

WEATHERING THE FORECLOSURE STORM - Law Change Impacts Homeowners Associations

Foreclosure headlines are constant. Nationally, Colorado consistently ranks high in foreclosures. Associations have to face the realities of homeowners who are going through foreclosure. The lender on the property is not the only party that is owed money. The homeowner usually owes the association dues. The Colorado legislature enacted several changes to reform the foreclosure process. Under the new law, if a lien does not have current mailing information, then it is invalid. An invalid lien is eliminated in the foreclosure without being paid. This article discusses several solutions for an association to preserve and protect their lien rights.

Under the current law, the association's interest in six months of dues has a priority over any mortgage recorded against the property (the "superlien"). Currently, assessment liens should have the current mailing address of the association, but some liens only refer to the declaration or the old management company.

The changes in the foreclosure law require that a recorded instrument must give the address for the party claiming an interest; otherwise, the interest is eliminated in the foreclosure (Colorado Revised Statute §38-38-103(C) see www.htspc.com – link for posting of statute). Association liens that do not contain a current mailing address will be eliminated in a foreclosure. Association liens must contain current addresses.

In Colorado, until December 31, 2007 a lien provides third parties with notice of a lien, even if there is no mailing address on the document. If the association lien does not have an address, the association still has a valid lien against the property. On January 1, 2008, any lien recorded that does not have a current address of the association will be extinguished in the foreclosure process.

Many assessment liens and declarations do not have current addresses for the association management. There is a chance that the Colorado Common Interest Ownership Act ("CCIOA") may trump the January 1, 2008 change in the foreclosure statute, and not require association liens or the declaration to have a current address. Nevertheless, we recommend that associations strictly comply with the new law to

preserve their super liens. We advise associations to place a priority on recording assessment liens. The Firm prepares liens with current mailing information.

A review of your association liens for a mailing address is the first step to determine if there is a problem. The law change is not an issue for your HOA if your association has a current mailing address on all liens. If your HOA does not have a current mailing address then your association must choose a method to provide notice of the association's current mailing address. Our firm recommends that your association adopt one of the following methods of notice:

- 1) Amend the declaration to include the current mailing address of the association; or
- 2) Record notices against every unit in the association of the contact information for the association; or
- 3) Make sure the current contact information is provided on every assessment lien and make sure your assessment liens are recorded promptly when the owners default.

Any of these three options will result in your association protecting their assessment liens.

1) Amending the Declaration

Amending the Declaration typically requires two-thirds approval of all members of the association. This can be a difficult and time-consuming process for an association, depending on how much agreement there is for the change and how active your owners are in the management of the association. If the association takes on the task of amending the Declaration, there will be some necessary clean up work.

Amending the declaration takes months and is a large financial cost for the association. It only makes financial sense to amend the declaration if the association has other issues, in addition to this current address issue, to fix in the governing documents. If

your assessment liens refer to the Declaration, then this amendment should satisfy the notice requirements under the new law.

2) Recording Notices

Recording a notice of association address is faster than amending the Declaration. The legal descriptions for each unit must be verified. The fee for filing with the clerk and recorder is \$6 per notice. This can be an expensive proposition to larger communities, as there are also costs to prepare the notices. The cost of preparing and recording these notices may be justified by the possibility of losing superlien money when a property goes into foreclosure. However, there is a less expensive alternative available.

3) Assessment Liens

The third approach is the timely recordation of assessment liens. If your HOA is recording your assessment liens then make sure that your current mailing information is on the lien. This approach will be effective in situations where the association is prompt in recording liens against delinquent homeowners. The drawback is if the association's collection policy and procedure does not place a priority on recording the assessment lien, then the superlien can be lost, under the new law. This policy problem is easily fixed by amending the association's collection policy and procedure to place a priority on promptly recording the assessment lien.

Some associations have a policy of delaying the recording of a lien until there is a large balance due, with the hope that there will be a large payoff from a title company. This is not a good approach, especially in light of the new law. Once an assessment lien is recorded, the association is entitled to demand the total current amount due (including attorneys' fees and interest) from any title company requesting a payoff in a purchase situation. In a foreclosure situation, the association will often only receive through the foreclosure up to the six months of dues, even if the assessment lien was recorded when there were only three months of dues. Any attorneys' fees and interest

would still be the responsibility of the homeowner who is being foreclosed upon, and would not be included in the superlien.

There are other solutions for an HOA that we do not recommend. Some lawyers may recommend that the association do nothing, and hope that the current treatment of assessment liens continues. However, we view this position as overly optimistic and unrealistic.

Other lawyers may recommend that the association can record one document that references the declaration, but we do not recommend this approach. This is an attempt to circumvent the declaration amendment requirements. Circumventing the amendment requirements of the declaration can create problems for the association. After discussing this issue with several Front Range county clerk and recorder offices and a prominent title company, there are risks in this one notice approach. One, not all clerk and recorders will cross reference the document to each individual unit in the HOA. Two, not all title companies will catch the notice in a typical title search for a foreclosure. Good title companies may catch the notice; bad title companies will miss it. Associations cannot rely upon title companies to protect their interests.

If your association does not currently have a mailbox, the association needs to get one. Management agreements change, and it is a hassle and additional expense for the association to go through updating the association address anytime there is a change in management. Either every HOA should have its own mailing address, a physical address, P.O. Box, or an address with a mail services company. Control over checking the mail can be made the responsibility of a board member or management company.

Your association needs to review your declaration and check for a current mailing address. The association should then weigh the benefits of the different approaches to providing parties with notice of their address. Record your assessment liens promptly, and choose the recommended approach that works for the association budget and implement the plan. Foreclosures are a difficult part of home ownership, but it is the reality of the current economic condition in many of our Colorado communities. Make sure your association is prepared to weather the storm.

CRS §38-38-103(c) effective 1/1/2008

“If a recorded instrument does not specify the address of the party purporting to have an interest in the property under such recorded instrument, the party shall not be entitled to notice and any interest in the property under such instrument shall be extinguished upon the execution and delivery of a deed pursuant to section 38-38-501.”