

# Homeowner Association Lien Foreclosure (NV)

A Practical Guidance® Practice Note by Jacqueline A. Gilbert, Kim Gilbert Ebron



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This practice note explains the residential homeowner association (HOA) foreclosure process in Nevada, focusing on nonjudicial foreclosure and the interplay between an association's lien for common assessments and deed(s) of trust that may also be recorded against the property. Whether these procedures affect planned communities where the units are restricted exclusively for non-residential or commercial use depends on the Declaration of Covenants, Conditions & Restrictions (CC&Rs). Nev. Rev. Stat. Ann. § 116.12077(1). Requirements for foreclosure of a deed of trust or mortgage or for planned communities which have not expressly adopted these provisions of Nev. Rev. Stat. Chapter 116 are outside the scope of this practice note.

For guidance on foreclosing on a deed of trust in Nevada, see [Residential Foreclosure \(NV\)](#), [Commercial Foreclosure \(NV\)](#), and [Foreclosure Resource Kit \(NV\)](#).

## The Lien: Historical, Legal, and Procedural Overview

In 1991, Nevada adopted the Uniform Common Interest Ownership Act (UCIOA), codified as Nev. Rev. Stat. Chapter 116. *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 334 P.3d 408, 410 (Nev. 2014). The provisions for liens and the enforcement of such are found in Nev. Rev. Stat. §§ 116.3116–116.31168. Since adoption, the foreclosure

statutes have been through a number of changes, with many of those changes made effective October 1, 2015. For purposes of this note, all references to the foreclosure process and procedures are based on current statutes. If reviewing proper procedures or representing those who purchased at nonjudicial foreclosure sales it is important to note when the noticing and foreclosure took place, especially if challenging or defending against a challenge to the sale. In addition, legislation currently pending before the Nevada state legislature would eliminate an HOA's ability to nonjudicially foreclose if it does not initiate the foreclosure process prior to October 1, 2021. See SB 144 (pending as of February 24, 2021).

Real property that is subject to a common interest regime in Nevada is separated into units that are then conveyed to and owned by individual unit owners. The HOA has a lien for assessments against the individual units. Nev. Rev. Stat. § 116.3116(1). The lien can include common assessments (i.e., dues determined by the annual budget), penalties, fees, charges, late charges, fines, and interest and collection costs for collecting on past due obligations. Recording of the CC&Rs provides record notice and perfection of the lien. Nev. Rev. Stat. Ann. § 116.3116(9).

### Priority of the HOA Lien

The HOA lien has priority over all other liens except the following:

- Liens and encumbrances recorded prior to the recording of the declaration of CC&Rs
  - A first security interest recorded before the date on which the assessment sought to be enforced became delinquent –and–
  - Government and property tax liens
- Nev. Rev. Stat. Ann. § 116.3116(2).

In Nevada, a deed of trust is the customary security interest used by lenders for loans secured by residential real estate and a first deed of trust generally has the first security interest in a property. Thus, an HOA lien has priority over second or third deeds of trust, judgment liens, and other liens, extinguishing them upon foreclosure. Mechanics' or materialmen's liens keep whatever priority they have under Nevada law. For guidance on mechanic's liens in Nevada, see [{Mechanic's Liens \(NV\)}](#).

### **Superpriority of Portion of HOA Lien**

The HOA's lien is a split priority lien, meaning that a portion of the lien has priority over even a first deed of trust to the extent of up to nine months of unpaid common assessments (i.e., monthly dues) and for any charges incurred by the HOA for maintenance/nuisance and abatement. Nev. Rev. Stat. Ann. § 116.3116(3)(a)(b). The costs of enforcement of the lien also have priority to the extent allowed in the statute. Nev. Rev. Stat. Ann. § 116.3116(5). No attorney's fees have priority over a first security interest. Foreclosure of an HOA lien including any of these amounts extinguishes a first deed of trust and makes the deed of trust unenforceable against the property. The portion of the HOA lien having priority over a first security interest has been referred to as the "superpriority portion" or a "superpriority lien" in caselaw.

As is generally understood in foreclosure law, specifically with nonjudicial foreclosure, foreclosure of a superior or prior lien extinguishes junior or inferior liens against the property with those liens attaching to the proceeds of the sale.

## **Foreclosure Process and Procedures**

The procedure for a foreclosure by sale, or nonjudicial foreclosure, is similar to that for foreclosure under a deed of trust. Due to the split nature of the HOA lien and its priority over a first security interest, though, it requires some additional steps and allows for a redemption period. Because a property owner has the right to cure its debts, the HOA's first step in collecting past due obligations is to mail the unit owner a schedule of fees that may be charged, a proposed repayment plan, and a notice of the right to contest the delinquency and charges with the procedures to do so. This information cannot be sent until the unit owner is a minimum of 60 days past due on the obligations. If, after 30 days from mailing this information, no action has been taken, the HOA may begin the nonjudicial foreclosure process.

### **Notice of Delinquent Assessments**

Under Nevada law, the first step in the nonjudicial foreclosure process is to send a notice of delinquent assessment (NODA) by certified or registered mail to the unit owner at the owner's address, if known, and at the subject property address stating the amount of all assessments and other amounts due to the HOA allowed under Nev. Rev. Stat. § 116.3116(1)(a). This gives the unit owner time to contact the HOA and clear the debt before continuing with the foreclosure process. While the NODA is not required to be recorded in the public records, many associations or their collection agents will record it. The NODA also does not need to be sent to other lienholders. This is an attempt to keep the costs of collection low so the unit owner has time to contact the HOA and clear the debt without the more expensive collection costs being added to the current debt.

### **Notice of Default and Election to Sell**

A unit owner is entitled to clear the debt, but if the unit owner has not taken steps to stop the foreclosure sale (e.g., payment plan or successful challenge), then after a minimum of 30 days from sending the NODA, the HOA, generally through its collection agent, can prepare and record a notice of default and election to sell (NOD). Nev. Rev. Stat. Ann. § 116.3116(2)(b).

Because of the unique superpriority portion of the lien, the NOD must provide with particularity the deficiency of payment, provide a separate statement of the superpriority amount, if any, including the amount of common assessments with such status and amounts attributable to charges incurred for maintenance/nuisance-abatement, and the amount of costs of enforcement incurred as of the date of the NOD. Nev. Rev. Stat. Ann. § 116.3116(2)(b)(1)-(2). In addition, the NOD must advise that if the holder of the first security interest does not pay the superpriority amount, the HOA may nonjudicially foreclose and that the sale will extinguish the first security interest as to the property. Nev. Rev. Stat. Ann. § 116.3116(2)(b)(3). The NOD must also advise the first security interest holder that if it pays the superpriority portion at least five days prior to the foreclosure sale and that satisfaction is recorded at least two days prior to the sale, then the sale may take place, but will not extinguish the first security interest. Nev. Rev. Stat. Ann. § 116.3116(2)(b)(3)(I)-(II). Finally, the NOD must advise the unit owner that it has until five days before the sale to pay all amounts due to the HOA to avoid the foreclosure. Nev. Rev. Stat. Ann. § 116.3116(2)(c)-(d).

The NOD must be sent by certified or registered mail to the unit owner, and by certified mail to each lienholder who has recorded their interest prior to the recording of the NOD. Nev. Rev. Stat. §§ 116.3116(3)(b), 116.3116(3)(2).

## Notice of Sale

The recording of the NOD starts a 90-day calendar after which the collection company can prepare and record a notice of sale (NOS). The NOS provides the specific time, date, and place for the sale. Nev. Rev. Stat. Ann. § 116.311635. In Clark County, where Las Vegas is located, the location for such sales is currently 930 South Fourth Street, Las Vegas, Nevada—the same place where bank foreclosure sales are held. See Nev. Rev. Stat. § 116.31164. The NOS must be recorded, posted on the property as described by statute, and sent by certified mail to the unit owner and the lienholders, as with the NOD, and to the ombudsman. Finally, the NOS must be published in a local newspaper three times at weekly intervals prior to the foreclosure sale. See Nev. Rev. Stat. § 116.311635.

The date of sale on the NOS also provides the date from which deadlines to pay to stop the sale or preserve the first deed of trust are calculated, as described in the NOD. See the subsection Notice of Default and Election to Sell, above; see also Nev. Rev. Stat. § 116.31162(1)(b)(3)(II).

The foreclosure sale can be postponed to a later date at the same time and location by oral announcement at the noticed scheduled sale, but only up to three times. After three oral postponements, mailing, recording, posting, and publishing of the NOS must begin again. Nev. Rev. Stat. § 116.31164(5). A new NOD is not required.

## Conducting the Sale

The sale is made at a public auction to the highest cash bidder, held between the hours of 9 a.m. and 5 p.m. in a place designated by statute (and as stated in the NOS). At the sale, the person conducting the sale must tell the assembly whether or not the holder of the first security interest has satisfied the superpriority portion of the HOA's lien. Nev. Rev. Stat. § 116.31164(3), (6). Generally, an HOA may credit bid up to the amount of unpaid assessments plus permitted costs, fees, and expenses incident to enforcement. If no one bids higher than a credit bid, the property will revert to the HOA, which can then take title to, hold, lease, mortgage, or convey the property. Nev. Rev. Stat. § 116.31164(6)(b).

## Type of Title Transferred

The purchaser at an HOA foreclosure sale takes title subject to the right of redemption, which lasts for a period of 60 days. Also, title may be taken subject to a first deed of trust if the superpriority amount was satisfied at least five days prior to the sale.

## Post-Sale Procedures: No Redemption

Following the sale, the person conducting the sale must record and give to the purchaser a certificate of sale stating the unit is subject to redemption. If the property is not timely redeemed, the person conducting the sale shall deliver to the purchaser a deed without warranty. The deed's recitals of: (1) the default, (2) compliance with all mailing and noticing requirements, (3) the elapsing of 90 days, (4) the unit owner's failure to pay assessments and other sums due prior to the expiration of time provided in the statute, and (5) the recording of statutorily required affidavits "are conclusive proof of the matters recited[,]" which are conclusive against the former units owner, heirs and assigns, and "all other persons." Nev. Rev. Stat. Ann. § 116.31166(7)–(9).

## Redemption

During the 60-day redemption period, the unit's owner or any junior lienholder may redeem by paying the purchaser the following:

- The purchase price and 1% per month interest until the time of redemption
- The amount with interest of any assessments, taxes, or payments toward lien created before the purchase and paid by the purchaser
- Any reasonable amount spent by the purchaser for necessary maintenance and repair to keep the unit within the HOA standards –and–
- If the redemptioner was a recorded lienholder, the amount of any superior lien, plus interest

Nev. Rev. Stat. § 116.31166(3).

The person redeeming must also serve a notice of redemption on both the person who conducted the sale and the purchaser, and include a certified copy of the deed or document showing succession rights if by the former unit owner, successor, or assigns. If the redeeming party is a lienholder or successor, the notice must instead include an original or certified copy of the deed of trust with any necessary assignments along with an affidavit showing the actual amount due on the lien in which they are claiming an interest. Nev. Rev. Stat. § 116.31166(4).

If the former unit owner redeems, the sale is effectively void and the unit owner's interest in the property is restored subject to any lien existing on the property at the time of sale. The person to whom the redemption amount was paid must provide and record a certificate of redemption. Nev. Rev. Stat. § 116.31166(5).

If a lienholder redeems, the person who conducted the sale must deliver to that lienholder a deed without warranty conveying all title of the unit owner to the unit and deliver a copy of the deed to the ombudsman within 30 days. The deed provided to a redeeming lienholder must include the same recitals with the same effect as those included in a deed to a purchaser. Nev. Rev. Stat. § 116.3116(6), (8), and (9).

## Challenges to HOA Nonjudicial Foreclosure Sales

A unit owner or lienholder seeking to stop a nonjudicial foreclosure sale must do so by either filing for bankruptcy and invoking the automatic stay or bringing suit in state or federal court to obtain a temporary restraining order or injunction. To obtain injunctive relief, the unit owner or lienholder will need to demonstrate, among other things, likelihood of success on the merits.

For foreclosures initiated before 2015, the Nevada Supreme Court has allowed the use of equity to overcome the conclusive recitals in the foreclosure deed. At this time, there is no caselaw addressing whether equity can intervene for the conclusive recitals provided post-2015. However, the 2015 amendments do provide that after the expiration of the 60-day redemption period, failure to comply with Nev. Rev. Stat. §§ 116.3116–116.31168, inclusive, does not affect the rights of bona fide purchasers or bona fide encumbrancers for value. Such challenges may very well come in the future.

For pre-2015 sales, at this time, title companies are requiring some proof of quiet title before issuing title insurance to those who purchased at such a sale. This can be accomplished either by obtaining it via court order, including all appeals or settlement agreements between purchasers and those holding first security interests.

Prior to the 2015 amendments there was no requirement to record a satisfaction and release of the superpriority portion of the HOA lien, so many challenges arose based on purported payment or attempt to pay by the first security lienholder. Even post-2015, there are no recording requirements for other hidden interests that could affect the purchaser's title, such as federal preemption based on a loan being owned by Freddie Mac or Fannie Mae where Freddie or Fannie's interest is not recorded in their name. See *Berezovsky v. Moniz*, 869 F.3d 923 (9th Cir. 2017); see also *In re Montierth*, 1354 P.3d 648 (Nev. 2015); *Daisy Trust v. Wells Fargo Bank, N.A.*, 445 P.3d 836 (Nev. 2019). Additionally, and still a potential minefield, is whether a homeowner can pay the superpriority amount of the HOA lien and the first deed of trust be protected, where there is no indication of such payment in the public record, and even the holder of the first security interest is unaware of such payment is still undetermined. For pre-2015 sales this issue remains alive and it is unsure how it would affect post-2015 sales.

## Other Means of Collection

Nothing in Nev. Rev. Stat. Ann. §§ 116.3116–116.31168 precludes an HOA from seeking to enforce its lien through judicial foreclosure. An HOA may elect to seek to enforce its lien by judicial foreclosure, which would carry with it a one-year right of redemption. Judicial foreclosure is rarely used as the costs can rise quickly, although recovery of attorney's fees is provided for under the statutes. Nev. Rev. Stat. Ann. § 116.3116(12). Similarly, an HOA can also commence an action to recover the amount of the lien directly from the unit owner. See Nev. Rev. Stat. Ann. § 116.3116(11). However, such a judgment provides less security than the statutory lien because it would not have priority over a first deed of trust, or any other prior recorded encumbrance. Finally, an HOA may accept a deed in lieu of foreclosure, but again, that would leave it subject to a first deed of trust. Nev. Rev. Stat. Ann. § 116.3116(11).

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