



LEGAL ALERT

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Nevada Super Priority Lien for HOA Assessments Extended to Nine Months

Nevada law provides that under certain circumstances the lien of a homeowners association for delinquent assessments may have priority over a lender's first deed of trust. Effective October 1, 2009, the super priority lien will secure delinquent assessments that accrued within nine (9) months prior to the initiation of enforcement by the association. An amendment to the Nevada Revised Statutes, extending the period of the super priority lien from six (6) months to nine (9) months,¹ was signed by the Governor of Nevada on May 28, 2009, and will become effective October 1, 2009.

This provision is part of the Uniform Common Interest Ownership Act (the "Act"), which was drafted by the National Conference of Commissioners on Uniform State Laws and has been enacted in Nevada and seven (7) other states (Alaska, Colorado, Connecticut, Delaware, Minnesota, Vermont, and West Virginia). The Act applies to residential subdivisions and residential condominium projects which include common elements. It also applies to commercial condominium projects if the developer elects to be governed by the Act. As drafted in the Uniform Act, the super priority lien covered a period of six (6) months of delinquent assessments. The drafters of the Act explained the super priority provision as follows:

"A significant departure from existing practice, the 6 months' priority for the assessment lien strikes an equitable balance between the need

¹ The extension is subject to FNMA and FHLMA requirements, which limit the super priority lien to six (6) months in the case of mortgages on individual condominium units sold to those entities.



to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of the 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."

Issues regarding this super priority lien are arising with greater frequency. In a typical situation, liens are placed on units in a residential subdivision by a master association, which was never under the control of the developer of the subject subdivision. In other cases, some of the units in a residential subdivision have been sold, and the association has become active and has begun levying assessments. Then sales have stopped or diminished to a small level of absorption. The original developer still owns a substantial number of units, subject to the construction lender's first deed of trust, but the developer has lost or abandoned control of the association. Under either scenario, if the developer fails to pay assessments on its units, the master association or sub-association may commence a foreclosure of the liens securing the assessments.

Under these circumstances, the construction lender may be required to pay the nine (9) month super priority lien to preserve its status as senior lien holder and to prevent a foreclosure by the HOA in a senior position, which could impair or wipe out the construction lender's deed of trust. Whenever there are unpaid HOA assessments on a project

in Nevada, which is subject to the Act, the lender should be prepared to pay those assessments for a nine (9) month period, if required to do so to protect its priority position on the property.

Lenders should be aware that the Act does not require that notice of the foreclosure of the HOA lien be provided to the senior lender unless the lender has notified the association of the existence of the deed of trust. Lenders holding loans on multiple units or lots in the situations described above should consider giving such notices to all known owners' associations.

The Act does not expressly require that the association provide to the senior lender a statement for the nine (9) months of assessments secured by the super priority lien, even upon the lender's request, or that the association accept payment of that amount. Snell & Wilmer was involved in one situation where a lender offered, in writing, to pay the amount of the six (6) month super priority lien, but the HOA refused to provide the amount that the lender would have to pay to discharge the lien. Additionally, the Act does not require the association to confirm that, upon payment of the super priority lien, any remaining lien for unpaid assessments is subordinate to the deed of trust as provided in the Act.

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