foreclosure sale:

> NRS 116.3116(2) provides that the association's lien is prior to all other liens recorded against the unit *except:* liens recorded against the unit before the

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> declaration; first security interests (first deeds of trust); and real estate taxes or other governmental assessments. **There is one exception to the exceptions, so to speak, when it comes to priority of the association's lien. This exception makes a portion of an association's lien prior to the first security interest.** The portion of the association's lien given priority status to a first security interest is what is referred to as the "super priority lien" to distinguish it from the other portion of the association's lien that is subordinate to a first security interest. **The ramifications of the super priority lien are significant in light of the fact that superior liens, when foreclosed, remove all junior liens. An association can foreclose its super priority lien and the first security interest holder will either pay the super priority lien amount or lose its security.**

See The Super Priority Lien, NV Real Estate Div. Advisory Op. 13-01, pp. 8-9 (Dec. 12, 2012)(emphasis added), attached as **Exhibit 2**.

At a hearing of the Nevada Senate Judiciary Committee on May 6, 2013, Gail Anderson, Administrator of the Real Estate Division provided the following testimony confirming the Real Estate Division's position that the non-judicial foreclosure of an HOA Lien containing super priority amounts extinguishes a first security interest:

> The super priority lien comes into play in two situations—when the association forecloses ahead of a first security and when a first security forecloses ahead of the association. If the first secured forecloses its lien ahead of the association, the amount of the super priority lien would remain a lien on the unit. When the association forecloses before the first security, the issue is whether the first security is extinguished. **The Division believes the purpose of the super priority lien is to give associations leverage over a first security. For that reason, the Division takes the position that the association's foreclosure of its super priority lien would extinguish the first secured if the first secured does not pay the priority lien amount before the sale.**

Summary of NRED Advisory Opinion 13-01, Presentation to Senate Committee on Judiciary, May 6, 2013, attached as **Exhibit 3.**

5. *Comments to the Uniform Common Interest Ownership Act Support the Real Estate Division's Position*

If the provisions of NRS 116.3116(2) stating that portions of an HOA Lien are prior to first security interests are construed as ambiguous, then the Court may consider the legislative history, including the comments to the uniform act adopted by the Legislature. NRS 116.3116 is based on Section 3-116 of the Uniform Common Interest Ownership Act (UCIOA). Comment 1 to Section 3-116 illustrates that an HOA can foreclose on its super priority lien, extinguishing a first security interest:

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> However, as to prior first security interests the association's lien does have priority for 6 months' assessments based on the periodic budget. A significant departure from existing practice, the 6 months' priority for the assessment lien strikes an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of lenders. **As a practical matter, secured lenders will most likely pay the 6 months' assessments demanded by the association rather than having the association foreclose on the unit. If the lender wishes, an escrow for assessments can be required. Since the provision may conflict with the provisions of some state statutes which forbid some lending institutions from making loans not secured by first priority liens, the law of each state should be reviewed and amended when necessary.**

See UCIOA (1982), Section 3-116, Comment 1, p. 155 (emphasis added) (attached in **Exhibit 4**).

First, if an HOA sale could never extinguish a first security interest; it does not make sense that "secured lenders will most likely pay the 6 months' assessments demanded by the association rather than having the association foreclose on the unit." Similarly, if the holder of a first security interest was only liable for the super-priority amount when it foreclosed, creating an escrow account for HOA assessments, like ones used for taxes and insurance, would be unnecessary. Finally, the UCIOA comment would not warn states to evaluate the statute for conflict with provisions of other state statutes "which forbid some lending institutions from making loans not secured by first priority liens" if the super-priority amount was not actually superior to a first security interest. Most importantly, nothing in the comments suggests that an HOA's power to foreclose on the super priority amounts is limited. Defendant's argument that its security interest can never be extinguished is without merit.

6. *The Real Estate Division's Interpretation is Consistent with the Legislative Counsel Bureau's Interpretation of the Effect of an HOA Foreclosure Sale*

The Legislative Counsel Bureau confirmed in an opinion letter on December 7, 2012 that a purchaser at an HOA sale takes free and clear of security interests. *See* LCB Opinion Letter, attached as **Exhibit 5**. "[N]o part of an ownership interest vested in the purchaser may be extinguished by a foreclosure on a security interest to which the previous owner was obligated that occurs after the purchaser obtains title to the property under NRS 116.31164." *Id.* at p. 4. Plainly stated, after an HOA foreclosure sale, a first security interest holder's only recourse is against its borrower personally. Its lien is extinguished and it may not proceed against the

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property. Not surprisingly, the Legislative Counsel Bureau's interpretation is consistent with the Nevada Real Estate Division's Advisory Opinion issued just days later on December 12, 2012.

7. *The Real Estate Division Advisory Opinion is Consistent with Opinions Issued by Nevada Courts*

The Real Estate Division's interpretation is consistent with opinions issued by the Honorable Judge Elizabeth Gonzales of the Eighth Judicial District of Nevada, by the Honorable Judge Linda Riegle of the United States Bankruptcy Court for the District of Nevada and the Honorable Judge Susan Scann of the Eighth Judicial District of Nevada. *See Wingbrook Capital, LLC v. Peppertree Homeowners Assoc.,* Case No A-11-636948-B, June 2, 2011 Order (Dist. Ct. Clark County, NV. June 2, 2011), at p. 3, ¶¶ 2-3 ("Homeowners' associations . . . have a Super Priority Lien which has priority over the First Security Interest on a homeowners' unit.") attached as **Exhibit 6**; *In re Gonzalez*, Case No. BK-S-11-12044-lbr, Dkt. No. 44, unpublished order, at p. 4, ¶¶ 9-14 (Bankr. D. Nev. Dec. 13, 2012) ("Pursuant to NRS 116.3116(2), any security interest in the Property held by [a bank with a first security interest] is junior to the HOA's super-priority lien.") attached as **Exhibit 7**; *see also Centeno v. MERS*, Case No. A-12-660999-C, September 12, 2012 Order, at p. 4 (Dist. Ct. Clark County, NV. September 12, 2012) ("The plain language of the statute supports [Plaintiff's] argument that [it] owns [the property] free and clear of the bank's lien.") attached as **Exhibit 8**.

8. *Defendant Does Not Cite Any Binding Authority.*

Defendant cites to cases, none of which are binding, to support its contention that its failure to cure the super priority amounts of the HOA Lien had no effect when the HOA foreclosed. The cases cited however, are materially distinguishable or the analysis included in the orders is unpersuasive.

Defendant relies on the widely-cited decision by the Honorable Judge Dawson in *Diakonos Holdings LLC v. MTC Financial Inc. et al, Case No. 2:12-cv-00949-KJD-NJK. See* Motion, 10:20-22.[6] The *Diakonos* decision fails to provide any meaningful statutory analysis to

[6] Similar to the *Diakonos* order, the orders in *Sanucci Ct. Trust v. Elevaso*, Case No. A-12-670423-C, Dept. 30 and *Villa Palms Court 102 Trust v. Riley*, Case No. A-13674595 provide no substantive analysis of the statute and do not address the Real Estate Division's Advisory Opinion.

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support their holdings. The order denying plaintiff's motion to remand and granting defendant's motion to dismiss is not binding on this Court and is not particularly persuasive because it is devoid of any statutory analysis. The *Diakonos* order fails to articulate which, if any, plain and unambiguous provisions of NRS 116.3116 supported its dismissal of the complaint and misstates the statutory language. It does not identify which, if any, ambiguous provisions of NRS 116.3116 it interpreted in reaching its conclusion. Further, it does not address other provisions of NRS 116, the legislative history, comments to the UCIOA, or the advisory opinion regarding super priority liens issued by the Real Estate Division on December 12, 2012. In addition, the plaintiff in *Diakonos* has filed a motion to alter or amend judgment so that the court can consider the Real Estate Division's December 12, 2012 Advisory Opinion and the December 7, 2012 Legislative Counsel Bureau's Opinion Letter which were not before the court when it issued its February 11, 2013 order. *See* Docket, *Diakonos Holdings LLC v. MTC Financial Inc. et al, Case No. 2:12-cv-00949-KJD-NJK*, attached as **Exhibit 9**.

Defendant contends the court's ruling in *Wingbrook* stands for the proposition that the HOA's lien is junior to a first security interest. *See* Motion, 12:9-12. *Wingbrook* focuses on the amount off the super priority lien and not the issue at hand in this case. However, as Defendant recognizes, in *Wingbrook,* Judge Gonzalez ruled that pursuant to NRS 116.3116(2), the HOA has a statutory lien which has priority over the First security interest on a homeowner's unit.

Defendant contends the Court's ruling in *JPMorgan Chase Bank v. Countrywide Home Loans*, Case No. A-08-562678, Dept. XVI states that a junior assessment lien has only a limited priority over a first security interest. *See* Motion, 12:24-13:3. In *JPMorgan Chase*, the Honorable Judge Williams found that an HOA has a statutory super priority lien over a deed of trust holder pursuant to NRS 116.3116. RJN at Exhibit R. Unlike this case, though, in *JPMorgan*, it was the lender, not the HOA which foreclosed on the property. As described above, when an inferior interest is foreclosed on, it takes title to the property subject to the superior interest. In *JPMorgan*, the parties litigated over the amount of the HOA's lien because the HOA's super priority lien survived the lender's foreclosure as the superior lien. As such,

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JPMorgan is factually dissimilar to the issue at hand, but still stands for the proposition that an HOA's assessment lien is superior to that of a first deed of trust.

Similarly, Defendant contends the court's decision in *Korbel Family Trust v. Spring Mountain Rance Master Association*, Case No. 06-A-523959-C, confirms that a first security interest is not eliminated by an HOA foreclosure sale. *See* Motion, 12:24-13:3. That is inaccurate. In *Korbel*, the Honorable Judge Glass also found that an HOA has a statutory super priority lien over a first position deed of trust holder pursuant to NRS 116.3116(2). RJN at Exhibit S. Just like in *JPMorgan*, this case was decided when a lender foreclosed prior to an HOA foreclosure. Judge Glass expressly determined that the HOA's statutory super priority lien cannot be extinguished by a first deed of trust lender's foreclosure sale, when the lender forecloses first. *Id.* It logically follows that, if a lender forecloses prior to the HOA and the lender's foreclose does not legally extinguish the HOA's super-priority claim, i.e. the property remains subject to the HOA's lien after the lender's foreclosure, then the lender's lien is legally inferior to the HOA's super priority lien. Since the first deed of trust holder has a lien that is legally inferior to the HOA's super priority lien, it is a matter of law that a HOA's lien extinguishes the first deed of trust holder's inferior lien, when the HOA forecloses first.

Defendant also cites two other cases currently being appealed to the Nevada Supreme Court. In *9320 Pokewood Ct. Trust v. Wells Fargo Bank of Nevada, N.A*, Case No. A-13-677406-C, the Nevada Supreme Court granted Appellant's emergency motion seeking a temporary injunction to prevent respondents from conducting foreclosure sales of the subject properties. Defendant's reliance on the Honorable Judge Nancy Allf's order in *SFR Investments Pool 1, LLC v. U.S. Bank et al*, Case No. A-12-673671-C for the proposition that injunctive relief is inappropriate is similarly misplaced. The Honorable Judge Nancy Allf subsequently granted a preliminary injunction requested by SFR based on a similar factual pattern and the same legal arguments made by SFR in this case. *See SFR Investments Pool 1, LLC v. BAC Home Loans Servicing, LP*, Case Number A-13-679289-C. Non-binding orders that contain limited or no statutory analysis should be disregarded, and Plaintiff's motion should be granted.

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Defendant argues that the court's decision in *Design 3.2, LLC* supports Defendant's position that a HOA foreclosure sale does not extinguish a first position deed of trust. *See* Motion, 14:1-3. However, a review of the pleadings and Judge Silver's minute order reveals that the issue in this case was not fully briefed or argued in *Design 3.2, LLC*. Therefore, the minute order cited by Defendant is not only non-binding, but is also unpersuasive.

Defendant's motion should be denied.

9. *Non-Judicial Foreclosure is Equitable and Provides Due Process*

The Nevada legislature has chosen to adopt non-judicial foreclosure in the various contexts, including HOA liens. The non-judicial foreclosure requirements found in NRS 116.31162-116.31168 closely track the requirements of NRS 107.080 in place at the time NRS 116 was enacted and through 2005 when the Legislature began making significant changes to the requirements to address predatory lending and robo-signing by the banks. As shown in the table below, the Legislature included almost the same requirements for an HOA non-judicial foreclosure sale as it did for non-judicial foreclosure sales by banks before banks were perceived to be abusing the system. The changes to NRS 107.080 since then include the implementation of the foreclosure mediation program, special requirements designed to give extra information to those in owner-occupied properties, and provisions to address concerns about which bank owns the note underlying the deed of trust being foreclosed.

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HOA Foreclosure	Statutory Requirement	Bank Foreclosure
NRS 116.31162(1)(a)	Delinquency by homeowner	NRS 107.080(1)
NRS 116.31162(1)(a)	Mail notice of delinquency to homeowner	No statutory requirement; generally required by terms of deed of trust
NRS 116.31162(1)(b)	Execute Notice of Default and Election to Sell (NOD) that describes deficiency in performance or payment	NRS 107.080(2)(b)
NRS 116.31162(1)(a)	Record NOD	NRS 107.080(3)
NRS 116.31162(2)(b)	Mail NOD by certified or registered mail, return receipt requested to homeowner	NRS 107.080(3)
NRS 116.31163 and NRS 116.31168 (incorporating requirements of NRS 107.090)	Mail NOD to interested parties who request notice	NRS 107.090(3)(a)
NRS 116.31168 (incorporating requirements of NRS 107.090)	Mail NOD to subordinate claim holders	NRS 107.090(3)(b)
NRS 116.31162(1)(c)	Failure to pay for 90 days after NOD is recorded and mailed	NRS 107.080(4)
NRS 116.311635(1)(a)	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/posting in a public place and on property	NRS 107.080(4)
NRS 116.311635(1)(a)(1)	Mail Notice of Sale (NOS) to homeowner	NRS 107.080(4)
NRS 116.311635(1)(b)(1) and NRS 116.311635(1)(b)(3)	Mail NOS to interested parties who request notice	NRS 107.090(4)
NRS 116.311635(1)(b)(1)	Mail NOS to subordinate claim holders	NRS 107.090(4)
NRS 116.311635(1)(b)(3)	Mail NOS to Ombudsman	No statutory requirement
NRS 116.311635(2)	Post NOS on property or personally deliver to homeowner	NRS 107.080(4)

Most importantly, the 1991 Legislature included specific language in NRS 116 stating that the noticing requirements of NRS 107.090 also apply an HOA foreclosure: **"The provisions of NRS 107.090 apply to the foreclosure of an association's lien as if a deed of trust were being foreclosed." NRS 116.31168(1)**. NRS 107.090 requires notice to all subordinate claim holders:

> 3. The trustee or person authorized to record the notice of default shall, within 10 days after the notice of default is recorded and mailed pursuant to NRS 107.080, cause to be deposited in the United States mail an envelope, registered or

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certified, return receipt requested and with postage prepaid, containing a copy of the notice, addressed to:

(a) Each person who has recorded a request for a copy of the notice; and

(b) Each other person with an interest whose interest or claimed interest is subordinate to the deed of trust.

NRS 107.090(3)(a)-(b) (emphasis added).

Because a deed of trust is subordinate to at least a portion of the HOA's Lien, the HOA is required to give notice of the foreclosure. Here, the holder of the First Deed of Trust was given notice of the HOA foreclosure sale, yet failed to act.

10. *Plaintiff's Claims for Quiet Title and Declaratory Relief Should Not be Dismissed.*

Pursuant to NRS 40.010, a quiet title action "may be brought by any person against another who claims an estate or interest in real property, adverse to the person bringing the action, for the purpose of determining such adverse claim." The burden of proof in a quiet title action "rests with the plaintiff to prove good title in himself." *Wensley v. First Nat. Bank of Nevada*, 874 F.Supp.2d 957, 966 (D. Nev. 2012) (citing *Breliant v. Preferred Equities Corp.*, 112 Nev. 663, 918 P.2d 314, 318 (1996)). To quiet title, a party is required "to allege that [it] has paid any debt owed on the property." *Id.*, (citing *Lalwani v. Wells Fargo Bank, N.A.,* No. 2–11–cv–00084, 2011 WL 4574338 at *3 (D.Nev. Sep. 30, 2011) and *Ferguson v. Avelo Mortg., LLC,* 126 Cal.Rptr.3d 586, 589 (Cal.Ct.App.2011)). Here, U.S. Bank is alleging a claim adverse to SFR relating to the effect of the HOA foreclosure on U.S. Bank's security interest in the Property. As more fully explained above, pursuant to NRS 116.3116, the HOA foreclosure that vested title in SFR also extinguished U.S. Bank's security interest. Plaintiff has asserted sufficient factual allegations to survive Defendant's motion to dismiss, this court should not dismiss Plaintiff's claim for quiet title and declaratory relief.

11. *Plaintiff's Claim For Injunctive Relief Should Not Be Dismissed.*

Because Plaintiff's quiet title survives dismissal, Plaintiff's injunctive relief claim should also remain. As more fully described in Plaintiff's motion for preliminary injunction, which is fully incorporated herein by reference, Plaintiff is entitled to injunctive relief because it enjoys a likelihood of success on the merits and will suffer injury if Defendant is allowed to sell the

Property. As set forth above, Defendant's entire Motion is based on a faulty interpretation of the law. In determining whether to issue a preliminary injunction, this Court should consider the following factors: (1) the applicant's likelihood of success on the merits; (2) the threat of irreparable harm to the applicant if the injunction is not granted. *Pickett v. Comanche Const., Inc.*, 108 Nev. 422, 426 (1992). Plaintiff's request for injunctive relief should be granted because it has a reasonable probability of success on the merits based on the plain language of NRS 116.3116 and the authority interpreting that statute.[7]

12. *Plaintiff's Claim for Unjust Enrichment Should Not be Dismissed.*

Defendant does not disagree that Plaintiff has expended funds and resources in connection with the acquisition and maintenance of the Property. Instead, Defendant argues Plaintiff has not been unjustly enriched or otherwise harmed in this case because Plaintiff purchased the Property subject to Defendant's security interest. That contention is simply incorrect. As discussed in detail above, Defendant's interest in the Property was extinguished when Defendant failed to cure prior to the HOA foreclosure. As such, Plaintiff purchased the Property free and clear of Defendant's security interest. However, as alleged in Plaintiff's complaint, if this Court determines SFR is not the rightful owner of the Property, Defendant will be unjustly enriched by the resources Plaintiff expended on the property. As such, Plaintiff has asserted a valid claim for unjust enrichment.

C. SFR Should Be Granted Leave to Amend

As explained above, SFR has plead its claims sufficiently to survive a motion to dismiss for failure to state a claim pursuant to NRCP 12(b)(5). However, should this Court determine that SFR's complaint does not contain sufficient factual allegations, SFR respectfully requests

[7] A reasonable probability of success, not an overwhelming likelihood, is all the movant need show for preliminary injunctive relief. *See Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 422 (9th Cir. 1991); *Johnson v. California State Bd. of Accountancy*, 72 F.3d 1427, 1429 (9th Cir. 1995) ("[F]air chance of success on the merits," not certainty or even probability, is sufficient for preliminary injunction purposes.) Where there is a strong probability of success on the merits, like here, the movant need only demonstrate that it will suffer a degree of hardship that outweighs the hardship of the defendant. *See Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524, 1528 (9th Cir. 1993).

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leave to amend pursuant to NRCP 15(a).

IV. CONCLUSION

U.S. Bank is not entitled to dismissal under NRCP 12(b)(5). U.S. Bank's motion should be denied. Alternatively, SFR requests leave to amend its complaint pursuant to NRCP 15.

DATED May 23rd, 2013.

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EXHIBIT 1

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

*James L. Winokur***

TABLE OF CONTENTS

** Professor of Law, University of Denver College of Law, LL.B., A.B., University of Pennsylvania. Gurdon Buck, David Kirch, Jim Strichartz, and Dale Whitman were particularly helpful with comments on earlier drafts of this article. This research also benefitted from the generous comments of Mike Clowdus, Wayne Hyatt, Lynn Jordan, Jerry Orten, and Gary Tobey. Valuable research assistance was provided by Randy Evans, Blake Thompson, and Florian Kogelnick.

INTRODUCTION

The Uniform Common Interest Ownership Act (UCIOA), promulgated in 1982 by the National Conference of Commissioners on Uniform State Laws (Uniform Laws Conference), consolidates previously promulgated uniform acts which address condominiums,[1] planned communities[2] and cooperatives.[3] The consolidation of acts regulating these three different ownership forms is based on the Uniform Laws Conference's accurate perception[4] that, substantively, all three forms share a fundamental common trait: in all these forms unit owners beneficially[5] own both their own units and the community's common elements, with a mandatory community association managing the common areas. Thus, common interest communities (CICs) regulated by UCIOA include all developments which have mandatory community associations responsible for managing common areas or assets, with funds assessed by the association against individual homeowners, and enforcing use restrictions throughout the

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

2. UNIF. PLANNED COMMUNITY ACT, 7B U.L.A. 8 (1980).

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

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

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

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

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

common interest community.[6] Thus, CICs include condominiums, townhouses, free-standing single-family residences, cooperatives, and other planned unit developments.

CICs were relatively novel ownership forms only twenty-five years ago. Since then, they have proliferated, and now CICs account for a substantial portion of the entire United States housing stock. CICs currently include residences of approximately 30,000,000 people or more, including 12-17% of the U.S. population.[7] While condominium development may have peaked temporarily in some areas,[8] the overall number of common interest communities is expected to grow substantially again during the 1990s.[9]

One factor contributing to the recent growth of CICs is the affordability of clustered housing in which the crowding of individual homes is offset by substantial common areas and facilities, developer economies in overall acreage, construction of homes and infrastructure, and in provision of public service, where streets built for private maintenance are held to less exacting standards than the local governments would require if the same streets were dedicated over to public ownership and care. Furthermore, CIC developments have been the vehicle for privatization of a range of previously public services, including not only

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

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

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

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

maintenance of facilities, but also services such as trash collection, snow removal, street maintenance and cleaning,[10] with community associations both obligated and empowered to perform them or contract for their performance.[11] Planned Unit Developments (PUDs) have allowed local planning commissions to save local governments money by requiring that streets, other infrastructure or mandatory amenities such as drainage basins or parks be provided by the subdivision developer rather than the municipality, and then maintained privately by an association so that the public government avoids maintenance responsibilities.

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

In carrying out their crucial responsibilities for preservation and maintenance of community infrastructure and common assets such as building exteriors, associations vary greatly as to their financial strength,[12] and the financial and personal management experience of their

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

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

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

From a reserves survey of CAI member associations, RESERVE TO PRESERVE also reports that 4% of surveyed associations lacked any reserves, with an additional 4% having added nothing to their reserves in the immediately prior year. These figures represented improvements from five years earlier. The report praises the average responding associations as having both increased median reserves per association by 40%, and doubling reserves per unit

elected officers.[13] The main source of financial and interpersonal strain on association boards is the association's inability to collect assessments.[14]

Contributing to many associations' financial weakness, the collection of delinquent assessments has been an extremely inefficient and often frustrating process. In hard economic times, assessment collection typically becomes both more important and less effective. Traditionally, CIC declarations, and many state statutes,[15] have provided that the association holds a lien against each unit to secure payment of owner assessment obligations. There is common law authority[16] that these assessment liens

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between 1979 and 1982. RESERVE TO PRESERVE, at 29. Figures for recent condominium conversions of older buildings were particularly troubling. Also, the report characterizes as a "serious financial management deficiency" that fewer than a third of all responding associations report having any written investment policy. Further, only 13% of volunteer self-managed associations have such a policy. *Id.* at 29. The 524 associations responding to this survey are likely unusually active in seeking training and in managing the associations, so that these results might understate reserves inadequacies in 1982. Arguably, reserves inadequacies will have become worse during the recessionary years since RESERVE TO PRESERVE was published. For additional recent expression of concern regarding adequacy of association reserves generally, see also *RCA Characteristics and Issues, in* RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM? 9-18 (U.S. Advisory Commission on Intergovernmental Relations, 1989).

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

14. *See also* BARTON & SILVERMAN CALIFORNIA STUDY, *supra* note 7, at 22.

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

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

have priority over all unit mortgages.[17] However, state statutes[18] and declaration provisions[19] have typically been effective to relegate this assessment lien to junior priority relative to at least some mortgages against the same unit. Therefore, associations typically compete unsuccessfully for foreclosure sale proceeds with lenders who hold mortgages on CIC units. Typically, the foreclosure sale bid will equal no more than the foreclosing lienor's debt,[20] leaving no foreclosure sale proceeds remaining to pay any of the association's lien.[21] In a weak market, where the unit's value would

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

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

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

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

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

be lower than the amount of the senior mortgage, the association lien's junior priority is particularly devastating. Since any assessment lien foreclosure purchaser would have to buy subject to a mortgagee lien greater than the entire current property value, foreclosure of the junior association lien becomes a worthless remedy.

In evaluating the policy of according unit mortgagees priority over association assessment liens, it would be folly to ignore the needs of mortgage lenders, whose CIC investments have from the start been crucial to the emergence of these new ownership forms.[22] On the other hand, the financial strength of an association often bears strongly on the value of the housing units in which both lenders and residents have invested. Indeed, as assessments on some properties in a community become uncollectible, the CIC unit lender is itself damaged by increasing assessments and decreasing values for other properties it may hold as security.[23]

Associations in weak financial condition cannot always justify incurring the costs involved to pursue collection efforts for unpaid assessments actively, especially when they are unsure of the ultimate results of the enforcement effort. When CIC assessments go uncollected, however, the defaulting homeowner's share of community costs to maintain common elements currently falls on those least responsible for the default—neighboring homeowners who regularly pay their assessments, remain in good standing, and constitute the community association.[24] As their assessments rise, these owners face greater pressure to default if they cannot afford the assessment increases, and lower valuations of their homes should they opt to sell in order to escape unanticipated assessment costs.[25]

Faced with this dilemma, some associations attempt to defer the

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Ass'n v. Norwest Bank Bismark, N.A., 420 N.W.2d 349 (N.D. 1988) (no assumption by foreclosure sale purchaser, no liability).

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

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

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

25. Judy and Wittie, *supra* note 24, at 482 (arguing that disproportionate burdening of a decreasing base of solvent owners itself threatens ability of those owners to meet higher assessment bills, leading to increasing foreclosures).

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

This syndrome of disproportionately burdening owners in good standing—whose resulting assessment defaults further burden a shrinking group of owners still paying—is greatly exacerbated in hard economic times; foreclosures and abandonment of CIC units severely deplete the assessment base and property values within these communities.[26] As the assessment base dries up, it is difficult for association leadership to maintain common elements. As a result, CICs will face the quandary of either heavily assessing the decreasing number of remaining solvent residents, often in excessive amounts, or deferring needed maintenance facilities as basic as the roofing over individual units, only to be later forced to higher assessments as deferred maintenance takes its toll. As CICs age further and require more substantial maintenance, these problems will become more and more acute. Considering that most presently existing associations are less than 20 years old,[27] the worst CIC maintenance crises lie ahead.[28]

When a homeowner defaults on a mortgage loan outside community association developments, the lender assumes substantial financial responsibility for the property. At least pending foreclosure, the lender—who will likely own the home after foreclosure[29]—will typically undertake to protect its security.[30] The lender may often find it unfeasible to care for the property by possessing it. However, where the borrower has become irresponsible, the lender will often pay costs of casualty insurance, security, physical maintenance of the exteriors of homes and landscaping.[31] Prominent among these burdens is the payment of prop-

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

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

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

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

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

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

erty taxes. In this era of privatized public services, with private associations rather than public governments collecting trash, maintaining roads and parks, and the like, association assessment charges have become more and more analogous to property taxes, liens which receive priority over virtually all others.

This norm of lender responsibility for insurance, maintenance, and property taxation costs after default should also apply to CIC homes. Imposing lender responsibility for security preservation costs it would bear in other, non-CIC communities is appropriate because—as in those other communities—this obligation would merely call upon the lender to protect its own security, albeit partly in the form of assessment responsibility in a CIC. Furthermore, the lender is able to protect itself against losses on its loan in ways community associations cannot.[32] Unlike most associations,[33] the lender can investigate and disapprove a homebuyer borrower's credit. It can control its risk by varying the loan size relative to value of the security or by requiring the escrow of funds to cover priority claims. Furthermore, the lender can obtain mortgage insurance.[34] These safeguards are not available to community associations.[35] As the unit owner's involuntary creditor, a community association exercises no discretion over whether to rely on a particular debtor for its income stream.[36]

UCIOA's provisions delineating the respective creditor rights of community associations and mortgage lenders grow out of recognition of the harsh realities of community associations' economics, the nature of mortgage lenders' risk and risk avoidance mechanisms in CICs, and the impor-

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

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

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

34. Judie and Wittie, *supra* note 24, at 496.

35. *Id.* at 494.

36. *Id.* at 475-76.

tance of lenders' continued CIC investment. These realities require financially solvent community associations, which operate more efficiently in collecting and managing assessment revenues. In that sense, what is required are "meaner, leaner" economic units, which can be relied upon by both CIC investors and the community at large to effectively perform the maintenance functions they were created to undertake.[37] Consequently, UCIOA enables more efficient collection of common assessments from all unit residents.[38] Where recovery from some unit owners is thwarted, UCIOA imposes a significant but limited portion of the unpaid assessment burden on the defaulting unit owners' lenders, whose security is enhanced with those very assessment dollars.[39]

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

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

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

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

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

II. UCIOA's Response: Toughening Assessment Collection Remedies for Community Associations

A. *Recovery of Collection Costs*

UCIOA contains several measures to strengthen association collection powers as a means to increase community associations' financial viability. UCIOA supplements existing community association rights by authorizing the association to "impose charges for late payment of assessments and, after notice and an opportunity to be heard, levy reasonable fines for violations of the declaration, bylaws, rules and regulations of the association."[40] This bolsters a community association's " 'governmental' functions as the ruling body of the common interest community,"[41] but it would be far more effective if it also addressed the often paralyzing specter of attorney fees for enforcement of assessment obligations.[42] With public hostility toward lawyers running high, attorneys fees legislation could be controversial. However, since individual delinquencies are often small components of a substantial total of assessments owed by all residents in a community, enforcement of assessment delinquencies will often not take place if the association lacks recourse to recover its expenses. The importance of enabling associations to collect attorneys fees for enforcement of assessments, whether by lien foreclosure or personal suit, cannot be overemphasized. Association fees[43] for late payment of assessments, as authorized by UCIOA, will cover only a small fraction of enforcement expenses.

B. *Association Lien with Split Priority*[44]

To further support collection of CIC assessments, the UCIOA creates a perpetually renewable association lien for unpaid assessments or fines,

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

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

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

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

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

> Section 3-116. Lien for Assessments
>
> (a) The association has a lien on a unit for any assessment levied against that unit or fines imposed against its unit owner from the time the assessment or fine becomes due. Unless the declaration otherwise provides, fees, charges, late charges, fines, and interest charged pursuant to Section 3-102(a)(10), (11), and (12) are enforceable as assessments under this section. If an assessment is paya-

"from the time the assessment or fine becomes due" or, where an assess-

ble in instalments, the full amount of the essessment is a lien from the time the first instalment thereof becomes due.

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

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

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

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

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

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

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

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

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

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

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

(3) In a cooperative whose unit owners' interests in the units are

ment is due in installments, "from the time the first instalment [sic] thereof becomes due."[45] Subject to any contrary language in the declaration, the "assessments" for which UCIOA's lien is provided includes not only regular monthly dues, but also fees or charges for the use of common facilities or for association services, late charges and fines, and interest.[46]

The UCIOA assessment lien is given statutory priority over all liens and encumbrances on each unit, with the limited exceptions of interests recorded before the declaration, liens for taxes or other public governmental charges, and first mortgages recorded before any assessment delinquency.[47] In its most controversial provision, UCIOA grants the

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

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

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

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

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

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

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

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

assessment lien a further limited priority over such first mortgages.[48] The lien and its statutory priority may not be waived.[49]

1. Super priority versus first mortgages

In its most heralded break with traditional law,[50] UCIOA grants the association a lien priority over first mortgages recorded before any assessment delinquency "to the extent of the common expense assessments based on the periodic budget adopted by the association pursuant to section 3-115(a) which would have become due in the absence of acceleration during the six months immediately preceding an action to enforce the lien."[51] Any excess of total assessment defaults, in addition to other lienable fines or costs over this six-month ceiling remains a lien on the property. The portion of the association lien securing this excess will be junior to the first mortgage on the unit, but senior to other mortgages and encumbrances not recorded before the declaration. Thus, although the association's lien is a single lien, its varying priority effectively separates the association's rights in a given unit into what may be conceived of as two liens,[52] which are hereinafter referred to as the "Prioritized Lien" and the

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48. *Id.*

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

50. The "super priority" lien for assessments over first mortgages and deeds of trust has thus far been adopted as part of the UCIOA in the following states: Alaska, ALASKA STAT. § 34.08.470 (1990); Colorado, COLO. REV. STAT. § 38-33.3-316 (1991); Connecticut, CONN. GEN. STAT. § 47-258 (1989); Nevada, NEV. REV. STAT. § 116.3116 (1991); West Virginia, W. VA. CODE § 36B-3-116 (1986). Essentially the same statutory lien priority provision has been adopted as part of the Uniform Condominium Act (UCA), applicable only to condominiums, in the following states: Pennsylvania, PA. CONS. STAT. ANN. § 5-3101 to -3414 (1990), Rhode Island, R.I. GEN. LAWS § 34-36.1-1.01 to 34-36.1-4.20 (1982). *But see* Act of March 9, 1992, ch. 8, 1992 R.I PUB. LAWS 8 (recently amending R. I. GEN. LAWS §34-36.1-3.16 (1991), cutting back the super priority from five years of assessments to six months) *Compare* WASH. REV. CODE § 64.34.364(3) (1991) (providing for the limited six-month assessment lien priority, except that (1) a mortgagee may reduce the six-month priority by up to three months of delay in the association's provision of a notice of delinquency where the mortgagee has previously asked for such notice from the association); WASH. REV. CODE § 64.34.364(4) (1991); WASH. REV. CODE § 64.34.364 (1991) (providing that the super priority for any portion of the lien is waived if it is foreclosed by non-judicial foreclosure). Washington, D.C. has adopted the super priority for assessment liens as part of a sweeping revision bringing its statute fairly closely in line with the UCA. *See* D.C. CODE ANN. § 45-1853 (1991). Several states have adopted the UCA without incorporating the "super priority" lien provisions. *See, e.g.*, ARIZ. REV. STAT. ANN. § 33-1201 (1990 & Supp. 1991); ME. REV. STAT. ANN. tit. 33, §§ 1601-101 to 1604-118 (West 1988 & Supp. 1991); MO. ANN. STAT. §§ 448.1-101 to 448.1-120 (Vernon 1986); NEB. REV. STAT. §§ 76-801, 76-874 (1990); N.M. STAT. ANN. §§ 47-7A-1 to 47-7D-20 (Michie Supp. 1991).

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

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

"Less-Prioritized Lien."

A careful reading of the quoted language reveals that the association's Prioritized Lien, like its Less-Prioritized Lien, may consist not merely of defaulted assessments, but also of fines and, where the statute so specifies,[53] enforcement and attorney fees. The reference in section 3-116(b) to priority "to the extent of" assessments which would have been due "during the six months immediately preceding an action to enforce the lien"[54] merely limits the maximum amount of all fees or charges for common facilities use or for association services, late charges and fines, and interest which can come within the Prioritized Lien.[55] So, for example, if a unit owner fell three months behind in assessments, the Prioritized Lien might include—in addition to the three months of arrearages—the other fees, charges, costs, etc. enforceable as assessments under UCIOA.[56] However, for any assessments or other charges to be included within the Prioritized Lien, there must have been a properly adopted[57] periodic budget promulgated "at least annually" by the association from which the appropriate six months assessment ceiling can be computed.

UCIOA's specification of "the 6 months immediately preceding an

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tion of seller's trust deed to construction loan lien deemed conditional, so that only part of construction lien takes priority).

53. *See supra* note 46.

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

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

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

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

action to enforce the [association's] lien"[58] as the Prioritized Lien's measuring stick leaves unclear the consequences of an association's non-judicial foreclosure and of a mortgagee's foreclosure to which the association lien is subject. In both these cases, it may be argued that there has been no "action to enforce the [association's] lien,"[59] and therefore there is no prioritized lien.

A less restrictive reading of section 3-116(b) would suggest, first, that a non-judicial foreclosure is an "action" as contemplated by UCIOA. After all, if section 3-116 is adopted with its optional authorization for non-judicial foreclosure of the association lien, it would seemingly serve no purpose to deny the association super priority when the association elected the option this very statute provides. This argument is particularly strong in states where non-judicial foreclosures have mandatory judicial components, thereby more closely resembling a judicial "action."[60] Where the association is party to a judicial foreclosure initiated by a first mortgagee, the association can reasonably argue that the action initiated by the mortgagee has, by joinder of the association, also become an action to enforce the association's lien.[61]

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

59. *Id.*

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

61. *See, e.g.*, BAXTER DUNAWAY, *supra* note 20, at 12-9 (1991). *See also* Marion A. Marquis, *Statutory Redemption Rights*, 3 WASH. L. REV. 177, 185-86 (1928) (addressing the rule that a creditor may not exercise rights of statutory redemption after "his own" foreclosure sale)

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

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

Rather than relying on such esoteric distinctions, however, UCIOA's § 3-116(b) should be clarified. Washington has a provision measuring the six months from the date of:

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

WASH. REV. CODE § 64.34.364(3) (Supp. 1991). By measuring the six months from the date of a foreclosure sale, the Washington statute has the additional advantage of including within

Because of lender fears that the amount of the Prioritized Lien could balloon in any given year, the Colorado version of the super priority subjects the Prioritized Lien to an additional maximum: six times 150% of the average monthly assessment during the association's immediately preceding fiscal year.[62] While limiting the senior lender's exposure for sudden, short-lived assessment increases, this provision still allows assessments to grow quite substantially over time.

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

UCIOA's provisions on association assessment liens, including the grant of the "super priority" to a portion of that lien, are among relatively few sections[63] of the Uniform Act expressly singled out for application to associations existing before enactment of UCIOA.[64] UCIOA limits applicability of these substantive sections: "those sections apply only with respect to events and circumstances occurring after the effective date of this [Act] and do not invalidate existing provisions of the [declaration, bylaws, or plats or plans] of those common interest communities."[65] Clearly, new CICs created after enactment of UCIOA in a given state will be generally subject to UCIOA, including its lien assessment provisions.[66]

In communities predating enactment of UCIOA,[67] UCIOA's associa-

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the lien priority an important period of frequent assessment delinquency.

In considering whether junior liens are being enforced in senior lienor foreclosure actions, see 4 AM. LAW OF PROP. § 16.191 (Casner ed., 1952). Here, the late Professor Osborne's treatment reflects that the purposes of including a junior lienor in a senior lienor's foreclosures include allowing such junior to realize on its security much like the senior, except with a lower priority claim to the sale proceeds.

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

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

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

65. *Id.*

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

67. UCIOA § 1-206 leaves it unclear whether a preexisting CIC can elect to be treated as fully subject to UCIOA, as if it were a new CIC. UCIOA § 1-206, 7 U.L.A. at 269 (1982). The language of § 1-206 appears to permit such an election, if only by an amendment to the declaration incorporating the full UCIOA statute into the declaration. *Id.* However, Comment 6 to § 1-206 explicitly concludes that this section does not permit a preexisting community to elect to come entirely within the provisions of the Act. UCIOA § 1-206 cmt. 6, 7 U.L.A. at 269 (1982). The comment may be distinguishing between amendment of internal governance documents versus choice of applicable public law. However, it is unclear why an amendment incorporating the statute, or even a UCIOA variant, should not be permissible under UCIOA § 1-206. Comment 6 does suggest a daunting alternative—terminating the CIC under preexisting law and creating a new, post-UCIOA CIC. The biggest drawback to this suggestion is that, until UCIOA has become applicable, termination would require a

tion lien provisions also govern the respective priorities of an association lien and a first mortgage, but only where both the lien and the mortgage arise after UCIOA's enactment.[68] Applying the statute to pre-UCIOA mortgages would likely violate UCIOA's restriction on its applicability to events and circumstances occurring after the effective date of UCIOA. However, where a post-UCIOA mortgage is given on the unit in a preexisting CIC, the events and circumstances at issue—the mortgage and any assessment delinquency—will have occurred after UCIOA's effective date.

This analysis is fairly straightforward where the declaration is silent regarding lien priorities, perhaps relying on existing statutory law to resolve the priorities. Applicability of the "super priority" lien also seems appropriate where the declaration provides that priority of the assessment lien will be pursuant to priority imposed in a genenically defined, state condominium or CIC statute.[69] By effectively amending the statute, UCIOA would change the substantive content of the declaration's priority provision.

However, in the many cases where the association declaration expressly provides that first mortgages take priority over the assessment lien,[70] UCIOA's applicability to new financing in preexisting CICs is threatened. First, mortgagors likely will argue that conferring UCIOA's "super priority" upon the assessment lien in the face of a subordination

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unanimous vote of unit owners unless the declaration authorized termination of the CIC upon a lesser vote. *See* GERALD KORNGOLD, PRIVATE LAND USE ARRANGEMENTS, § 11.03 (1990). UCIOA replaces the unanimity requirement for termination with an 80% requirement. UCIOA § 2-118, 7 U.L.A. at 483 (1982).

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

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

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

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

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

provision in the declaration "invalidates" the declaration's subordination provision in violation of UCIOA's applicability section.[71] Preexisting associations, on the other hand, will seek at least limited application of the new "super priority" lien over first mortgages within their communities. Applicability of the "super priority" lien to new loans in their own community may well have been the basis for CIC's initial support of UCIOA's enactment.

In constructing an argument for application of the "super priority" lien in preexisting communities with subordination provisions, the threshold issue must be interpretation of the declaration's subordination language. Associations may argue that the assessment lien referred to in this contractual subordination referred only to the assessment lien *created by* the same *declaration*. Of course, this interpretation would rely heavily on the specific subordination language. If the contractual subordination is narrowly drawn to subordinate only "*the assessment provided for herein*,"[72] the lien of the UCIOA statutory lien could be portrayed by the association as distinct from the contractual lien created by declaration. As a statutory lien under a statute not even in existence when the declaration was drafted, the UCIOA lien could not have been in the contemplation of the declaration's drafter. Thus, the association would argue, the UCIOA lien is unaddressed and unaffected by the declaration's assessment lien subordination.[73]

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

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

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

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

73. An analogous issue is created where a CIC's declaration expressly provides that notice of assessment liens shall be afforded by recording notices of default whenever a unit owner fails to pay assessments. This requirement is far more burdensome than the UCIOA requirement that "recording of the declaration constitutes record notice and perfection of the lien." UCIOA § 3-116(d), 7 U.L.A. at 351 (1982). Recording requirements applicable to the UCIOA statutory assessment lien are discussed *infra* in text accompanying notes 135-41. As suggested by the immediately preceding discussion of the priority provision in many CIC declarations, however, it will often be arguable that the perfection requirement applied only to the lien created by the declaration, and not to the UCIOA lien.

Even if the declaration's subordination is interpreted as intended to cover all assessment liens, contractual and statutory, the association may argue that UCIOA overrides the subordination by expressly subjecting preexisting communities to section 3-116.[74] The association should prevail, and the "super priority" lien provisions will govern priority of assessment liens versus new mortgages, unless application of the super priority provisions is seen as "invalidating" the preexisting CIC declaration's subordination in violation of section 1-204.

UCIOA's section 1-204 declares that, as applied to preexisting communities, the statute may "*not invalidate* existing provisions of the [declaration]."[75] By the better view, according "super priority" to the association lien over a post-UCIOA mortgage would limit, but not "invalidate,"[76] the declaration's subordination of the assessment lien. Far from

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

75. *Id.*

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

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

Though incorporated associations differ in important respects from the classic for-profit corporation, *see, e.g.*, NATELSON, *supra* note 19, at 66-67, the validity of applying corporate-regulatory provisions of UCIOA to incorporated associations can be reinforced by reference to reserved corporate power provisions in state constitutions and statutes, which allow fu-

invalidated, the subordination will still apply. First of all, it will give a post-UCIOA first mortgage priority over any excess beyond the limited amount of the Prioritized Lien. Also, the subordination will remain wholly effective as against all pre-UCIOA mortgages, because such mortgages would not be "events and circumstances occurring after the effective date of [UCIOA]."[77]

This result is only fair. The priority of association liens on units in preexisting associations with declaration subordination provisions should properly depend on whether competing first mortgages were prior or subsequent to the enactment of UCIOA. Mortgagees making CIC loans after the enactment of UCIOA should reasonably be held to be on notice[78] that they take subject to the "super priority" lien. With such notice available to lenders, there is little reason to deprive preexisting associations of this important benefit of the new legislation which these associations particularly need. Older associations are particularly likely to encounter physical decay of common improvements. Association solvency is crucial in order to repair or replace these aging common improvements. Also, older associations formed when experience with CICs was very limited are the most likely to have relatively primitive documentation, providing inadequate collection remedies for the association, and specifying less realistic mechanisms for amendment of their documentation to add efficient remedies.

In preexisting CICs, recognizing the association's Prioritized Lien as senior to a post-UCIOA mortgage and overriding the declaration's contractual subordination should be permissible under the U.S. Constitution's contracts clause.[79] That clause is the principal reason UCIOA's impact was so narrowly limited in its application to preexisting common interest communities.[80] The only parties in preexisting contractual relationships addressed by this application of UCIOA are associations seeking

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ture changes in corporate regulations as part of the contract creating the corporation. *See, e.g.*, Brundage v. New Jersey Zinc Co., 226 A.2d 585 (N.J. 1967); McNulty v. W. & J. Sloane, 54 N.Y.S.2d 253 (N.Y. Sup. Ct. 1945). *See generally* HARRY G. HENN & JOHN R. ALEXANDER, LAW OF CORPORATIONS, 953-55 (1983). Therefore, in considering adoption or amendment of the statute, section-by-section review of the applicability provisions will likely generate several candidates for broader applicability than now provided in UCIOA.

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

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

78. Formally, notice to lenders derives from the new statute plus recorded declarations which UCIOA gives greater effect as imparting notice. As a practical matter, the lending and title communities will very likely become actually aware of UCIOA's lien priority provisions—including the new import of recorded declarations, and the lack of necessity for recorded delinquencies—during the legislative process. At the latest, lenders will learn of the new provisions when they begin transacting under the new statute. On the other hand, notice to new mortgagees of properties in preexisting CICs could be further clarified by use of more precise language for resolving differences between UCIOA's provisions and those of declarations in communities where new loans are made.

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

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

broader application of the UCIOA lien provisions, and the unit owners who are the declaration's constituent parties. Overall unit owner liability is unchanged by UCIOA's alteration of lien priorities.[81] The parties burdened by the "super priority" lien are those mortgage lenders whose mortgage contracts with unit owners were created after enactment of UCIOA.[82] Therefore, UCIOA's impact on these mortgage contracts is not retroactive, as required for violation of the U.S. Constitution's "contract clause."[83] Regardless of the lenders to which it is applied, the "super priority" lien's constitutionality is further bolstered by its relatively insubstantial,[84] remedial[85] impact requiring merely the prioritizing of six months' worth of assessments. This is a very narrowly tailored[86] method of addressing "a broad, generalized economic or social problem."[87]

3. Priority versus mechanics' liens

In language which may prove ambiguous, UCIOA also expressly avoids changing governing state law regarding attachment and priority of mechanics' and materialmen's liens.[88] Under most states' mechanics' and

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

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

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

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

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

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

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

88. Useful discussion of these priority questions in the context of the Uniform Condominium Act appears in Judy and Wittie, *supra* note 24, at 501. *See also* the FHA Model Act, *supra* note 18, on which many state statutes were based, providing the association lien priority over all liens but first liens, presumably including mechanics' liens. These genera-

materialmen's lien statutes, certain workers and suppliers otherwise unsecured claims for work performed on real estate are accorded a statutory lien which, once perfected by proper filing, relate back for priority purposes to the commencement of work on a project or some other date preceding perfection of the lien.[89] Where such a mechanics' or materialmen's lien is competing with an association assessment lien, the result will turn on the date as of which the association assessment lien came into existence.

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

On the other hand, in setting priorities between the association assessment lien and first mortgages,[90] section 3-116(b) compares perfection (recordation) of the mortgage with the date the assessment became delinquent.[91] Perhaps the moment of assessment delinquency is the critical date for comparison with relation back date of mechanics' or materialmen's lien, just as with priority competition between the assessment lien and the first mortgage.[92] After all, regardless of UCIOA's language dating the lien from the due date, delinquency is prerequisite to having an enforceable lien.

Yet another, somewhat less likely comparison date would be the date of the declaration creating the CIC. Under the general rule of section 3-116(b), liens and encumbrances recorded before the recordation of the declaration are the only interests taking priority over the association assessment lien. However, section 3-116(b) seems clearly to except mechanics' or materialmen's liens from that general rule.[93] Therefore, the use of its comparison date would seem contrary to the drafters' intentions.

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lized condominium statutes may be expressly superseded in the adoption of UCIOA. This might be less likely with respect to those state statutes specifically according mechanics' liens priority over assessment liens. *See* IDAHO CODE § 55-1518 (1989); N.C. GEN. STAT. § 47A-22(a) (1991); WIS. STAT. ANN. § 703.23(1)(a) (1991).

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

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

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

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

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

C. Foreclosure and Redemption Options

UCIOA provides that the association lien may be foreclosed "in like manner as a mortgage on real estate"[94] or, pursuant to optional language, by power of sale.[95] However, power of sale foreclosure is unavailable in many states.[96] Some others with provision for non-judicial foreclosures have nonetheless adopted UCIOA, requiring that the assessment lien can be foreclosed only by judicial foreclosure as a mortgage.[97]

The distinction between judicial and power of sale foreclosure, important in all foreclosure settings,[98] is particularly crucial in foreclosures of CIC association assessment liens, where assessment defaults continue to mount during the pendency of foreclosure proceedings. Given the relatively small dollar amount of assessment arrearages, especially those holding super priority under UCIOA, extension of foreclosure from the few months or less required for non-judicial foreclosure to the one and one-half to two years required for judicial foreclosure[99] can generate additional assessment defaults several times the amount of the assessment default first foreclosed upon.[100] The relatively small stakes in an assessment foreclosure may also generate a hostile judicial response to devoting court time to such cases.[101] On the other hand, a statutory grant of power of sale foreclosure authority raises several problems,[102] among which would be the more likely application of constitutional due process safeguards to

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

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

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

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

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

99. *See* Judy and Wittie, *supra* note 24, at 516.

100. *Id.* at 515.

101. *See* Anderson, *supra* note 56, at 5.

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

a power of sale created by statute than to one privately conferred.[103] On balance, however, it is excessively burdensome to restrict associations to judicial foreclosures in a state where power of sale foreclosure is permitted.[104] UCIOA should be adopted including the optional language of section 3-116(j)(1) and (2) permitting associations foreclosure by non-judicial foreclosure.

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

The process would vary considerably if, instead, the party seeking foreclosure were the holder of a first mortgage on a CIC unit. Regardless of whether the first mortgagee's loan is in payment default, default on the association assessment is also likely an event of default under the mortgage, allowing its holder to initiate foreclosure. If a Prioritized Lien were outstanding against the unit, the mortgage and its foreclosure would be subject to the association's Prioritized Lien. As a senior interest, the association's Prioritized Lien could probably not be forced into the mortgage foreclosure.[105] The Prioritized Lien can receive no portion of the foreclo-

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

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

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

Even assuming that the Prioritized Lien is in existence for a sum certain, foreclosing junior liens generally have no power to force foreclosure upon holders of senior liens. *See generally* NELSON & WHITMAN, *supra* note 17, at § 7.14. An exception to the senior's right to stay out of the junior's foreclosure permits joinder of the senior for the informational purposes of determining the amount and priority of his lien. *Id.* Where, as here, the debt secured by the senior lien is already due and payable, some authority would allow the junior lienor to force the senior lienor in on the theory that the foreclosure will effect a redemption of the senior lien from the proceeds of the junior lienor's foreclosure sale. *Id.* at 516. However, the better view is that the senior "should be allowed to exercise his own judgment as to

sure sale proceeds without participating in the foreclosure. However, payment of the Prioritized Lien—which, unlike the Less-Prioritized Lien, should survive this foreclosure[106] as a senior interest—will be necessary to clear title for resale of the unit, or often for presentation of mortgage insurance or guaranty claims to the FHA[107] or VA.[108]

If the association wished to include its Prioritized Lien in a foreclosure initiated by the mortgagee, an additional problem might arise where the association lien must be foreclosed judicially in a state which otherwise recognizes power of sale foreclosure.[109] In that case, if the association is to be included in the foreclosure, the first mortgagee might instead need to yield and use judicial foreclosure. But the mortgagee would presumably resist switching from the more efficient non-judicial foreclosure to the slower, more expensive judicial proceeding.

Ironically, the burdensome requirement that the association foreclose judicially could increase the association's leverage over a first mortgagee foreclosing by power of sale. In suing to foreclose on its senior Prioritized Lien, even after a power of sale foreclosure has been commenced by the

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the time to foreclose." EDGAR DURFEE, CASES ON SECURITY 204 (1951). *Compare* NELSON & WHITMAN, *supra* note 17, *with* GRANT NELSON & DALE WHITMAN, REAL ESTATE TRANSFER, FINANCE & DEVELOPMENT: CASES & MATERIALS (3d ed. 1987) (the casebook suggesting weaker authority for the view that the senior can be forced in). For a recent argument that the junior should be permitted to force in senior interests, see David G. Carlson, *Simultaneous Attachment of Liens on After-Acquired Property*, 6 CARDOZO L. REV. 505, 530-34 (1985).

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

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

107. *See* 24 C.F.R. § 200.155 (1991).

108. *See* 38 C.F.R. § 36.4320 (h)(5) (1991).

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

mortgagee, the association will have to join as necessary parties the first mortgagee, the owner, and all other junior interests—all holders of parts of the equity of redemption vis a vis the association's lien.[110] With these necessary parties also standing to be extinguished in the mortgagee's power of sale foreclosure, pursuit of the association's foreclosure lawsuit should require suspension of the non-judicial foreclosure, in order to allow the judicial foreclosure to go forward with the mortgagee and all other necessary parties participating.[111] If the association can predictably accomplish suspension of the power of sale foreclosure, enforcement of the association's lien will threaten substantial delays to the secured lender.

Those who drafted UCIOA's "super priority" lien provisions appear to have been fixated on foreclosure. This fixation is quite understandable since a primary and favorable impact of the "super priority" lien will be to allow aggressive associations to bring units with defaulted assessments into foreclosure. Without UCIOA in effect, lenders holding defaulted mortgages on CIC property have often felt little motivation to foreclose for extended periods until they have finally worked out some disposition for the property. This delay can mean the difference between financial life and death for the many CICs in economically depressed markets, where a single lender holds defaulted mortgages on a substantial number of units which have either insolvent or abandoning owners. With UCIOA's "super priority" lien in effect, the lender is vulnerable to the association's foreclosure—which may be especially costly where the association has no access to an otherwise available non-judicial foreclosure process[112] and must foreclose itself by judicial process. To retain control over any foreclosure, the lender may agree to pay delinquent assessments to the association as necessary, even including new assessments pending completion of foreclosure, for which the lender is technically not liable.[113] But the more important goal of the association in foreclosure will be to speed the time when the unit is owned by an entity, probably the lender purchasing at foreclosure, which will pay assessments regularly in the future. If the lender holds multiple properties in a CIC, the resulting assessment income can be very substantial.

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110. *See, e.g.*, NELSON & WHITMAN, *supra* note 17, § 7.12.

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

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

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

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

Facing the threat of even a relatively efficient foreclosure,[114] the first mortgagee holding subject to a potential Prioritized Lien will consider paying the association the portion of the unit owner's debt secured by the Prioritized Lien. Mortgagee payment of the Prioritized Lien was the lender response envisioned by UCIOA's drafters.[115] Such payment might also seem attractive where an assessment default is not accompanied by a default in mortgage payments. According to provisions in most mortgages, the lender's payment to the association of its borrower's delinquent assessments can be added to the secured debt.[116]

By payment of the delinquent assessments, the mortgagee might be contemplating a result analogous to that triggered by the equitable redemption from mortgages generally—acquiring the senior lien by paying it off.[117] As a result of UCIOA's fixation on foreclosure, however, the parties' respective lien rights under section 3-116 are less clear in pre-foreclosure settings than once foreclosure is commenced. Also, UCIOA's perpetually renewable, statutory lien works differently in several respects from a mortgage securing a fixed or decreasing debt, so that payment of the Prioritized Lien at any given moment cannot permanently eliminate the senior lien as a threat to the first mortgage, which is normally the goal of redeeming from a senior mortgage.

One difference between the UCIOA lien and an ordinary mortgage is that the Prioritized Lien and the Less-Prioritized Lien are both parts of the same lien, with varying priorities. A mortgagee seeking literally to equitably redeem the Prioritized Lien would thus face the all-or-none rule, requiring redemption of all or none of the lien, here both the Prioritized and Less-Prioritized Liens, unless the senior lien holder otherwise elects to accept a partial redemption.[118] On the other hand, the mortgagee seeking redemption would have no right to redeem an interest junior to its mortgage,[119] arguably including the Less-Prioritized Lien. The mortgagee can probably solve these problems by requesting to pay the entire assessment delinquency, as secured by both Prioritized and Less-Prioritized Lien. The association would have little motive in rejecting such an offer. However, following such payment, any new delinquency would again be secured by the UCIOA lien, with its super priority for the first dollars of

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

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

116. *See, e.g.*, Judy and Wittie, *supra* note 24, at 481.

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

118. *See* NELSON & WHITMAN, *supra* note 17, § 7.3.

119. *Id.* § 7.2.

delinquency up to the six-month maximum. UCIOA's lien covers all assessments, with no language suggesting that payment of earlier delinquencies leaves later assessments unsecured. Nor does the super priority provision contain language suggesting any reduction of the amount prioritized based on payment of previously prioritized amounts.

A second difference between ordinary mortgagee redemption of a senior mortgage and attempting redemption of the Prioritized Lien is in computing the amount necessary to redeem. The maximum amount for Prioritized Lien is potentially changing at all times as new assessments are levied and some or all go unpaid, as is the amount of the total UCIOA lien. Each assessment default increases the overall association lien. Meanwhile, the maximum size of the Prioritized Lien, "*the common expense assessments . . . which would have become due . . . during the 6 months immediately preceding institution of an action to enforce the lien*"[120]—remains unknowable (except by approximation). This is true until an action to enforce the lien is instituted, pinning down which six months of assessments are to be used to compute the maximum. By floating the potential Prioritized Lien maximum by reference to changing assessment figures, UCIOA continually redefines the Prioritized and Less-Prioritized Lien, portions of the total overall assessment lien flowing into the Prioritized Lien any time the Prioritized Lien total falls below its maximum, and flowing back to the Less-Prioritized Lien any time the applicable maximum decreases. As a result, until an action to enforce the UCIOA lien is initiated, there is literally no proper amount to be paid in order for a mortgagee to redeem the lien.

Put another way, under the current language of section 3-116(b), there *is no Prioritized Lien until* the moment *foreclosure* is initiated.[121] So there is no lien to redeem, even though one will materialize instantaneously upon initiation of foreclosure.

Even more fundamentally, a mortgagee permanently redeeming either the Prioritized Lien or the entire association lien—so that uncured or future delinquencies could not come within protection of such lien—would be inconsistent with the perpetually renewable nature of the UCIOA lien. UCIOA accurately contemplates ongoing extensions of credit by the association to the unit owner. It also provides that unit owner's assessment obligations shall all be secured with at least some priority over competing encumbrances. Just as the association cannot really limit its own extension of credit, the statute contemplates no limit on the overall assessment lien in dollars or time. While the super priority provision contemplates a six-month maximum at any given moment, it contemplates no limit over time.[122] Whatever happens to the six months of assessments prioritized by initiation of a foreclosure action in the middle of year one, a Prioritized Lien of up to six months assessments exists if another enforcement action is initiated in year three—or at *any* future

120. UCIOA § 3-116(b), 7 U.L.A. at 351 (1982).
121. *Id.*
122. *Id.*

time.[123]

A first mortgagee seeking protection from the Prioritized Lien by paying off the assessments it secures (or even paying off all overdue assessments) might seek to document its payment as a purchase of association rights to foreclose on any Prioritized Lien—including one consisting of new delinquencies—for some time into the future.[124] Phrased, differently,[125] the mortgagee could describe the deal as an assignment to the mortgagee of the association's Prioritized Lien. Under an assignment, the mortgagee/assignee would intend for the lien to remain alive and still securing the amount the mortgagee paid for it. So long as the Prioritized Lien now held by the mortgagee/assignee remained alive and unforeclosed, no additional delinquencies could gain the benefit of the super priority.

From a public policy perspective, the advantage of honoring this "assignment" approach is in creating an incentive for first mortgagees to pay the association the Prioritized Lien.[126] However, even if a court would seriously consider recognizing assignment of a lien which does not and may never exist, such an assignment of the Prioritized Lien should violate the UCIOA's prohibition against waiver or variation by agreement of UCIOA-created rights.[127] To allow the mortgagee to purchase this lien, so

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

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

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

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

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

In the case of an attempted purchase of the Prioritized Lien, the mortgagee could argue that the variation in rights under § 3-116 was valid becuase it had been purchased for adequate consideration. However, the term "agreement" itself, describing a prohibitted transaction under § 1-104, seems to contemplate consideration paid and that such payment would not validate a waiver or variation of UCIOA's terms. *Compare* Shearson American Express,

that the association would relinquish its prioritized security for all future assessments, either permanently or for some extended period, would fly in the face of UCIOA's statutory scheme. It would be as if a governmental taxing authority were to give up its future power to attach prioritized tax liens for new defaults whenever one deficiency were cured. In levying assessments, the association is somewhat analogous to a governmental authority[128] levying taxes. Like the government, it must collect assessments from its residents to perform critical functions which clearly resemble governmental responsibilities.[129] Like the government, the association has

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

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

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

129. *See supra* notes 10-11 and accompanying text. Community association's expenses are often even more varied than those of public municipalities, including not only municipal-type expenses (like private road maintenance) and otherwise essential expenses (like casualty insurance premiums), but also expenses which seem neither municipal-like nor essential (such as some recreational expenses)—nor necessarily entitled to priority over all other liens. However, these classifications are fraught with definitional ambiguity, as in the case of expenses to maintain a swimming pool, which is arguably both recreational and municipal-like. Because of the definitional complexities in distinguishing between more crucial

the option neither to deny extending more and more credit over time to unit owners nor to withhold performance of its responsibilities to maintain the community physically. And like government, its ability to function in socially critical arenas depends on renewable, prioritized lien protection of its assessment income.

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

> an *involuntary* creditor which becomes obligated to advance services to unit owners in return for a promise of future payment. Such payments are much like the loans made by a mortgagee under an obligatory mortgage future advances clause, but with only the most rudimentary controls upon the amount and timing of loan advances, the terms of the loan, and the continuing credit worthiness of the borrower.[130]

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

Like the holder of a mortgage securing obligatory future advances,[131] the association's priority for its lien should not be limited at some amount or point in time while the association's obligation to make advances persists. Rather, new advances, costs covered by assessments, should relate back and receive the same priority accorded to the original association lien (under UCIOA, holding a split priority) relative to intervening liens like the first mortgagee. With a senior mortgage to secure obligatory future advances, no one's payment of a past advance blocks inclusion of future obligatory advances in the priority lien. The same result should hold for community associations and their prioritized statu-

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and less crucial expenses, the drafters of UCIOA opted to include all duly levied CIC assessments, regardless of purpose, within the limited lien priority afforded to assessment liens by § 3-116. *See generally* Judy and Wittie, *supra* note 24, at 484-88. Similarly, the assessment and lien provisions do not inquire beyond the general budgeting process into the details of association governance or possibly poor association judgment in levying a particular judgment. Rather than examine each of these subtle variables in each case, § 3-116 begins with the fundamental compromise of limiting the association's priority to six months worth of assessments rather than giving the association first priority for all its assessments as municipal taxes receive.

130. Judy and Wittie, *supra* note 24, at 475.

131. *See* NELSON & WHITMAN, *supra* note 17, § 12.7.

tory lien.

Despite the unavailability of protection fully analogous to that afforded by equitable redemption, first mortgagees whose own loans are not in payment default may very well elect to pay assessment defaults in order to eliminate the present threat of foreclosure by the association.[132] While such mortgagees will remain vulnerable to future defaults gaining priority over them, those defaults will hopefully take some time to rise to a level where association foreclosure would become worthwhile. Indeed, at least where generalized economic conditions are not severe, the first mortgagee can often persuade the unit owner to cure its assessment default and keep its assessments current in the future.[133] In weaker economies, however, the lender may decide to refrain from paying assessment delinquencies until the lender obtains title to the unit in foreclosure, after which payment is far more likely.[134]

III. Streamlining Internal Association Financial Management

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

A. Recording the Assessment Lien

First, UCIOA provides that recording the CIC declaration itself constitutes record notice and perfection of the lien for assessments.[135] In many states, recording of a delinquency notice has been deemed necessary to perfect any lien for unpaid assessments.[136] But the burden of recording individual delinquencies, unit by unit, can be overwhelming and unnecessary for associations, especially when their management consists of amateurs. Attorneys attempting perfection by recording delinquencies

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

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

134. *See supra* text accompanying *supra* note 107.

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

136. In some states, the perfection requirement is expressed statutorily. *See, e.g.*, N.C. Gen. Stat. § 47C-3-116(a) (1984). *See also* Gary Poliakoff, Law of Condominium Operations Associations § 5.26 (1988). Elsewhere, perfection has evolved as a rule of practice, with trial courts occasionally insisting upon it.

have varied in opinion as to whether each successive default on a given unit must be recorded, or whether recording one delinquency on a unit will perfect the lien as to subsequent delinquencies as to the same unit.[137] In place of requiring recording of individual delinquencies, UCIOA requires recording of only the declaration[138] and a formalized assessment status reporting system.[139] Under UCIOA's language, the statutory lien is based on the association's existence and not on its declaration's content. Thus, there is no requirement in UCIOA that the declaration contain a provision creating an assessment lien.[140]

Desirable though it may be to require recordation of only the declaration, the present language without more may leave a community association in some states off the list of parties receiving notice of any senior mortgage foreclosure against a unit in their CICs. Some state statutes confine their list of parties to whom notice foreclosure must be provided to holders of interests "recorded subsequent to the [mortgage or] deed of trust being foreclosed and before recordation of the notice of sale."[141] Because the declaration was likely recorded before recordation of the mortgage or deed of trust being foreclosed upon, the association might not be entitled to notice of foreclosure of such a mortgage or deed of trust, even though its Less-Prioritized Lien would stand to be extinguished in such a sale. Recording delinquency notices could cure this problem. Preferably, UCIOA should be amended to clarify that recordation of the declaration,

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

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

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

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

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

even though predating recordation of a first mortgage or deed of trust, would entitle the association to notice of foreclosure in these cases.

B. Assessment Status Inquiries

As an efficient substitute for recording separate notices of delinquencies against each unit owing unpaid assessments, UCIOA codifies each unit owner's ability to obtain from the association verification of the status of any unpaid assessments charged against the unit.[142] Within ten business days after receiving the owner's written request, the association is obligated to provide a recordable assessment status certificate binding on the association, the board and all unit owners in the CIC. The statement can then be presented to other interested parties, such as a mortgagee or potential buyer. Furthermore, it can be placed on the public record.

This provision for assessment status reports codifies what had become standard practice in many communities that had no statute mandating provision of such "estoppel statements." As a precondition to some contemplated transactions, buyers, lenders and title insurers regularly insist on proof that assessment delinquencies do not encumber the unit. In expressly obligating the association to respond to these requests, however, UCIOA increases the unit owner's leverage in seeking a response from a recalcitrant board. Further, the information contained in the statement required by UCIOA is more precise and reliable than a simple recorded notice of delinquency, which will often point to a single default, without revealing whether subsequent defaults have increased the size of the assessment lien.

Nonetheless, the UCIOA provision could be strengthened in several respects. Most importantly, the statute should ideally specify the consequences of an association's failure to respond to a request for an assessment status report. Such a non-response is a particularly troubling risk with weakly managed association boards unaware of their obligations or of how precisely to fulfill them.[143]

Arguably, the consequence of a non-response and a late response should be the equivalent of a response that there are no assessment delinquencies chargeable against the unit. Thus, any delinquencies outstanding at the time of an unanswered status report request would become wholly unenforceable, by either foreclosure or personal action on the assessment debt. In this same strict spirit, late responses might be treated as no response at all. A more moderate approach to the association's failure to timely respond could trigger loss of the association's entire statutory lien[144] for assessments then outstanding, but without affecting the

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

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

144. This would include both the Prioritized and the Less-Prioritized Lien.

association's unsecured claim against the unit owner.[145] An even milder remedy where no timely response is forthcoming would entail merely loss of super priority for the unreported assessments then outstanding; the unreported delinquencies would remain secured by the association's Less-Prioritized Lien.[146] Of course, if delinquencies continue to mount, the new delinquencies would become part of a renewable[147] Prioritized Lien and the earlier loss priority would be nullified. In selecting from these potential sanctions, the goal should be not only to motivate a response once a request is received, but also to encourage the association more generally to undertake management practices necessary to enable prompt responses to all requests.

An ideal assessment status report statute should also clarify who can receive assessment inquiries for the association. With informal association organizations and changing citizen leadership, the inquiring unit owner could well encounter the objection of having asked the wrong party. Colorado addresses this problem by requiring that the inquiry be addressed to the association's registered agent.[148] Associations may wish to appoint their management company, if any, or their attorney as the appropriate agent. Designation of an association officer runs a far greater risk that the

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

146. Compare Colorado's recently adopted version, which provides vaguely that, when the association fails to respond to a proper request for an assessment status report, "it shall have no right to assert a priority lien upon the unit for unpaid assessments which were due as of the date of the request." COLO. REV. STAT. § 38-33.3-316(8) (1991) (emphasis added). The term "priority lien" leaves unclear whether it is merely the Prioritized Lien which no longer secures the unreported assessments, or whether these assessments have also lost the security of the Less-Prioritized Lien. Since even the Less-Prioritized Lien does have statutory priority under UCIOA over mortgages junior to the first mortgage but filed after the declaration, this Less-Prioritized Lien could conceivably be within the term "priority lien." This unfortunate language was the product of last-minute, political compromise.

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

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

individual designee will change without all members of the community realizing the change has occurred.

Finally, the statute could also specify how inquiries or responses under this section can be later proven, when one of the parties disagrees over who did what when. Thus, Colorado's provision specifies use of "certified mail, first class postage prepaid, return receipt requested,"[149] for these inquiries and responses, so that proof of either the request or the response will be readily available.

C. *Budgeting*

To focus the association's internal financial planning, UCIOA also requires annual association budgeting once the first association assessment has been made.[150] Availability to the association of the Prioritized Lien also depends on adoption of such an annual budget, because the assessments used to measure the six-month super priority must be based on such a budget.[151] Once the association board adopts a proposed budget, UCIOA requires notice to the community of the budget proposal and of an opportunity to meet and review the proposal.[152] However, regardless of actual attendance at the announced budget meeting, the budget is considered automatically accepted unless a majority of all homeowners, or any larger percentage specified in the declaration, objects. If the budget is rejected, the previous budget in effect for the association continues until a new proposal successfully survives this process.

The UCIOA budget provision draws fire from some community association officers as generally too burdensome, and as opening the floodgates to paralyzing dissent on budget issues which must be efficiently resolved. However, the UCIOA procedure strikes a remarkably good balance between insisting on methodical financial planning by associations[153] and allowing boards leeway to govern without fruitless disruption by unrepresentative, disgruntled residents.[154]

IV. Prophets of Doom: Fears of the "Super Priority" Lien

In the various jurisdictions which have considered UCIOA, opposition to the legislation has focused primarily on the "super priority" lien for associations collecting defaulted assessments. In addition to lender interests, opposition has come from several other constituencies whose positions on the "super priority" lien have varied from state to state.[155]

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149. Colo. Rev. Stat. § 38-33.3-316(8) (Supp. 1991).
150. UCIOA § 3-115(a), 7 U.L.A. at 349 (1982).
151. UCIOA § 3-116(b), 7 U.L.A. at 351 (1982).
152. UCIOA § 3-103(c), 7 U.L.A. at 328 (1982).
153. Regarding the need for better financial planning by many community associations, see *supra* note 12 and accompanying text.
154. For authorities reporting outrageous and disruptive behavior by community association members, *see, e.g.*, Winokur, *Mixed Blessings*, *supra* note 7, at 63 n.263.
155. For example, in Colorado the realtors and developers supported enactment of the statute, including the "super priority" lien while title insurers and the Real Estate and Ti-

Though the arguments over UCIOA's "super priority" lien varied from state to state, certain themes emerged—often focusing on fears that the new "super priority" lien would foul up existing real estate, lending or insurance markets. Several such prophecies of doom are recounted and addressed below.

A. Marketability of CIC Mortgages on Secondary Market

Among the arguments often made against adoption of the "super priority" lien is that this priority would impair sale of mortgages on the secondary market because of government requirements that such mortgages be first liens.[156] This, in turn, would dry up mortgage funds to CIC unit owners in states imposing the "super priority" lien for assessments, interfering with sales of CIC properties. However, the same Fannie Mae and Freddie Mac regulations which require lenders to receive first liens expressly contemplate acquisition of mortgages subject to the uniform acts' six month assessment lien priority on the same basis as first liens on other residential property.[157] Lenders' and developers' attorneys in states

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

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

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

The contrast between the Fannie Mae and Freddie Mac provisions on acceptability of mortgages subject to the "super priority" lien echoes the contrasting positions of the Department of Housing and Urban Development and the Veterans Administration on whether mortgagee payment of the six-month delinquency will be covered under claims under HUD

where the uniform acts' "super priority" lien is in effect report that these provisions have in no way discouraged secondary purchase or sale of CIC mortgages subject to such priority.[158]

B. Escrows of Assessments

An additional argument against the "super priority" lien has been that lenders facing a loss of priority would demand that each new homebuyer escrow six months assessments to protect lenders against the risk of having to pay defaulted assessments. Since developers may be unit owners well into the life of a CIC, during which time the allocation of assessment responsibility may not discriminate in favor of the developer, the aggregate of assessment escrows faced by developers owning multiple units could become quite substantial.[159] By this view, such an escrow requirement would inappropriately increase development costs and home purchase costs to potential buyers already coping with high housing costs and, more recently, a troubled economy.

The drafters of the "super priority" lien shared this concern and fully expected that first mortgagees would require that unit owners establish escrows in the amount of the Prioritized Lien.[160] The expectation of

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mortgage insurance or the VA. While HUD has taken the position that such payments are covered, the VA contends that they are not, citing its statutory restriction of VA loans to first liens only. *See* FEDERAL NATIONAL MORTGAGE ASSOCIATION MEMORANDUM TO ALL FHA/VA SELLER/SERVICERS (West Va.) (Nov. 18, 1980). FNMA, however, assures that VA guaranteed mortgages may be subject to the "super priority" lien provided adequate assurance is provided to FNMA that it will be held harmless with respect to prioritized assessments. *Id.*

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

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

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

160. Wittie, *Origins of the Community Association's Special Lien Priority for Unpaid Assessments Under the Uniform Acts*, MULTIPLE OWNERSHIP ACTS SYMPOSIUM, *supra* note

escrow requirements was one basis for limiting the Prioritized Lien to equal no more than six months assessments.[161] However, some experience with the super priority lien suggests that lenders may not ordinarily impose any escrow requirement on CIC unit purchasers.[162]

Even if escrows were routinely required, they would be forcing homeowners to pay costs which are, in any case, legitimate costs of CIC homeownership. UCIOA's correct premise is that these very real common costs must be recognized and borne by those who benefit from the maintenance and other services and the facilities generating the costs. With maintenance needs rising as the first large CIC generation ages,[163] we can no longer casually view community associations as a convenient place to transfer unwanted local governmental responsibilities[164] without also enabling associations to raise the funds necessary to meet those infrastructure responsibilities. The "super priority" lien should itself help assessment collections. If that boost is accompanied by the escrowing of a modest amount of assessments per unit, the escrowing should further help assure that CIC homeowners each pay their fair share. Furthermore, it would limit the risk faced by the most reliable homebuyers that, due to others' defaults in the same community, their own assessments may skyrocket while their home values plummet.[165] This lowered risk, in turn, should help CIC properties to hold their value.

C. Title Insurance Coverage

Title insurers have expressed fears of new claims against them under the UCIOA assessment lien priority. One argument is that the structure of the "super priority" lien would place title insurers in the position of insuring against an unforeseen future event, the Prioritized Lien fueled by a default subsequent to issuance of the title policy.[166] Such potential liability seems very far fetched under UCIOA and the standard language of the vast majority of title policies.

22, at 171, 173. *See also* UCIOA § 3-116 cmt. 1, 7 U.L.A. at 529 (1982).

161. Wittie, *supra* note 160, at 173.

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

163. For estimates of the age of community associations, see *supra* note 27.

164. For a discussion of the transfer of governmental responsibilities to community associations, see *supra* notes 11-12 and accompanying text.

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

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

UCIOA clearly provides that, although filing of the declaration is prerequisite to the statutory assessment lien's existence, the lien itself dates not from filing of the declaration but only "from the time the assessment or fine becomes due."[167] Given this language, a subsequently arising lien, triggered only upon a default subsequent to issuance of the title policy, would clearly be within the American Land Title Association standard owner's and lender's form Exclusions from Coverage. Absent any contrary endorsement to the standard policy, these exclusions from coverage include "liens, [etc.] attaching or created subsequent to Date of Policy (except [mechanics liens for labor or materials furnished before policy issuance])."[168]

In condominium and planned unit development title policies, there is often added an endorsement which provides the unit owner various assurances about the legality of the condominium's or PUD's documentation, existence and operation under applicable law.[169] These standard endorsements have also traditionally provided coverage against priority of assessment liens over mortgage liens. Thus, the traditional condominium endorsement (ALTA Form 4) adds coverage: "against loss or damage by reason of . . . [t]he priority of any lien for charges and assessments provided for in the condominium statutes and condominium documents over the lien of any insured mortgage identified in Schedule A."[170] The traditional PUD endorsement (ALTA Form 5) adds coverage: "against loss or damage by reason of . . . [t]he priority of any lien for charges and assessments in favor of any association of homeowners which are provided for in any document referred to in Schedule B over the lien of any insured mortgage identified in Schedule A."[171]

Read literally, these traditionally standard endorsements[172] could conceivably be taken to insure against the super priority of a statutory assessment lien even though the lien arises subsequent to issuance of the title policy as a result of a later default. After all, UCIOA's super priority

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

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

169. A.L.T.A. Condominium Endorsement Form 4; A.L.T.A. PUD Endorsement Form 5.

170. A.L.T.A. Condominium Endorsement Form 4.

171. A.L.T.A. PUD Endorsement Form 5.

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

is accorded literally to "a lien for charges and assessments" and is priority over a mortgage which will be listed in Schedule B. However, such a literal reading of this endorsement flies in the face of the fundamental nature of title insurance which—unlike casualty, health, fire, and other types of insurance—"insure[s] against past risks and excludes [from coverage] future risks."[173]

To clarify this important limitation on coverage against assessment lien priority, the standard ALTA endorsements should be refined. Gurdon Buck has proposed that the relevant paragraph of Form 4 (and presumably Form 5) be altered to limit coverage supplied by the endorsement to: "The priority of any Common Expense assessments, including special assessments, due against the Unit identified in Schedule A and unpaid as of the date of the policy."[174] This endorsement would leave the insurer responsible only for defaulted assessments from before issuance of the title policy. To obtain information about such past delinquencies, the insurer need only obtain the binding assessment status statement required under UCIOA.[175] Inquiries into assessment status have long been standard procedure for many title insurers, but without any statutory provision to back up the request with the force of law. Under the current ALTA policy, with a properly tailored CIC endorsement, title insurance coverage will not extend to a lien arising only upon a later default. If a title company wished to provide such coverage, it could of course elect to do so in its own business judgement, either as a special service to a good client or for an additional fee.[176]

CONCLUSION

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

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

174. 1 GURDON BUCK, CONDOMINIUM DEVELOPMENT § 8:66, at 8-117 (1991).

175. *See supra* text at notes 142-49.

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

or private lenders with mortgages securing obligatory future advances.

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

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

More difficult questions are posed by UCIOA's applicability rules as applied to the UCIOA lien. With many association declarations containing express subordination of association liens to first mortgages, associations in existence before enactment of UCIOA could arguably lose perhaps UCIOA's strongest benefit, which even UCIOA itself first purports to give to existing associations (by expressly listing section 3-116 as applicable to preexisting communities[177]) before arguably taking it away later in the same sentence with its unwillingness to "invalidate" provisions of existing declarations.

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

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

EXHIBIT 2

STATE OF NEVADA
DEPARTMENT OF BUSINESS AND INDUSTRY
REAL ESTATE DIVISION
ADVISORY OPINION

Subject:	Advisory No. **13-01**	21 pages
The Super Priority Lien	Issued By: Real Estate Division	
	Amends/ Supersedes N/A	
Reference(s): NRS 116.3102; ; NRS 116.310312; NRS 116.310313; NRS 116.3115; NRS 116.3116; NRS 116.31162; Commission for Common Interest Communities and Condominium Hotels Advisory Opinion No. 2010-01	Issue Date: December 12, 2012	

QUESTION #1:

Pursuant to NRS 116.3116, may the portion of the association's lien which is superior to a unit's first security interest (referred to as the "super priority lien") contain "costs of collecting" defined by NRS 116.310313?

QUESTION #2:

Pursuant to NRS 116.3116, may the sum total of the super priority lien ever exceed 9 times the monthly assessment amount for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115, plus charges incurred by the association on a unit pursuant to NRS 116.310312?

QUESTION #3:

Pursuant to NRS 116.3116, must the association institute a "civil action" as defined by Nevada Rules of Civil Procedure 2 and 3 in order for the super priority lien to exist?

SHORT ANSWER TO #1:

No. The association's lien does not include "costs of collecting" defined by NRS 116.310313, so the super priority portion of the lien may not include such costs. NRS 116.310313 does not say such charges are a lien on the unit, and NRS 116.3116 does not make such charges part of the association's lien.

SHORT ANSWER TO #2:

No. The language in NRS 116.3116(2) defines the super priority lien. The super priority lien consists of unpaid assessments based on the association's budget and NRS 116.310312 charges, nothing more. The super priority lien is limited to: (1) 9 months of assessments; and (2) charges allowed by NRS 116.310312. The super priority lien based on assessments may not exceed 9 months of assessments as reflected in the association's budget, and it may not include penalties, fees, late charges, fines, or interest. References in NRS 116.3116(2) to assessments and charges pursuant to NRS 116.310312 define the super priority lien, and are not merely to determine a dollar amount for the super priority lien.

SHORT ANSWER TO #3:

No. The association must *take action* to enforce its super priority lien, but it need not institute a civil action by the filing of a complaint. The association may begin the process for foreclosure in NRS 116.31162 or exercise any other remedy it has to enforce the lien.

ANALYSIS OF THE ISSUES:

This advisory opinion – provided in accordance with NRS 116.623 – details the Real Estate Division's opinion as to the interpretation of NRS 116.3116(1) and (2). The Division hopes to help association boards understand the meaning of the statute so they are better equipped to represent the interests of their members. Associations are encouraged to look at the entirety of a situation surrounding a particular deficiency and evaluate the association's best option for collection. The first step in that analysis is to understand what constitutes the association's lien, what is not part of the lien, and the status of the lien compared to other liens recorded against the unit.

Subsection (1) of NRS 116.3116 describes what constitutes the association's lien; and subsection (2) states the lien's priority compared to other liens recorded against a unit. NRS 116.3116 comes from the Uniform Common Interest Ownership Act (1982) (the "Uniform Act"), which Nevada adopted in 1991. So, in addition to looking at the language of the relevant Nevada statute, this analysis includes references to the Uniform Act's equivalent provision (§ 3-116) and its comments.

I. NRS 116.3116(1) DEFINES WHAT THE ASSOCIATION'S LIEN CONSISTS OF.

NRS 116.3116(1) provides generally for the lien associations have against units within common-interest communities. NRS 116.3116(1) states as follows:

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

(emphasis added).

Based on this provision, the association's lien includes assessments, construction penalties, and fines imposed against a unit when they become due. In addition – unless the declaration otherwise provides – penalties, fees, charges, late charges, fines, and interest charged pursuant to NRS 116.3102(1)(j) through (n) are also part of the association's lien in that such items are enforceable as if they were assessments. Assessments can be foreclosed pursuant to NRS 116.31162, but liens for fines and penalties may not be foreclosed unless they satisfy the requirements of NRS 116.31162(4). Therefore, it is important to accurately categorize what comprises each portion of the association's lien to evaluate enforcement options.

A. "COSTS OF COLLECTING" (DEFINED BY NRS 116.310313) ARE NOT PART OF THE ASSOCIATION'S LIEN

NRS 116.3116(1) does not specifically make costs of collecting part of the association's lien, so the determination must be whether such costs can be included under the incorporated provisions of NRS 116.3102. NRS 116.3102(1)(j) through (n) identifies five very specific categories of penalties, fees, charges, late charges, fines, and interest associations may impose. This language encompasses all penalties, fees,

charges, late charges, fines, and interest that are part of the lien described in NRS 116.3116(1).

NRS 116.3102(1)(j) through (n) states:

> 1. Except as otherwise provided in this section, and subject to the provisions of the declaration, the association may do any or all of the following: ...
> (j) Impose and receive any payments, fees or charges for the use, rental or operation of the common elements, other than limited common elements described in subsections 2 and 4 of NRS 116.2102, and for services provided to the units' owners, including, without limitation, any services provided pursuant to NRS 116.310312.
> **(k) Impose charges for late payment of assessments pursuant to NRS 116.3115.**
> (l) Impose construction penalties when authorized pursuant to NRS 116.310305.
> (m) Impose reasonable fines for violations of the governing documents of the association only if the association complies with the requirements set forth in NRS 116.31031.
> (n) Impose reasonable charges for the preparation and recordation of any amendments to the declaration or any statements of unpaid assessments, and impose reasonable fees, not to exceed the amounts authorized by NRS 116.4109, for preparing and furnishing the documents and certificate required by that section.

(emphasis added).

Whatever charges the association is permitted to impose by virtue of these provisions are part of the association's lien. Subsection (k) – emphasized above – has been used – the Division believes improperly – to support the conclusion that associations may include costs of collecting past due obligations as part of the association's lien. The Commission for Common Interest Communities and Condominium Hotels issued Advisory Opinion No. 2010-01 in December of 2010. The Commission's advisory concludes as follows:

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

Analysis of what constitutes the *super priority lien* portion of the association's lien is discussed in Section III, but the Division agrees that the association's lien does include items noted as (a), (b) and (c) of the Commission's advisory opinion above. To support item (d), the Commission relies on NRS 116.3102(1)(k) which gives associations the power to: "Impose charges for late payment of assessments pursuant to NRS 116.3115." This language would include interest authorized by statute and late fees if authorized by the association's declaration.

"Costs of collecting" defined by NRS 116.310313 is too broad to fall within the parameters of charges for late payment of assessments.[1] By definition, "costs of collecting" relate to the collection of past due "obligations." "Obligations" are defined as "any assessment, fine, construction penalty, fee, charge or interest levied or imposed against a unit's owner."[2] In other words, costs of collecting includes more than "charges for late payment of assessments."[3] Therefore, the plain language of NRS 116.3116(1) does not incorporate costs of collecting into the association's lien. Further review of the relevant statutes and legislative action supports this conclusion.

B. PRIOR LEGISLATIVE ACTION SUPPORTS THE POSITION THAT COSTS OF COLLECTING ARE NOT PART OF THE ASSOCIATION'S LIEN DESCRIBED BY NRS 116.3116(1).

The language of NRS 116.3116(1) allows for "charges for late payment of assessments" to be part of the association's lien.[4] "Charges for late payments" is not the same as "costs of collecting." "Costs of collecting" was first defined in NRS 116 by the adoption of NRS 116.310313 in 2009. NRS 116.310313(1) provides for the association's

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[1] Charges for late payment of assessments comes from NRS 116.3102(1)(k) and is incorporated into NRS 116.3116(1).
[2] NRS 116.310313.
[3] "Costs of collecting" includes any fee, charge or cost, by whatever name, including, without limitation, any collection fee, filing fee, recording fee, fee related to the preparation, recording or delivery of a lien or lien rescission, title search lien fee, bankruptcy search fee, referral fee, fee for postage or delivery and any other fee or cost that an association charges a unit's owner for the investigation, enforcement or collection of a past due obligation. The term does not include any costs incurred by an association if a lawsuit is filed to enforce any past due obligation or any costs awarded by a court. NRS 116.310313(3)(a).
[4] NRS 116.3102(1)(k) (incorporated into NRS 116.3116(1)).

right to charge a unit owner "reasonable fees to cover the costs of collecting any past due obligation." NRS 116.310313 is not referenced in NRS 116.3116 or NRS 116.3102, nor does NRS 116.310313 specifically provide for the association's right to lien the unit for such costs.

In contrast, NRS 116.310312, also adopted in 2009, allows an association to enter the grounds of a unit to maintain the property or abate a nuisance existing on the exterior of the unit. NRS 116.310312 specifically provides for the association's expenses to be a lien on the unit and provides that the lien is prior to the first security interest.[5] NRS 116.3102(1)(j) was amended to allow these expenses to be part of the lien described in NRS 116.3116(1). And NRS 116.3116(2) was amended to allow these expenses to be included in the association's super priority lien.

The Commission's advisory opinion from December 2010 also relies on changes to the Uniform Act from 2008 to support the notion that collection costs should be part of the association's super priority lien. Nevada has not adopted those changes to the Uniform Act. Since the Commission's advisory opinion, the Nevada Legislature had an opportunity to clarify the law in this regard.

In 2011, the Nevada Legislature considered Senate Bill 174, which proposed changes to NRS 116.3116. S.B. 174 originally included changes to NRS 116.3116(1) such that the association's lien would specifically include "costs of collecting" as defined in NRS 116.310313. S.B. 174 proposed changes to NRS 116.3116 (1) and (2) to bring the statute in line with the changes to the same provision in the Uniform Act amended in 2008.

The Uniform Act's amendments were removed from S.B. 174 by the first reprint. As amended, S.B. 174 proposed changes to NRS 116.3116(2) expanding the super priority lien amount to include costs of collecting not to exceed $1,950, in addition to 9 months

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[5] See NRS 116.310312(4) and (6).

of assessments. S.B. 174 was discussed in great detail and ultimately died in committee.[6]

Also in 2011, Senate Bill 204 – as originally introduced – included changes to NRS 116.3116(1) to expand the association's lien to include attorney's fees and costs and "any other sums due to the association."[7] The bill's language was taken from the Uniform Act amendments in 2008. All changes to NRS 116.3116(1) were removed from the bill prior to approval.

The Nevada Legislature's actions in the 2009 and 2011 sessions are indicative of its intent not to make costs of collecting part of the lien. The Nevada Legislature could have made the costs of collecting part of the association's lien, like it did for costs under NRS 116.310312. It did not do so. In order for the association to have a right to lien a unit under NRS 116.3116(1), the charge or expense must fall within a category listed in the plain language of the statute. Costs of collecting do not fall within that language. Based on the foregoing, the Division concludes that the association's lien does not include "costs of collecting" as defined by NRS 116.310313.

A possible concern regarding this outcome could be that an association may not be able to recover their collection costs relating to a foreclosure of an assessment lien. While that may seem like an unreasonable outcome, a look at the bigger picture must be considered to put it in perspective. NRS 116.31162 through NRS 116.31168, inclusive, outlines the association's ability to enforce its lien through foreclosure. Associations have a lien for assessments that is enforced through foreclosure. The association's expenses are reimbursed to the association from the proceeds of the sale. NRS 116.31164(3)(c) allows the proceeds of the foreclosure sale to be distributed in the following order:

(1) The reasonable expenses of sale;

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[6] See http://leg.state.nv.us/Session/76th2011/Reports/history.cfm?ID=423.
[7] Senate Bill No. 204 – Senator Copening, Sec. 49, ln. 1-16, February 28, 2011.

> (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.

Subsections (1) and (2) allow the association to receive its expenses to enforce its lien through foreclosure *before* the association's lien is satisfied. Obviously, if there are no proceeds from a sale or a sale never takes place, the association has no way to collect its expenses other than through a civil action against the unit owner. Associations must consider this consequence when making decisions regarding collection policies understanding that every delinquent assessment may not be treated the same.

II. NRS 116.3116(2) ESTABLISHES THE PRIORITY OF THE ASSOCIATION'S LIEN.

Having established that the association has a lien on the unit as described in subsection (1) of NRS 116.3116, we now turn to subsection (2) to determine the lien's priority in relation to other liens recorded against the unit. The lien described by NRS 116.3116(1) is what is referred to in subsection (2). Understanding the priority of the lien is an important consideration for any board of directors looking to enforce the lien through foreclosure or to preserve the lien in the event of foreclosure by a first security interest.

NRS 116.3116(2) provides that the association's lien is prior to all other liens recorded against the unit *except:* liens recorded against the unit before the declaration; first security interests (first deeds of trust); and real estate taxes or other governmental assessments. There is one exception to the exceptions, so to speak, when it comes to priority of the association's lien. This exception makes a portion of an association's lien prior to the first security interest. The portion of the association's lien given priority status to a first security interest is what is referred to as the "super priority lien" to

distinguish it from the other portion of the association's lien that is subordinate to a first security interest.

The ramifications of the super priority lien are significant in light of the fact that superior liens, when foreclosed, remove all junior liens. An association can foreclose its super priority lien and the first security interest holder will either pay the super priority lien amount or lose its security. NRS 116.3116 is found in the Uniform Act at § 3-116. Nevada adopted the original language from § 3-116 of the Uniform Act in 1991. From its inception, the concept of a super priority lien was a novel approach. The Uniform Act comments to § 3-116 state:

> [A]s to prior first security interests the association's lien does have priority for 6 months' assessments based on the periodic budget. A significant departure from existing practice, the 6 months' priority for the assessment lien strikes an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of lenders. As a practical matter, secured lenders will most likely pay the 6 months' assessments demanded by the association rather than having the association foreclose on the unit. If the lender wishes, an escrow for assessments can be required.

This comment on § 3-116 illustrates the intent to allow for 6 months of assessments to be prior to a first security interest. The reason this was done was to accommodate the association's need to enforce collection of unpaid assessments. The controversy surrounding the super priority lien is in defining its limit. This is an important consideration for an association looking to enforce its lien. There is little benefit to an association if it incurs expenses pursuing unpaid assessments that will be eliminated by an imminent foreclosure of the first security interest. As stated in the comment, it is also likely that the holder of the first security interest will pay the super priority lien amount to avoid foreclosure by the association.

III. THE AMOUNT OF THE SUPER PRIORITY LIEN IS LIMITED BY THE PLAIN LANGUAGE OF NRS 116.3116(2).

NRS 116.3116(2) states:

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

(emphasis added)

Having found previously that costs of collecting are not part of the lien means they are not part of the super priority lien. The question then becomes what can be included as part of the super priority lien. Prior to 2009, the super priority lien was limited to 6 months of assessments. In 2009, the Nevada legislature changed the 6 months of

assessments to 9 months and added expenses for abatement under NRS 116.310312 to the super priority lien amount. But to the extent federal law applicable to the first security interest limits the super priority lien, the super priority lien is limited to 6 months of assessments.

The emphasized language in the portion of the statute above identifies the portion of the association's lien that is prior to the first security interest, i.e. what comprises the super priority lien. This language states that there are two components to the super priority lien. The first is "to the extent of any charges" incurred by the association pursuant to NRS 116.310312. NRS 116.310312(4) makes clear that the charges assessed against the unit pursuant to this section are a lien on the unit and subsection (6) makes it clear that such lien is prior to first security interests. These costs are also specifically part of the lien described in NRS 116.3116(1) incorporated through NRS 116.3102(1)(j). This portion of the super priority lien is specific to charges incurred pursuant to NRS 116.310312. Payment of those charges relieves their super priority lien status. There does not seem to be any confusion as to what this part of the super priority lien is. Analysis of the super priority lien will focus on the second portion.

A. THE SUPER PRIORITY LIEN ATTRIBUTABLE TO ASSESSMENTS IS LIMITED TO 9 MONTHS OF ASSESSMENTS AND CONSISTS ONLY OF ASSESSMENTS.

The second portion of the super priority lien is "to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien."

The statute uses the language "to the extent of the assessments" to illustrate that there is a limit on the amount of the super priority lien, just like the language concerning expenses pursuant to NRS 116.310312, but this portion concerns assessments. The limit on the super priority lien is based on the assessments for

common expenses reflected in a budget adopted pursuant to NRS 116.3115 which would have become due in 9 months. The assessment portion of the super priority lien is no different than the portion derived from NRS 116.310312. Each portion of the super priority lien is limited to the specific charge stated and nothing else.

Therefore, while the association's *lien* may include any penalties, fees, charges, late charges, fines and interest charged pursuant to NRS 116.3102 (1) (j) to (n), inclusive, the total amount of the *super priority lien* attributed to assessments is no more than 9 months of the monthly assessment reflected in the association's budget. Association budgets do not reflect late charges or interest attributed to an anticipated delinquent owner, so there is no basis to conclude that such charges could be included in the super priority lien or in addition to the assessments. Such extraneous charges are not included in the association's super priority lien.

NRS 116.3116 originally provided for 6 months of assessments as the super priority lien. Comments to the Uniform Act quoted previously support the conclusion that the original intent was for 6 months of the assessments alone to comprise the super priority lien amount and not the penalties, charges, or interest. It is possible that an argument could be made that the language is so clear in this regard one should not look to legislative intent. But considering the controversy surrounding the meaning of this statute, the better argument is that legislative intent should be used to determine the meaning.

The Commission's advisory opinion of December 2010 concluded that assessments *and* additional costs are part of the super priority lien. The Commission's advisory opinion relies in part on a Wake Forest Law Review[8] article from 1992 discussing the Uniform Act. This article actually concludes that the Uniform Act language limits the

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[8] See James Winokur, *Meaner Lienor Community Associations: The "Super Priority" Lien and Related Reforms Under the Uniform Common Interest Ownership Act*, 27 WAKE FOREST L. REV. 353, 366-69 (1992).

amount of the super priority lien to 6 months of assessments, but that the super priority lien does not necessarily consist of only delinquent assessments.[9] It can include fines, interest, and late charges.[10] The concept here is that all parts of the lien are prior to a first security interest and that reference to assessments for the super priority lien is only to define a specific dollar amount.

The Division disagrees with this interpretation because of the unreasonable consequences it leaves open. For example, a unit owner may pay the delinquent assessment amount leaving late charges and interest as part of the super priority lien. If the super priority lien can encompass more than just delinquent assessments in this situation, it would give the association the right to foreclose its lien consisting only of late charges and interest prior to the first security interest. It is also unreasonable to expect that fines (which cannot be foreclosed generally) survive a foreclosure of the first security interest. Either the lender or the new buyer would be forced to pay the prior owner's fines. The Division does not find that these consequences are reasonable or intended by the drafters of the Uniform Act or by the Nevada Legislature. Even the 2008 revisions to the Uniform Act do not allow for anything other than assessments and costs incurred to foreclose the lien to be included in the super priority lien. Fines, interest, and late charges are not *costs* the association incurs.

In 2009, the Nevada Legislature revised NRS 116.3116 to expand the association's super priority lien. Assembly Bill 204 sought to extend the super priority lien of 6 months of assessments to 2 years of assessments.[11] The Commission's chairman, Michael Buckley, testified on March 6, 2009 before the Assembly Committee on Judiciary on A.B. 204 that the law was unclear as to whether the 6 month priority can

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[9] See id. at 367 (referring to the super priority lien as the "six months assessment ceiling" being computed from the periodic budget).
[10] See id.
[11] See http://leg.state.nv.us/Session/75th2009/Reports/history.cfm?ID=416.

include the association's costs and attorneys' fees.[12] Mr. Buckley explained that the Uniform Act amendments in 2008 allowed for the collection of attorneys' fees and costs incurred by the association in foreclosing the assessment lien as part of the super priority lien. Mr. Buckley requested that the 2008 change to the Uniform Act be included in A.B. 204. Mr. Buckley's requested change to A.B. 204 to expand the super priority lien never made it into A.B. 204. Ultimately, A.B. 204 was adopted to change 6 months to 9 months, but commenting on the intent of the bill, Assemblywoman Ellen Spiegel stated:

> Assessments covered under A.B. 204 are the regular monthly or quarterly dues for their home. *I carefully put this bill together to make sure it did not include any assessments for penalties, fines or late fees.* The bill covers the basic monies the association uses to build its regular budgets.

(emphasis added).[13]

It is significant that the legislative intent in changing 6 months to 9 months was with the understanding that no portion of that amount would be for penalties, fines, or late fees and that it only covers the basic monies associations use to build their regular budgets. It does make sense that a lien superior to a first security interest would not include penalties, fines, and interest. To say that the super priority lien includes more than just 9 months of assessments allows several undesirable and unreasonable consequences.

B. NEVADA HAS NOT ADOPTED AMENDMENTS TO THE UNIFORM ACT TO ALTER THE ORIGINAL INTENT OF THE SUPER PRIORITY LIEN.

The changes to the Uniform Act support the contention that only what is referenced as the super priority lien in NRS 116.3116(2) is what comprises the super priority lien. In 2008, § 3-116 of the Uniform Act was revised as follows:

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[12] See Minutes of the Meeting of the Assembly Committee on Judiciary, Seventy-fifth Session, March 6, 2009 at 44-45.
[13] See Minutes of the Senate Committee on Judiciary, Seventy-fifth Session, May 8, 2009 at 27.

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

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

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

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

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

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

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

Explaining the reason for the changes to these sections, the Uniform Act includes the following comments:

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

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

The Uniform Act's amendment in 2008 is very telling about § 3-116's original intent. The comments state reasonable attorneys' fees and court costs are *added* to the super priority lien stating that it is currently 6 months of regular common assessments. The Uniform Act adds attorneys' fees and costs to subsection (a) which defines the association's lien. Those attorneys' fees and costs attributable to foreclosure efforts are also added to subsection (c) which defines the super priority lien amount.

If the association's lien ever included attorneys' fees and court costs as "charges for late payment of assessments" or if such sum was part of the super priority lien, there would be no reason to add this language to subsection (a) and (c). Or at a minimum, the comments would assert the amendment was simply to make the language more clear. It is also clear by the language that only what is specified as part of the super priority lien can comprise the super priority lien. The additional language defining the super priority lien provides for costs that are *incurred* by the association foreclosing the lien. This is further evidence that the super priority lien does not and never did consist of interest, fines, penalties or late charges. These charges are not incurred by the association and they should not be part of any super priority lien.

The Nevada Legislature had the opportunity to change NRS 116.3116 in 2009 and 2011 to conform to the Uniform Act. It chose not to. While the revisions under the

Uniform Act may make sense to some and they may be adopted in other jurisdictions, the fact of the matter is, Nevada has not adopted those changes. The changes to the Uniform Act cannot be insinuated into the language of NRS 116.3116. Based on the plain language of NRS 116.3116, legislative intent, and the comments to the Uniform Act, the Division concludes that the super priority lien is limited to expenses stemming from NRS 116.310312 and assessments as reflected in the association's budget for the immediately preceding 9 months from institution of an action to enforce the association's lien.

IV. "ACTION" AS USED IN NRS 116.3116 DOES NOT REQUIRE A CIVIL ACTION ON THE PART OF THE ASSOCIATION.

NRS 116.3116(2) provides that the super priority lien pertaining to assessments consists of those 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 requires that the association take action to enforce its lien in order to determine the immediately preceding 9 months of assessments. The question presented is whether this action must be a civil action.

During the Senate Committee on Judiciary hearing on May 8, 2009, the Chair of the Committee, Terry Care, stated with reference to AB 204:

> One thing that bothers me about section 2 is the duty of the association to enforce the liens, but I understand the argument with the economy and the high rate of delinquencies not only to mortgage payments but monthly assessments. Bill Uffelman, speaking for the Nevada Bankers Association, broke it down to a 210-day scheme that went into the current law of six months. Even though you asked for two years, I looked at nine months, thinking the association has a duty to move on these delinquencies.

NRS 116 does not require an association to take any particular action to enforce its lien, but that it institutes "an action." NRS 116.31162 provides the first steps to foreclose the association's lien. This process is started by the mailing of a notice of delinquent

assessment as provided in NRS 116.31162(1)(a). At that point, the immediately preceding 9 months of assessments based on the association's budget determine the amount of the super priority lien. The Division concludes that this action by the association to begin the foreclosure of its lien is "action to enforce the lien" as provided in NRS 116.3116(2). 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). Associations should make the delinquent assessment known to the first security holder in an effort to receive the super priority lien amount from them as timely as possible.

ADVISORY CONCLUSION:

An association's lien consists of assessments, construction penalties, and fines. Unless the association's declaration provides otherwise, the association's lien also includes all penalties, fees, charges, late charges, fines and interest pursuant to NRS 116.3102(1)(j) through (n). While charges for late payment of assessments are part of the association's lien, "costs of collecting" as defined by NRS 116.310313, are not. "Costs of collecting" defined by NRS 116.310313 includes costs of collecting any *obligation*, not just assessments. Costs of collecting are not merely a charge for a late payment of assessments. Since costs of collecting are not part of the association's lien in NRS 116.3116(1), they cannot be part of the super priority lien detailed in subsection (2).

The super priority lien consists of two components. By virtue of the detail provided by the statute, the super priority lien applies to the charges incurred under NRS 116.310312 and up to 9 months of assessments as reflected in the association's regular budget. The Nevada Legislature has not adopted changes to NRS 116.3116 that were made to the Uniform Act in 2008 despite multiple opportunities to do so. In fact, the Legislative intent seems rather clear with Assemblywoman Spiegel's comments to A.B. 204 that changed 6 months of assessments to 9 months. Assemblywoman Spiegel stated that she "carefully put this bill together to make sure it did not include any

assessments for penalties, fines or late fees." This is consistent with the comments to the Uniform Act stating the priority is for assessments based on the periodic budget. In other words, when the super priority lien language refers to 9 months of assessments, assessments are the only component. Just as when the language refers to charges pursuant to NRS 116.310312, those charges are the only component. Not in either case can you substitute other portions of the entire lien and make it superior to a first security interest.

Associations need to evaluate their collection policies in a manner that makes sense for the recovery of unpaid assessments. Associations need to consider the foreclosure of the first security interest and the chances that they may not be paid back for the costs of collection. Associations may recover costs of collecting unpaid assessments if there are proceeds from the association's foreclosure.[14] But costs of collecting are not a lien under NRS 116.310313 or NRS 116.3116(1); they are the personal liability of the unit owner.

Perhaps an effective approach for an association is to start with foreclosure of the assessment lien after a nine month assessment delinquency or sooner if the association receives a foreclosure notice from the first security interest holder. The association will always want to enforce its lien for assessments to trigger the super priority lien. This can be accomplished by starting the foreclosure process. The association can use the super priority lien to force the first security interest holder to pay that amount. The association should incur only the expense it believes is necessary to receive payment of assessments. If the first security interest holder does not foreclose, the association will maintain its assessment lien consisting of assessments, late charges, and interest. If a loan modification or short sale is worked out with the owner's lender, the association is better off limiting its expenses and more likely to recover the assessments. Adding unnecessary costs of collection – especially after a short period of delinquency – can

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[14] NRS 116.31164.

make it all the more impossible for the owner to come current or for a short sale to close. This situation does not benefit the association or its members.

The statements in this advisory opinion represent the views of the Division and its general interpretation of the provisions addressed. It is issued to assist those involved with common interest communities with questions that arise frequently. It is not a rule, regulation, or final legal determination. The facts in a specific case could cause a different outcome.

EXHIBIT 3

Presentation to Senate Committee on Judiciary
Real Estate Division Advisory 13-01
By Gail J. Anderson, Administrator
May 6, 2013

SUMMARY OF NRED ADVISORY OPINION 13-01

Advisory Conclusions:

- An association's lien does not include "costs of collecting" as defined by NRS 116.310313, so the super priority portion of the association's lien does not include "costs of collecting;"
- The super priority portion of the association's lien (the "super priority lien") consists of: (1) 9 months of assessments; and (2) abatement costs under NRS 116.310312;
- The assessment portion of the super priority lien consists of only "assessments", i.e. not late charges, fines or interest;
- The association must take action to enforce its super priority lien, but it need not institute a civil action by the filing of a complaint. The association may begin the foreclosure process set out in NRS 116.31162 to enforce its super priority lien.

The Division's advisory looks at the language of NRS 116.3116 to reach its conclusions.

NRS 116.3116 Liens against units for assessments.

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

2. A lien under this section is prior to all other liens and encumbrances on a unit except:

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

(b) A first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent or, in a cooperative, the first security interest encumbering only the unit's owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent; and

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

The lien is also prior to all security interests described in paragraph (b) to the extent of any charges incurred by the association on a unit pursuant to NRS 116.310312 and to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien, unless federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien. If federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien, the period during which the lien is prior to all security interests described in paragraph (b) must be determined in accordance with those federal regulations, except that notwithstanding the provisions of the federal regulations, the period of priority for the lien must not be less than the 6 months immediately preceding institution of an action to enforce the lien. This subsection does not affect the priority of mechanics' or materialmen's liens, or the priority of liens for other assessments made by the association.

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

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

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

6. This section does not prohibit actions to recover sums for which subsection 1 creates a lien or prohibit an association from taking a deed in lieu of foreclosure.

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

8. The association, upon written request, shall furnish to a unit's owner a statement setting forth the amount of unpaid assessments against the unit. If the interest of the unit's owner is real estate or if a lien for the unpaid assessments may be foreclosed under NRS 116.31162 to 116.31168, inclusive, the statement must be in recordable form. The statement must be furnished within 10 business days after receipt of the request and is binding on the association, the executive board and every unit's owner.

9. 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.

10. 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.

(Added to NRS by 1991, 567; A 1999, 390; 2003, 2243, 2272; 2009, 1010, 1207; 2011, 2448)

NRS 116.3102 Powers of unit-owners' association; limitations.

1. Except as otherwise provided in this chapter, and subject to the provisions of the declaration, the association:

(a) Shall adopt and, except as otherwise provided in the bylaws, may amend bylaws and may adopt and amend rules and regulations.

(b) Shall adopt and may amend budgets in accordance with the requirements set forth in NRS 116.31151, may collect assessments for common expenses from the units' owners and may invest funds of the association in accordance with the requirements set forth in NRS 116.311395.

(c) May hire and discharge managing agents and other employees, agents and independent contractors.

(d) May institute, defend or intervene in litigation or in arbitration, mediation or administrative proceedings in its own name on behalf of itself or two or more units' owners on matters affecting the common-interest community.

(e) May make contracts and incur liabilities. Any contract between the association and a private entity for the furnishing of goods or services must not include a provision granting the private entity the right of first refusal with respect to extension or renewal of the contract.

(f) May regulate the use, maintenance, repair, replacement and modification of common elements.

(g) May cause additional improvements to be made as a part of the common elements.

(h) May acquire, hold, encumber and convey in its own name any right, title or interest to real estate or personal property, but:

(1) Common elements in a condominium or planned community may be conveyed or subjected to a security interest only pursuant to NRS 116.3112; and

(2) Part of a cooperative may be conveyed, or all or part of a cooperative may be subjected to a security interest, only pursuant to NRS 116.3112.

(i) May grant easements, leases, licenses and concessions through or over the common elements.

(j) May impose and receive any payments, fees or charges for the use, rental or operation of the common elements, other than limited common elements described in subsections 2 and 4 of NRS 116.2102, and for services provided to the units' owners, including, without limitation, any services provided pursuant to NRS 116.310312.

(k) May impose charges for late payment of assessments pursuant to NRS 116.3115.

(l) May impose construction penalties when authorized pursuant to NRS 116.310305.

(m) May impose reasonable fines for violations of the governing documents of the association only if the association complies with the requirements set forth in NRS 116.31031.

(n) May impose reasonable charges for the preparation and recordation of any amendments to the declaration or any statements of unpaid assessments, and impose reasonable fees, not to exceed the amounts authorized by NRS 116.4109, for preparing and furnishing the documents and certificate required by that section.

(o) May provide for the indemnification of its officers and executive board and maintain directors and officers liability insurance.

(p) May assign its right to future income, including the right to receive assessments for common expenses, but only to the extent the declaration expressly so provides.

(q) May exercise any other powers conferred by the declaration or bylaws.

(r) May exercise all other powers that may be exercised in this State by legal entities of the same type as the association.

(s) May direct the removal of vehicles improperly parked on property owned or leased by the association, as authorized pursuant to NRS 487.038, or improperly parked on any road, street, alley or other thoroughfare within the common-interest community in violation of the governing documents. In addition to complying with the requirements of NRS 487.038 and any requirements in the governing documents, if a vehicle is improperly parked as described in this paragraph, the association must post written notice in a conspicuous place on the vehicle or provide oral or written notice to the owner or operator of the vehicle at least 48 hours before the association may direct the removal of the vehicle, unless the vehicle:

(1) Is blocking a fire hydrant, fire lane or parking space designated for the handicapped; or

(2) 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.