

**PA13-156**

HB6662

|           |  |     |
|-----------|--|-----|
| House     | 4637-4655  | 19  |
| Judiciary | 2464-2465, 2466-2468,<br>2479, 2480, 2485, 2492-<br>2498, 2502-2503, 2510-<br>2522, 2560, 2560-2561,<br>2566-2569, 2576-2578,<br>2597, 2599, 2602, 2678-<br>2752 | 117 |
| Senate    | 4142-4144  | 3   |

**H – 1163**

**CONNECTICUT  
GENERAL ASSEMBLY  
HOUSE**

**PROCEEDINGS  
2013**

**VOL.56  
PART 14  
4512 – 4855**

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HOUSE OF REPRESENTATIVES

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May 16, 2013

Have all the Members voted? Have all the Members voted? Will the Members please check the board to determine if your vote is properly cast.

If all the Members have voted, the machine will be locked and the Clerk will take the tally. Will the Clerk please announce the tally.

THE CLERK:

Mr. Speaker, Senate Bill Number 887 in concurrence

with the Senate.

|                             |     |
|-----------------------------|-----|
| Total Number Voting         | 130 |
| Necessary for Passage       | 66  |
| Those voting Yea            | 123 |
| Those voting Nay            | 7   |
| Those absent and not voting | 20  |

DEPUTY SPEAKER BERGER:

The bill passes in concurrence with the Senate.

Will the Clerk please call Calendar Number 507.

THE CLERK:

Mr. Speaker, Calendar Page 25, Calendar Number 507, Favorable Report of the Joint Standing Committee on Judiciary, Substitute House Bill Number 6662 AN ACT CONCERNING THE RECRUITMENT OF MONEYS OWED TO A UNIT OWNERS' ASSOCIATION DUE TO NONPAYMENT OF ASSESSMENTS.

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DEPUTY SPEAKER BERGER:

Representative Ritter, the esteemed Vice-Chair of the Judiciary Committee.

REP. RITTER (1st):

Thank you, Mr. Speaker. I move acceptance of the Joint Committee's Favorable Report and passage of the bill.

DEPUTY SPEAKER BERGER:

Motion before the Chamber is acceptance of the Joint Committee's Favorable Report and passage of the bill. Will you comment further, Representative?

REP. RITTER (1st):

Yes, Mr. Speaker. I believe the Clerk is in possession of an amendment. I'd like to call LCO Number 7228.

DEPUTY SPEAKER BERGER:

Will the Clerk please call LCO 7228. It will be designated House Amendment Schedule "A".

THE CLERK:

Mr. Speaker, LCO Number 7228, Calendar Number 507, House Amendment Schedule "A" designated as such, offered by Representative Fox et al.

DEPUTY SPEAKER BERGER:

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The Representative seeks leave of the Chamber to summarize the Amendment. Is there objection to summarization? Is there objection to summarization? Please proceed.

REP. RITTER (1st):

Thank you, Mr. Speaker. And this is a strike all Amendment, so I wanted to call it first, and if people would indulge me for, Chamber, for a few minutes, there is some legislative history I'd like to get on the record, through you, Mr. Speaker, and I'd like to also thank the Ranking Member, Representative Rebimbas and Senators Kissel and Fasano have also been involved in this, the drafting of this bill.

Essentially, this came to us out of some conflicting case law out of the Superior Courts interpreting 47-258, which are the statutes for condo associations to recoup the nonpayment of condo fees, and what I would really do is urge people to really focus on Lines 19 and 20 and the word, in all actions brought, and why that's important words.

Essentially, we want to clarify that the priority of condo association liens is perpetually renewing. It's not just a one-time evergreen lien if you will. It's not, you only get one bite of the apple to have

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that priority lien. It happens every single time that you bring a new action, and that's very, very important.

So again, to clarify the conflicting case law, it is a perpetually renewing priority lien. We are changing that priority lien from six months to nine months as well later on in the bill.

We also would like to point out that if you go into Subsection 2, that we're also now requiring some different notice provisions. One of the things that in talking to people who represent the bankers' associations is, in sort of working out the details of the bill is, they would like more notice of when people with whom they provide a mortgage to are late on their condo fees so they can pay for them and that does happen a lot of times here in the State of Connecticut. Many banks will pay that as their obligation is, but they sometimes don't get notice.

So two things to really focus on is one, you can't commence anyway under current law until there's two months of condo fees that are unpaid, as first you've got to provide both the unit owner with the demand for payment as well as the person who holds the mortgage in this case.

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The second part then would be that not less than 60 days before you actually bring the foreclosure action, the beginning of Line 52 you see the new process that you'd have to specify to the mortgage holder. The exact language is, by first class mail to the holders of all security interests at the address, and you may rely on the address last recorded, and that's really important as well.

Because one of the complaints we've heard from lawyers is, sometimes mortgages get assigned, and so we want to clarify here is that if you do a title search and it's Bank A, and somehow in the last couple of years Bank B got assigned that mortgage, you may rely on what was on the land records, and that's important.

Because when you go to the last section, Subsection 4, if you do not comply with the notice provisions, you may not try to recoup the attorney fees in this foreclosure action. However, if you rely on the last recorded address on the land records in this case through your title search, you can recoup those attorney fees, so that's a very important clarification for legislative intent, Mr. Speaker. Thank you very much.

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DEPUTY SPEAKER BERGER:

Thank you, Representative. Will you comment further on the Amendment before us, House Amendment Schedule "A"? Representative Rebimbas.

REP. REBIMBAS (70th):

Thank you, Mr. Speaker, and I'd like to thank the Representative for laying out the legislative history and also then highlighting the Amendment that's before us.

I do rise in support of the Amendment as I do believe it was a compromise that's been reached, and certainly a good one.

With that said, a few questions through you, Mr. Speaker, just again to further clarify the Amendment that's before us.

DEPUTY SPEAKER BERGER:

Please proceed, Representative.

REP. REBIMBAS (70th):

Thank you, Mr. Speaker. Through you, Mr. Speaker, to the Representative, regarding the notice requirement and again, maybe specifically looking at Lines 52 through 54, it says that the association shall provide a written notice by first class mail.

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Just again, to further clarify that, would that be the regular mail and therefore it's not needed to be certified and does that also exclude any other forms of written notification such as by electronic notification or e-mail?

Through you, Mr. Speaker.

DEPUTY SPEAKER BERGER:

Representative Ritter.

REP. RITTER (1st):

Through you, Mr. Speaker, it has to be sent by first class mail to comply with the provisions here. However, I suppose if they had an e-mail address, they could do that as well, which I might encourage someone to do because we're trying to get that notice out.

Through you, Mr. Speaker.

DEPUTY SPEAKER BERGER:

Representative Rebimbas.

REP. REBIMBAS (70th):

Thank you, Mr. Speaker. Just following up then on that e-mail notification, certainly something that we need to make sure, then, if it's allowed or not in that regard.

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So was it the testimony that e-mail notification would be allowed under this Amendment? Through you, Mr. Speaker.

DEPUTY SPEAKER BERGER:

Representative Ritter.

REP. RITTER (1st):

Through you, Mr. Speaker, e-mail would not comply with the statutory scheme. I guess what I meant to say through you, Mr. Speaker, was that if you sent it by first class mail there's obviously nothing in statute prohibiting you from sending an e-mail of course, but that would not comply with the statute. Through you, Mr. Speaker.

DEPUTY SPEAKER BERGER:

Representative Rebimbas.

REP. REBIMBAS (70th):

Thank you, Mr. Speaker, and thank you for the clarification. I may have misunderstood your first response in that regard, but that is my understanding then.

Certainly, you're always allowed to provide additional notification avenues, but the required one under this Amendment is by first class mail.

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Also, enumerated in this Amendment are specific factors, things that need to be mentioned that notification to make sure that the notification is proper and thorough.

I want to, through you, Mr. Speaker, again, for further clarification, Lines 72 through 74, if the items that were, that were already described earlier about how the last mailing address or how one would determine what the mailing address that the notification is going to be sent for.

As I read the Amendment before us it says the association may rely on the last recorded security interest of record. May certainly is not mandatory such as shall.

Through you, Mr. Speaker, just for clarification purposes, can we say that they may rely on that address if they do not have actual knowledge of any updated or other addresses, current addresses, then by default they may then go to the land records and use the last recorded address.

But in fact, if they have actual knowledge or have reason to have access to information regarding an updated address, that that would be the address that would be needed to be used? Through you, Mr. Speaker.

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DEPUTY SPEAKER BERGER:

Representative Ritter.

REP. RITTER (1st):

Through you, Mr. Speaker, two things I'd say. One is that when you look at Lines 72 to 79, there's two types of ways so one is yes, they may rely on the last recorded security interest.

And also, they could also if there was an action pending in Superior Court, they have to rely on that.

In the instance where I suppose someone had actual knowledge of where this should be sent, such as an assignment of a mortgage, through you, Mr. Speaker, and they knew that there was a different address, or that the title search produced by the prior holder prior to the assignment, I suppose that they have still the right under this statute to rely on whatever's on the land record if there's no action pending in Superior Court.

But again, I would think that common sense hopefully would prevail and they would at least reach out to the folks they know because I think at the end of the day the condo wants the association fees to be paid.

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But even if we look at Lines 72 through 79, they really only implicate the idea that whether or not they can recoup attorneys fees, so in that narrow example we could have an issue but it wouldn't derail the entire process.

Through you, Mr. Speaker.

DEPUTY SPEAKER BERGER:

Representative Rebimbas.

REP. REBIMBAS (70th):

Thank you, Mr. Speaker. And just some quick clarification question from the last question and it's actually Representative Ritter just touched upon it.

So in fact, if the notification was not proper enumerating all of the factors and requirements under this Amendment, how would that, if at all, change the priority of the lien? Through you, Mr. Speaker.

DEPUTY SPEAKER BERGER:

Representative Ritter.

REP. RITTER (1st):

Through you, Mr. Speaker, it would have no impact on the priority lien. It would simply mean that the attorney representing the condo fees for failure to provide with the new notice requirements pursuant to state statutes, could not recoup the attorneys' fees.

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But again, for legislative intent, I really appreciate the question from the Ranking Member. It in no way affects the priority lien, nor does it affect the perpetual evergreen lien that would exist for foreclosure actions.

Through you, Mr. Speaker.

DEPUTY SPEAKER BERGER:

Representative Rebimbas.

REP. REBIMBAS (70th):

Thank you, Mr. Speaker, and once again, I'd like to thank the Representative for all of his responses.

Certainly, I do support this Amendment and it has some clarity as to the guidelines of what needs to be followed in order to make a proper notice and certainly the intent is to make sure that notice is done in the most, best way to accomplish that.

And just for clarification purposes, so that would, as Representative Ritter had said, if it was improper notice, it does not change the priority of the lien, but certainly it would then challenge that the costs or attorney's fee would not be enumerated in the amount that then could be collected in that regard.

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But I do rise in support of the Amendment and I think it's a good compromise.

DEPUTY SPEAKER BERGER:

Thank you, Representative. Will you remark further on House Amendment Schedule "A"? Will you remark further on House Amendment Schedule "A"? Representative Alberts of the 50th.

REP. ALBERTS (50th):

Thank you, Mr. Speaker, if I may, a question to the proponent.

DEPUTY SPEAKER BERGER:

Please proceed, Representative.

REP. ALBERTS (50th):

Thank you, Mr. Speaker. As I look at Lines 52 through 71 that actually seem to have the mechanics of how the process will go forward in terms of the notification by the association to the holders of the security interest, I just want to make sure I understand what the roles of various parties might be.

Would this typically be an attorney that is representing the condo association that would be doing these actions, or does the proponent envision that it might be a property manager or association?

Through you, Mr. Speaker.

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DEPUTY SPEAKER BERGER:

Representative Ritter.

REP. RITTER (1st):

Through you, Mr. Speaker, I think the way it would work is, in the prior Section, which talks about the demand for payment, that might be the manager of the property.

When you start getting to Line 52 and the foreclosure process, I think we envision that an attorney representing the condo association should be bringing it out.

Through you, Mr. Speaker.

DEPUTY SPEAKER BERGER:

Representative Alberts.

REP. ALBERTS (50th):

Thank you, Mr. Speaker. That was my understanding as well, so I appreciate the confirmation, and I do appreciate the proponent for bringing out this bill and the Ranking Member's remarks.

I think this is a very good Amendment, which will become the bill and I urge my colleagues to support it.

DEPUTY SPEAKER BERGER:

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Thank you, Representative. Representative Smith of the 108th on House Amendment "A".

REP. SMITH (108th):

Thank you, Mr. Speaker. I, too, stand in support of this bill. It's a good bill. We've seen some of the consequences of our Supreme Court in ruling on this type of issue, especially with the inability to collect the association fees in subsequent actions.

So I think it's a good Amendment. I just had one question for clarification purposes on the notice provisions in Lines 52 to 71, if I may, through you.

DEPUTY SPEAKER BERGER:

Please proceed, Representative Smith.

REP. SMITH (108th):

Thank you. I notice the language refers to holders of all security interests and the dialogue has mostly focused on lenders or banks. But just reading the language of the bill, holders of all security interests in my mind would include judgment liens, mechanics liens, any other type of lien that may be found on the land records. I just want to verify that my understanding of the bill was accurate.

Through you, Mr. Speaker.

DEPUTY SPEAKER BERGER:

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Representative Ritter.

REP. RITTER (1st):

Yes, through you, that certainly is a term of art in state statute.

DEPUTY SPEAKER BERGER:

Representative Smith.

REP. SMITH (108th):

Thank you.

DEPUTY SPEAKER BERGER:

Representative O'Dea of the 125th, on House Amendment Schedule "A".

REP. O'DEA (125th):

Thank you, Mr. Speaker, if I may, through you to the proponent?

DEPUTY SPEAKER BERGER:

Please proceed.

REP. O'DEA (125th):

On Line Number 25, as I recall the original, the bill had 12 months as the time period look back and this appears to have 9. I was just wondering why it went down from 12 to 9? Through you, Mr. Speaker.

DEPUTY SPEAKER BERGER:

Representative Ritter.

REP. RITTER (1st):

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Through you, Mr. Speaker, yeah, I appreciate the good gentleman's question. It actually went to 6, to 9 to 12 back to 9. I think the issue in working out the bill and trying to get as many sides to agree on this as possible was that, if you went with 12 months it sort of means the bank would pay 100 percent of those costs.

And I think the feeling in the compromise was instead of going from 6 to 12, we'd go to 9 and that's, you know part of the legislation in that process of the back and forth. Through you, Mr. Speaker. If I understood the question, absolutely.

DEPUTY SPEAKER BERGER:

Representative O'Dea.

REP. O'DEA (125th):

Thank you very much, Mr. Speaker, and I will support the Amendment. Thank you.

DEPUTY SPEAKER BERGER:

Thank you, Representative. Will you remark further on House Amendment Schedule "A"? Will you remark further on House Amendment Schedule "A"?

If not, I will try your minds. All those in favor of House Amendment Schedule "A" signify by saying Aye.

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REPRESENTATIVES:

Aye.

DEPUTY SPEAKER BERGER:

All those opposed? The Ayes have it. The  
Amendment is adopted.

Will you remark further on the bill as amended?

Will you remark further on the bill as amended?

If not, will staff and guests please come to the  
Well of the House. The machine will be opened.

THE CLERK:

The House of Representatives is voting by Roll  
Call. Members to the Chamber, please.

The House of Representatives is voting by Roll  
Call. Members to the Chamber, please.

DEPUTY SPEAKER BERGER:

Before we lock the machine and call all Members,  
it should be noted that the board is reflective of the  
House Amendment Schedule "A". We passed House  
Amendment Schedule "A" on a voice vote. It was  
adopted but the board is reflective of a vote on the  
Amendment. The board will be corrected and your vote  
on the board is on the bill as amended.

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Have all the Members voted? Have all the Members voted? Will the Members please check the board to determine if your vote is properly cast.

If all the Members have voted the machine will be locked and the Clerk will take the tally. Will the Clerk please announce the tally.

THE CLERK:

Mr. Speaker, Substitute House Bill Number 6662, as amended by House "A".

|                             |     |
|-----------------------------|-----|
| Total Number Voting         | 132 |
| Necessary for Passage       | 67  |
| Those voting Yea            | 132 |
| Those voting Nay            | 0   |
| Those absent and not voting | 18  |

DEPUTY SPEAKER BERGER:

The bill passes as amended.

Representative Hennessey, for what purpose do you rise, sir?

REP. HENNESSEY (127th):

For an announcement and introduction.

DEPUTY SPEAKER BERGER:

Please proceed, Representative.

REP. HENNESSEY (127th):

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**CONNECTICUT  
GENERAL ASSEMBLY  
SENATE**

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SENATORS:

Aye.

THE CHAIR:

Opposed.

Senate B has been adopted.

This time, Senator Leone.

SENATOR LEONE:

If there are no objections, I would put to move this on the Consent Calendar.

THE CHAIR:

Are there -- seeing no objections, so ordered.

Senator Looney.

SENATOR LOONEY:

Thank you, Madam President.

Madam President, before calling for a vote on the first Consent Calendar, I have some additional items to add to that Consent Calendar. Appreciate the cooperation, the bipartisan cooperation of the membership in preparing this Consent Calendar. First item to add, Madam President, is on Calendar page 6, Calendar 349, House Bill Number 5513.

Next item, Madam President, Calendar page 9, Calendar 450, 450, Senate Bill Number 921. Next one, Madam President, is on Calendar page 16, Calendar 559, House Bill Number 6508. Next, Madam President, is on Calendar page 23, Calendar 614, House Bill Number 6587 and also on Calendar page 23, Calendar 616, substitute for House Bill Number 6678.

Moving, Madam President, to Calendar page 25, Calendar 629, substitute for House Bill Number 6662. And, Madam President, Calendar page 28, Calendar 650, substitute for House Bill Number 6659. And on

Calendar page 29, Calendar 653, substitute for House Bill Number 6699. And, finally, Madam President, on Calendar page 31, Calendar 664, substitute for House Bill Number 6689.

I would like to add those items to our Consent Calendar and, and now call for a, I would ask the Clerk to list all of the items on the Consent Calendar and then proceed to a vote on that first Consent Calendar.

Thank you, Madam President.

THE CHAIR:

Thank you.

Mr. Clerk.

THE CLERK:

Today's first Consent Calendar, on page 5, Calendar 341, House Bill 6364; Calendar 343, House Bill 5425; Calendar 346, House Bill 6322; Calendar 347, House Bill 6547; and on page 6, Calendar 349, House Bill 5513; page 9, Calendar 450, Senate Bill 921; on page 13, Calendar 506, House Bill 6491; Calendar 515, House Bill 6235.

On page 14, Calendar 524, House Bill 6380; on page 16, Calendar 559, House Bill 6508; page 17, Calendar 563, House Bill 5617; Calendar 569, House Bill 6485; and on page 19, Calendar 588, House Bill 6549; on page 23, Calendar 614, House Bill 6587; Calendar 616, House Bill 6678; page 25, Calendar 629, House Bill 6662; on page 26, Calendar 633, House Bill 6576; and on page 27, Calendar 640, House Bill 6550; on page 28, Calendar 650, House Bill 6659.

And on Page 29, Calendar 653, House Bill 6699; Calendar 655, House Bill 6339; page 31, Calendar 664, House Bill 6689; Calendar 665, House Bill 6355; page 34, Calendar 201, Senate Bill 911; and on page 40, Calendar 514, House Bill 5725.

THE CHAIR:

Mr. Clerk, will you call for a roll call vote on the first Consent Calendar. And the machine will be open.

THE CLERK:

Immediate roll call has been ordered in the Senate.  
Senators please return to the Chamber. Immediate roll call in the Senate on the first Consent Calendar of the day.

THE CHAIR:

Yeah, thank you. Good. There we go.

If all members have voted, all members have voted, the machine will be closed.

Mr. Clerk, will you please call the tally.

THE CLERK:

On the first Consent Calendar,

Total Number Voting 34

Necessary for Adoption 18

Those voting Yea 34

Those voting Nay 0

Those absent and not voting 2

THE CHAIR:

Consent Calendar passes.

Senator Looney.

SENATOR LOONEY:

Madam President.

THE CHAIR:

Senator Looney.

**JOINT  
STANDING  
COMMITTEE  
HEARINGS**

**JUDICIARY  
PART 8  
2448 - 2773**

**2013**

That does exhaust the names of individuals who signed on the public officials list, so we'll now turn to the general public list, and the first person to sign up on that list is -- it looks like Kark Kuegler.

KARK KUEGLER: Good morning, Senator Coleman, Representative Fox, Senator Doyle, Representative Ritter, Senator Kissel, Representative Rebimbas, and members of the Judiciary Committee. Thank you for the opportunity to submit testimony on behalf of Imagineers, LLC.

My name is Karl Kuegler. I'm the director of property management for Imagineers, LLC. We are a common interest community management company based out of Hartford and Seymour. We serve 178 communities from offices in Seymour and Hartford that comprise just about 17,000 condominium and other types of common interest homes. We're registered with the Department of Consumer Protection. We actually hold registration number 0001. We've been serving communities for over 32 years. I have been in the industry for 23 years and have -- hold the -- I am a certified manager of common interest communities, and serve on CAI's legislative action committee as well as chair of the organization's annual state educational conference that was just held earlier this month.

I'd like to submit testimony on two bills: Bill 6662 and Bill 6513. I have written

testimony that has been submitted on both bills. That has been provided. Thank you.

The first bill that I would like to speak on is Bill 6513, AN ACT CONCERNING THE BUDGET AND SPECIAL ASSESSMENT APPROVAL PROCESS FOR COMMON INTEREST COMMUNITIES. I think it's important to note that in 2009, the legislature approved major revisions to the Common Interest Ownership Act which for communities created prior to 1984, made its -- made the budget approval process similar to communities that were created after '84 which is the way the law is right now, which is that a majority of all unit owners have to vote against the budget for the budget not to be approved.

Prior to 1984 the process was the board would approve a budget, and their only obligation was to present it to the unit owners. Very similar to the board's fiduciary responsibility is similar to the State Legislature where you, as a legislative body, approve a budget for the State, and then for the pre-'84 communities, it was similar where you just had the obligation to present it.

The post-'84 communities created a safety measure which gave homeowners the opportunity, if they disagreed with the budget that was approved by their elected officials, that they had the opportunity to change that. Prior to 1984, the only means, which is still in place today, is that they could vote to remove their directors and put in different elected officials, and look for a change in the budget.

We think that the law that was enacted, you know, for those communities post-'84 and with the revisions from the 2009 revisions that it puts in place what's worked well for greater than 25 years. The board -- the board members take very seriously their fiduciary responsibilities. As a practicing manager for over 23 years, I can assure you that boards take very seriously the increases in common fees to -- to a fault in many cases. And I think that's evident by the number of special assessments and other large increases in loans the associations are getting right now because they find themselves in a predicament that the capital components of their structures have failed to the extent that they need to fund those, and they don't have an opportunity to wait.

So we're opposed to this particular bill. We would like to see it remain as it is and work to have boards, you know, communicate to transparency that's out there. It's helpful, and all this is a relatively recent change to the Common Interest Ownership Act, only going into effect in July of 2010.

The second bill that I'd like to speak on is Bill 6662, AN ACT CONCERNING THE RECOUPMENT OF MONEYS OWED TO UNIT OWNERS' ASSOCIATION DUE TO NONPAYMENT OF ASSESSMENTS.

Currently the priority lien for common interest communities is six months. We agree with the increase of that to twelve months. We

understand that that does not affect any of the ability for associations to get loans, and think that that would be a big benefit to associations. Associations are limited all ready by changes in the Common Interest Ownership Act that took effect in 2010 where they can't institute a foreclosure effort until somebody owes -- a unit owner owes at least two months. So if it's a six-month priority lien, and you can't start until two months, and the way the court process works, there's a lot of exposure to associations.

Recently there's been some court cases where banks have found a way, and the court has agreed to allow the bank to extend their process and not complete the foreclosure. So in essence, what's happened is some banks have delayed 18 months, two years or longer, and the association is only getting six months' worth of common fees and a reasonable court cost and attorney fees. In the meantime, the unit owners continue to fund the upkeep for the exterior of that unit, the insurance for that unit, and in some cases the heat and water for that unit. Where does that money come from? It comes from all the unit owners that are paying on a regular basis. It doesn't come from any other government agency. It doesn't come from any corporation. It's the unit owners that are there that are paying their common fees on a regular basis that are stuck doing this.

What we'd like to see is some additional language to this bill that would create an

evergreen-type effect to this priority lien to protect the homeowners that are paying on a regular basis so that they're not subsidizing assets being held by large banks as a maneuver to decide when they're going to finalize the foreclosure, or as a delay tactic so that the market maybe is going to recover, or maybe they just don't have a clue what they have in terms of an inventory. But it is something that needs to be effect -- a change that needs to be put into effect, because these condominium homeowners can't afford to be covering these expenses for these large banks.

Thank you.

SENATOR COLEMAN: Thank you. Are there questions?

Representative O'Neill.

REP. O'NEILL: Thank you. I'd like to ask you a couple of questions about Bill 6513.

KARK KUEGLER: Yes.

REP. O'NEILL: I understand that you're saying that the homeowners -- the unit owners have, or should have, access to information and that the board's directors you say always take into account the concerns about rising homeowner fees. But, what this is about is the idea that if people, at the end of the day, feel that those fees are going up too much, or that transparency has not, in fact, been going on, that they haven't gotten all the information that they needed, or there is a fundamental

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rc/gbr JUDICIARY COMMITTEE

March 25, 2013  
10:00 A.M.

SENATOR COLEMAN: Thank you for your testimony.

KARK KUEGLER: Thank you. Thank you for the opportunity.

SENATOR COLEMAN: Marianne Derwin.

MARIANNE DERWIN: Good morning, Co-Chairmen Senator Coleman, Representative Fox, Vice-Chair Senator Doyle, Representative Ritter, ranking members of the Judiciary, and members of the Judiciary.

HB 6662

I'm Marianne Derwin, Heritage Village, Southbury, Connecticut, and I am here to speak in favor of House Bill 6513. I respectfully request that you pass Raised Bill 6513 to the General Assembly. This bill will provide a democratic process for unit owners in common interest communities who vote on the budget.

In 2011-2012 budget vote in Heritage Village, 1786 votes were cast out of a potential 2580. Approximately 1200 votes were cast to reject the budget, and 594 votes not to reject. The budget was not rejected. The budget was not rejected because 794 unreturned ballots were counted as votes not to reject the budget. As is evident from these figures, one can conclude that virtually it is virtually impossible ever to reject a budget. This is the result of the formula for counting votes required in the current statute.

The proposed Bill 6513 adjusts the formula used to count the votes. This bill will count the majority of votes cast provided not less than

33 and 1/3rd percent of all unit owners entitled to vote on the proposed budget vote to reject the proposed budget.

This change will result, I believe, in a statute that is reasonable, fair, and balanced.

I would also like to speak in favor of Bill 6662 with the suggested amendments that refer to the proprietary liens.

Thank you so much for your consideration. Good morning.

SENATOR COLEMAN: Thank you. Are there questions for Ms. Derwin?

Representative O'Neill.

REP. O'NEILL: Mr. Chairman, not so much a question, but just thank you for taking the time to come up here and testify on this. I think you testified last year as well.

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MARIANNE DERWIN: I did.

REP. O'NEILL: And I know that this is an important issue to the folks who live in Heritage Village in particular, but I think in a lot of condominiums. But thank you very much for taking the time and coming up and testifying. Thank you.

MARIANNE DERWIN: Thank you, members of the Joint Judiciary. Good morning.

SENATOR COLEMAN: Okay. Thank you. Do you know, of the 1786, how many votes were in support of the budget and how many were --

MARIANNE DERWIN: In support? Yes, sir. We had 594 -- 594 not to reject the budget. We have to do a reject/not reject is the language, and we had approximately 1200 votes to reject. However, what you have to realize is that those votes are weighted votes, and the -- rather than write the number 1199.546, we use the approximation because we have two separate votes, one of them for the Master's Association is a weighted vote. The one for the Foundation is a 1:1 vote, one vote, one.

SENATOR COLEMAN: Okay. And also, regarding House Bill 6662, did you say you were supporting that bill?

MARIANNE DERWIN: I -- I am in support of that. I think it's very important that we protect our communities from exposure to really very dangerous risks.

SENATOR COLEMAN: Okay. Thank you for your testimony.

MARIANNE DERWIN: Thank you, Senator Coleman. Good morning.

SENATOR COLEMAN: Elizabeth Silver.

ELIZABETH SILVER: My name is Elizabeth Silver and I'm a homeowner at Heritage Village at number

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REP. O'NEILL: Okay.

ELIZABETH SILVER: But it's now, I understand, it's  
3 percent.

REP. O'NEILL: Okay. All right. Thank you, Miss --  
oh, and again, thank you for coming up from --  
from Southbury and from the Village to testify  
on this bill. Thank you.

SENATOR COLEMAN: Are there other questions for Ms.  
Silver? I think you're good. Thank you, Ms.  
Silver.

Scott Sandler.

SCOTT SANDLER: Chairman Coleman, Chairman Fox,  
other esteemed members of the Committee, thank  
you very much for giving me your time and  
attention.

I am Scott Sandler. I'm an attorney with the  
law firm of Perlstein, Sandler, and McCracken.  
We represent approximately 450 associations  
throughout the State of Connecticut. I am far  
too familiar with the Common Interest Ownership  
Act and the operations of associations, and I'm  
happy to answer any questions you may have  
concerning how those associations operate under  
the statute.

I've submitted written testimony on several  
pending bills before you, but I will focus my  
comments this morning on Raised Bill 6662  
concerning the priority lien of associations.

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Since 1984, Connecticut associations have statutory liens on the units for any unpaid common charges, and those liens enjoy a priority over a first or second mortgage in amount of up to six months' worth of common charges. And that has done wonders for protecting associations in their collection of delinquent expenses. If the mortgage company is foreclosing on a unit owner for failure to pay, and the owner also owes an outstanding balance to the association, upon completion of that foreclosure, the association is guaranteed to collect up to six months' worth of the outstanding balance due. Anything owed beyond that would be written off. But it ensures -- it provides at least some security to associations that they'll recover at least a portion of the outstanding balance.

What we're seeing today, unfortunately, is that it is taking far longer to complete a mortgage foreclosure. In fact, I've seen mortgage foreclosures drag on for two to three years, and there are any number of reasons why this is happening. But I've also seen, in my experience, where we've had to bring several separate foreclosures on behalf of an association to collect unpaid common charges during the life of a single mortgage foreclosure. In one case I have brought four separate actions against the same homeowner, while there was one single mortgage foreclosure pending.

And unfortunately some of the major lenders and servicers took an unusual reading of the Common

Interest Ownership Act, and have argued successfully that if they paid the association's lien in full on behalf of the homeowner without any change in title to the unit, they have forever satisfied the priority portion of the association's lien.

Now the association's lien was not meant to ever be considered fully satisfied. As stated in one Law Review article that discussed the dynamics of the lien and debt which I have provided as part of my testimony, the association's lien is a perpetually-renewing lien. That includes the priority portion. Our statute gives us a method of calculating the amounts of the lien that's entitled to priority, but it's not specific by -- just saying it's just these months here that have priority.

Unfortunately, some of the larger lenders and servicers are taking the position that no, no, it's just these months, and if we pay that, that's gone. So for as long as we're out here with our mortgage foreclosure pending, any new assessments come completely behind our mortgage which essentially eviscerates the protections of the priority lien. It goes away. Associations are now stuck in a position where foreclosure is a practical impossibility, because no bidder at a foreclosure sale will want to take title to a unit that's worth less than the mortgage that is still attached to it.

So associations would be stuck in the position of having to wait years before we have a paying

unit owner, and all -- all that time, all the common charges that accrue will disappear and have to be absorbed by the other members of the community. And of course that only causes the common charges to go up further, and it has this domino effect. More and more homeowners will find it financially untenable to remain in these communities. We'll see more bankruptcies, more foreclosures, and that's not what the statute ever intended.

Unfortunately, the way our statute is worded, it is subject to some interpretation. It was drafted at a time where nobody ever believed the mortgage company wouldn't be able to complete a foreclosure in a matter of months.

So I am in favor of Raised Bill 6662 which extends the priority lien to 12 months because that enhances the security offered to associations. Because of that -- that six-month limitation, associations can't wait around for the mortgage company to complete its action. They have to foreclose quickly, because the longer they wait, the more common charges they're likely to write off.

So I am in favor of expanding the priority lien from an amount of six months of common charges to twelve.

I've also provided language that I'd like to see incorporated into the bill that would clarify that the association's lien, including the priority portion, is evergreen. It's a perpetually-renewing lien, so that in year one,

if the -- if the common charges are paid off, the association's priority is not effective in year three. That would be absurd. That would absolutely defeat the specific intention of this statute.

And I'd be happy to answer any questions you have either on this bill, or any of the others that you have pending before you. Thank you.

SENATOR COLEMAN: I had asked Mr. Kuegler, and he, I think, referred my question to you, and my question was whether or not you are aware that foreclosure actions initiated by condominium associations are subject to the foreclosure mediation program.

SCOTT SANDLER: They are not, Mr. Chairman.

SENATOR COLEMAN: They're not.

SCOTT SANDLER: And that is a good thing, because with this limited priority, the longer it takes an association to complete its foreclosure, the more in common charges -- I'm sorry, the less in common charges we are likely to collect. All we're guaranteed is up to six months. When you add on the time it takes to work through the mediation program, you're easily adding another three months onto the process. And unlike the case in many mortgage foreclosures, the delinquent homeowner who's not paying his assessments may not have the same defenses available to him that he or she may have when it comes to the lender. The transactions between borrowers and lenders are vastly

different than they are between home owners and their associations.

SENATOR COLEMAN: Okay. Are there others with questions?

Representative O'Dea.

REP. O'DEA: Good morning. Thank you very much for your testimony. I've seen firsthand, in representing certain individuals, foreclosures can take a long, long time, so I very much appreciate your testimony. And I'm looking for the language -- I don't see any proposed language that you have in your Section C about 6662 should be revised to clarify that the portion -- the priority portion of the association's liens are evergreen in nature. Do you have any?

SCOTT SANDLER: It -- it should be the very last page of my testimony. Forgive me. A tactical mistake on my part. I included in my testimony a Law Review article that I thought you may find helpful, because it so accurately details the problem. But it's a lengthy article, and the very last page of my testimony provides the alternative language that we are seeking to address the fact that the association's lien is in effect for each and every foreclosure action brought either by the association or the mortgage company.

REP. O'DEA: I -- I do see that now. Thank you, and I do commend you that your -- your submitted

materials are the heaviest that we have in the packet. Thank you.

SCOTT SANDLER: You would think I bill by the word, but the fact is, you know, these issues can be rather complex and confusing when we're talking about statutory interpretation. To try to boil that down into two or three pages of plain English, well most lawyers will tell you it's impossible.

REP. O'DEA: My final question, if I may, Mr. Chair. Have you taken a position on either of the common interest language bills that have come up?

SCOTT SANDLER: I have. I've submitted testimony on both Bill 1145, which concerns certain proposed revisions to both the Common Interest Ownership Act, and the Condominium Act, having to do with various association governance issues. So I -- I boiled that down in one set of testimony. And then in another, I've also submitted testimony on Raised Bill 1101, having to deal with the installation of security cameras on the exteriors of units.

Our concern with that particular bill, while, you know, I believe protection of public safety is of course paramount, the bill itself doesn't take into account the fact that in most communities in Connecticut, the exteriors of the buildings are not individually owned. They're owned by everybody in common, and it's the association who has to maintain these exteriors. And so the bill doesn't take into

REP. O'DEA: Thank you very much, sir, and thank you, Mr. Chairman.

SENATOR COLEMAN: Thank you, Representative.

Representative Buck-Taylor.

REP. BUCK-TAYLOR: Thank you, Mr. Chair. Attorney Sandler, in your paperwork you state that two Connecticut Superior Courts have agreed with the lenders that they have permanently satisfied the priority lien. Do you know upon what grounds they based that decision?

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SCOTT SANDLER: The statute itself says that the association has a priority of an amount equal to six months' worth of charges and assessments that accrued during the six months immediately prior to an action to enforce either the association's lien or the mortgage. And as can be discussed by Attorney Kristie Leff, who will be testifying later on (she was actually involved in one of these cases), the court, in a more recent decision looked at -- at the history of both the mortgage foreclosure and the pending association foreclosure, and took the position that because the mortgage foreclosure had been pending continuously throughout both of association foreclosures, that by paying off the association in the first action, it paid the six months that accrued prior to its own -- the mortgage company's own foreclosure, thus those six months are satisfied and the lien is gone.

And it doesn't take into account that the statute doesn't say you're paying these six months. What the statute says is it's providing a method of calculation, the amount of the outstanding charges owed today, and the portion of that which is entitled to priority. We have a formula. We total up the six months of common charges that accrued during that -- those six months prior to the beginning of the action. That total gives you the current balance that enjoys priority today.

You're not paying just those six months for the priority. You're not satisfying just those six months. What you're doing is applying a formula. And unfortunately the court didn't see it that way. They read the statute to say you take the six months that accrued before the action. That's your priority. If the bank pays that, and its action is continuing, the priority is satisfied. It's done.

REP. BUCK-TAYLOR: Are either of those cases being appealed?

SCOTT SANDLER: The more recent one is. The older case was a very obscure case from the early 90s that has never been cited before, not in Connecticut nor any other jurisdiction. I would say that most attorneys haven't even discovered it until just recently when the second case came about.

REP. BUCK-TAYLOR: Thank you. Thank you, Mr. Chair.

SCOTT SANDLER: Thank you.

should be unwaivable, unrefundable. Each party needs to have a little skin in this game in order for it to work properly.

REP. ALBIS: Great. Thank you, Scott. Thank you very much for your answers.

SCOTT SANDLER: Thank you.

REP. ALBIS: Thank you, Mr. Chairman.

SENATOR COLEMAN: Representative Hewett, were you seeking recognition just now? Were you trying to get the floor? Okay.

Representative Ritter.

REP. RITTER: Thank you, Senator, and Attorney Sandler, thanks for being here today and thanks for taking the time to meet with us. As you've mentioned, it's a complicated statute, so we do appreciate your testimony. We probably won't read the Law Review article too much, but we'll try to scan it. I didn't do it in law school, so I don't want to do it now.

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In all seriousness, one thing I would like to ask, and I know, I'm not sure if anyone will be testifying on behalf of the lenders here, but we have encouraged people to work together to come to a resolution of this bill, and I would like your comments on that.

This is a very important bill to the 1st District; 31 Woodland House, Bill Cibes, is on the condo board. The former secretary of OPM

has emailed me about it a lot. 15 Woodland Street is another one that comes to mind. So it's being paid very close attention to. And it happens to also be Senator Coleman's district as well, so can you tell about how those discussions are going and whether we believe we'll have a resolution to this that we can work with. Thank you.

SCOTT SANDLER: Yes. Thank you. We have met with representatives at the Bankers' Association. They are confident that we can reach an agreement on final language. I'm awaiting a draft of their proposal, but they have mine. We've had a discussion -- we've had several discussions now. I look forward to seeing what they have to offer. They assure me that we can reach an agreement. I am hopeful that that is the case.

REP. RITTER: That's wonderful news. Thank you, Mr. Chair.

SENATOR COLEMAN: Are there other questions?

Representative Smith.

REPRESENTATIVE SMITH: Thank you, Mr. Chairman. Good morning, sir. You know, when you first started testifying, you -- I thought you talked about doing four separate actions at the -- for about -- with the same file and maybe I -- I -- I thought that maybe I heard that wrong, but maybe you could just talk about that a little bit more, and why you thought you had to bring four separate actions collecting one fee.

SCOTT SANDLER: Yes. I'd be happy to. It wasn't collecting one fee. What happened was a unit - the homeowner, the unit owner, was paying neither his mortgage nor the common charges owed to the association. The mortgage company had initiated its own foreclosure, and when that happens we in my firm, we usually stand back and wait to see if they make progress so we're not bringing a separate action that -- where our issues are going to be resolved with their issues, what -- what would be the point? But when the mortgage foreclosure starts taking on that -- that look of being stagnant, where it's not going anywhere, where there hasn't been a pleading filed in two or three months, and it doesn't seem like this matter is still in mediation, at that point we feel a need to kick it up. So we started a separate action on behalf of the association.

The foreclosing lender wrote a check to the association on behalf of the homeowner for payment in full. So we withdrew the action. We were done. But that didn't mean the homeowner was going to start making payments and, in fact, he didn't, and so several months later we're back with a large outstanding balance, a mortgage foreclosure that still has made no progress, and a six-month limited priority lien, so we can't sit around and wait for this mortgage foreclosure to finish. So we started a separate action again. And again the lender paid, and again we withdrew our action. And we went through this process about four times.

And this particularly lender didn't raise this argument about the priority lien being completely satisfied, but if they had, and if we were in front of the same judge who decided the most recent case, we wouldn't have collected this. And this went on for a good three years. And that would be three years where the association would have collected nothing but the first set of assessments where we got paid off that very first time. Anything that accrued beyond that, under this case, would be gone forever.

REP. RITTER: Okay. Thank you for clarifying that. I mean from my perspective it just seems like this -- the committee actually needs to address this. It seems like a total waste of judicial economy to have four separate actions brought to collect a six-month priority lien over and over and over again. Because it could have been much more than four. You could have continued on under this scenario until, you know, the foreclosure was absolutely resolved.

And in terms of the, you know, the recent Superior Court cases that came down that said your priority is six months, once it's paid, you're done, are they saying also that any other debt that you may have had behind that before five months or whatever, that's also satisfied?

SCOTT SANDLER: Actually that's how the law now works. If let's take a mortgage foreclosure where the association is owed maybe eight or

nine months' worth of common charges at the time the unit is sold at the foreclosure sale, on the transfer of title the association gets six months, and everything else is wiped out. Which is why I'm speaking in favor of expanding the priority lien from six months to twelve.

It also means we don't have to proceed with successive actions quite so quickly. We've got more time, more of a cushion to be able to wait and allow that mortgage foreclosure to play out.

REP. RITTER: Well let's take a different scenario. Let's assume the foreclosure did not go through. You were paid your six months priorities as you described earlier by the foreclosing lender, then their action was revoked, or resolved, but your -- you as the association are still owed five months say, but their foreclosure action's withdrawn because they've been satisfied. You're now owed five months. Does your lien go away because you were paid? Does your priority go away because you were paid the one-time six-month priority under the new cases?

SCOTT SANDLER: Under the new cases, yes, that's how it would work. We -- in fact, yeah, if we got paid the six months early on, and the mortgage foreclosure drags out several months, or a year or two, and finally is resolved through a sale, anything that accrued in that time period from when we got paid off to the foreclosure sale is just uncollectible.

REP. RITTER: And I wasn't around when we created six months as the priority. I wasn't part -- and I know -- or it's being proposed now to make it 12 months. Do we want to make it 12 months? Is that the right number? Is there -- should there be another number involved, or are you just satisfied with 12 and wish it were more?

SCOTT SANDLER: I'd have to say I'd be satisfied with 12, but wish it were more. In fact, in my utopian world which exists only in here, the association claim would enjoy complete priority over a mortgage because we're the ones maintaining the security for the benefit of the lender. The association is maintaining the building, is insuring the building and the unit. We are providing a service to the lender in that respect. If the -- if the property is just sitting there vacant while the mortgage foreclosure is pending, the lender really has no obligation to pay much of anything other than taxes because it's the association's obligation to insure the unit. So if there's a fire, we pay to rebuild.

And in other -- the lenders and I will disagree on this, but in a community association, the homeowners have no say over who moves into the community. They have no ability to check their qualifications or financial ability to contribute to the common fund. The lender has the ability to vet borrowers. They can decide whether or not to enter into the loan transaction. They can adjust the interest to the debt ratio. They can purchase mortgage

insurance in the event of a loss. Homeowners in an association don't have tools like that to protect them, and it's not our business decision to get in bed with a homeowner. They move in. We're stuck with them; hi neighbor, can you pay? And frequently people move in and unfortunately, in today's economy, I've seen a case where the poor homeowner can't pay from day one.

And so, yeah, in the perfect world, the association claim would enjoy complete priority because we have no controls. We don't living in a perfect world. We live in a world where Fannie Mae and Freddie Mac don't like priority liens. Florida is one of the few states, and possibly the only state in the country with a priority lien of 12 months.

Several years ago Connecticut tried extending the priority lien and there was some pushback from Fannie Mae and Freddie Mac. There was a lot of pushback, and unfortunately it died.

Since in Florida it seems to be working without a problem, I am hopeful it can -- we can do the same thing here. But the lenders who don't -- who view this priority like an out-of-pocket expense. If they end up owning the unit, they've got to pay the six months' worth of common charges. So they're not as favorable toward extending it. And I have to deal with that reality.

But yeah, in my perfect world, we'd have complete priority over the mortgage. It's the

only way to really provide homeowners with security.

REP. RITTER: Okay. Thank you for your response and based on your prior comments, it sounds like you and the lenders are trying to resolve this whole issue anyway which would be great for us.

Just one last question, Mr. Chairman, if I may? The proposed change that we have in the language of the raised bill right now seems to address these Lower Superior Court cases. Would you agree with that, or?

SCOTT SANDLER: Unfortunately, no. I think it's definitely reaching out toward addressing the problem. The problem is, it talks about the association being able to collect what's due on the closing, on the conveyance of the unit. But if the foreclosure goes on for three or four years, during that time the association won't be collecting the charges from that homeowner, and all of the other owners will have to make up the difference. Now, might we get that back three or four years from now?

REP. RITTER: Well let me just interrupt you for a second, if I may?

SCOTT SANDLER: Please. Certainly.

REP. RITTER: As I'm reading the language, the first sentence talks about the ability of the association to collect unpaid assessments that are not included in the lien amount, and then it goes on to talk about the right to collect

funds at a closing or a transfer of title, so I don't know, the way I read it anyway, there's two different sections. There were two different sentences, that one would allow, just grant a right for the association to recover whatever is due outside the six-month priority, and then also another right which is a little bit more ambiguous to me to collect some money that may happen at closing. So --

SCOTT SANDLER: But what I don't see (excuse me) -- what I don't see addressed in here is who's responsible for paying those assessments? Is it the buyer? Is it the lender who foreclosed? I don't see who's responsible for making this reimbursement. If it's the former owner, that's not going to help us at all because they're judgment proof.

REP. RITTER: And I agree with you. I just wanted to say it's a little ambiguous. So I think it could be cleaned up a little bit, but it seems to me to address at least some of the issues you've raised. And I know I don't want to take up the Committee's time at length, but we could talk afterwards. But I do appreciate your testimony and you being here today.

SCOTT SANDLER: I don't recall if -- if you were here earlier, but I did mention the very, very last page of my testimony includes language that would solve this problem, and it's very, very simple language.

REP. RITTER: Thank you. Thank you, Mr. Chair.

SENATOR COLEMAN: Representative Gonzalez.

REP. GONZALEZ: Thank you, Mr. Chair. And I will apologize if you -- if you discussed this before I came here. I was in another meeting, but I do have a question. In -- like a year ago I was -- I was trying to help a friend that she bought a condo, and -- and she was paying the condo fees. And then she was there like for five months and she was paying condo fees, but no service was, you know, they were not cleaning. They were not doing anything. And, you know, phone calls, letters, they never returned the phone calls, very, very irresponsible.

So she decided -- she decided to stop paying the condo fees. And she was paying and she was hired -- she hired a person, and he was doing the cleaning every month, and she was paying that person.

The condo association, they took her to court, and even though she got proof that she was paying every month, and she got proof that they were not providing the services, the judge, you know, at the end, she ended up paying again.

SCOTT SANDLER: Uh-huh.

REP. GONZALEZ: And my question: How is -- how you look at how we can resolve that problem when you find that some associations, they really don't care? They only collect the money and they don't provide the services.

SCOTT SANDLER: That is a problem that unit owners will need to address with their individual leadership. And if the leadership is not fulfilling the needs of the community, it only takes a majority of the votes cast at a meeting of the owners to remove the leadership. It's not a majority of the whole community like it is to reject the budget. You have a meeting. If 20 angry homeowners show up and -- call it a 40-unit complex and only 20 people show up, and of the 20, 15 vote in favor of removal, that board is out. So removing the leadership is a rather simple process, and I've seen it done on many an occasion.

But very recently in a Connecticut Supreme Court decision, the Court held that the necessity of the income stream -- the right to collect common charges in order to continue the operation of the community, even if its sub-par operation, is so important that the association's failure to provide services to a homeowner does not justify that homeowner from -- to stop making their payments. This is a Connecticut Supreme Court decision that came out just in the last year or two. And that income stream is absolutely vital to operating a community. Now homeowners, if they don't want to remove their board, or they don't have the support of their neighbors, have their own rights to sue the association for failure to provide services, and this goes a little bit to what Representative Albis and I were discussing on this pilot program for dispute resolution.

But the income stream is so vital that it's even been recognized at the Supreme Court level that we can't have it interrupted. Which is why I think eventually if -- if we don't resolve the problem legislatively on the evergreen priority lien, eventually a few years from now we'll have a Supreme Court decision that said that the Lower Court got it wrong. The problem is we've got unit owners -- homeowners here who can't afford to wait that long.

So that's why I implore you to act swiftly -- to act swiftly on that.

REP. GONZALEZ: Thank you for the answer. That doesn't sound like too fair for -- for the owners, you know, for the homeowners. Like -- like if I'm paying and I'm paying for six months, and I don't receive no services, so because, you know -- you know, that's in the State Statute that you can't hold the -- the condo fees, that means that I have to pay, even though if I keep calling and I send letters, and nothing is being -- so I think that is something that is an issue that we have to address here, because I don't think it's fair.

SCOTT SANDLER: I see where you're coming from, Representative Gonzalez, and I realize telling people well if you don't like it, sue, is not a wonderful answer, which is why we're looking at other forms of dispute resolution. But the fact is, the income stream is so vital it absolutely has to be protected.

REP. GONZALEZ: A question. Let's say that the tenants -- that the owners, they decide to sue. That means that they have to come up with their own money to sue the association?

SCOTT SANDLER: Yes, although the statute does provide for the recovery of attorney's fees and costs which is, you know, a bit of a derogation from our usual system of jurisprudence where each party pays it's own. So the -- the court, if they find a violation of the governing documents or the statute, can award the homeowner reimbursement for their attorney's fees and costs. And hopefully these matters get resolved long before we get to that point.

You know, oftentimes a homeowner is complaining that the association isn't properly maintaining, and the association's response is well we wanted to increase the budget for this, but you wouldn't let us. It's -- it's a very difficult balance to reach, and I don't envy board members who struggle to do so.

REP. GONZALEZ: Thank you.

SCOTT SANDLER: Thank you.

SENATOR COLEMAN: Are there any other members with questions or comments for Attorney Sandler? Seeing none, thank you for your input today.

SCOTT SANDLER: Thank you very much for your time and attention.

SENATOR COLEMAN: Paul Knierim is next.

SENATOR DOYLE: Any questions from the Committee?  
Thank you very much.

The next speaker is Kim McClain, then Lauren MacDonald, Kristie Leff, Rebekah Diamond, Peter Jones.

Is Kim here? Yes. Hello.

KIM MCCLAIN: Good afternoon, Senator Doyle, and distinguished members of the Judiciary Committee. My name is Kim McClain and I'm the executive director of the Community Associations Institute which is a chapter of a national organization that has 60 chapters throughout the country.

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I'd like to focus my comments on H.B. 6666, but I just would like to comment on a few of the other bills that have been discussed all ready today.

One is I don't know if the Committee takes requests for words for the day, but I'd like to propose one, and it would be evergreen, because with the proposed priority lien bill I think it's important to underscore the incredible significance of allowing the priority lien to be continued, to be evergreen. Many other states have been looking at this issue, and in fact this year, according to our national organization, we've got Florida looking to extend the priority lien from 12 months to 24; Massachusetts is looking to clarify the language in their bills; and S.B. 603 with Massachusetts is seeking to have the six months

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be continued as an evergreen bill, or an evergreen law; Georgia is looking to create a six-month priority, as is Hawaii, and Maine; and Virginia is looking to go three years. So I just wanted to put that into perspective for all of us because it really doesn't matter whether it's 6 months, or 12 months, or 24. It's that it is evergreen. And Kristie Leff will be speaking in a few moments about this particular bill.

Also too on 6513, I'd also like to remind you that Heritage Village is, indeed, very unique, and because of its size, it's been exempted from certain portions of CIOA in the past. So it's -- I would just like you to make note of that as well.

On bill number 6666, I'd just like to note that CAI supports alternative dispute (excuse me) alternative dispute resolution, and we do like the spirit of the bill. However, it's important to note that in our experience, when issues causing conflict arise in common interest communities, in the majority of situations it's due to the lack of understanding about the rights and responsibilities of unit owners and their boards. It is also -- we're thrilled to say that lately we've been working with the Department of Consumer Protection to create a greater access to information to better serve common interest community residents, and by virtue of that we are looking at opportunities to have more information on both their website

In conclusion, Connecticut law should not deprive people with disabilities the protection against sexual assault by requiring that they meet a demanding standard for qualifying as physically helpless. The victim in *Fourtin* and the people of Connecticut deserve better, and our laws ought to do better. We urge this Committee to do justice and approve Raised Bill Number 6641. Thank you very much for your time and the opportunity to present this.

SENATOR DOYLE: Thank you. Any questions from the Committee? Seeing none, thank you very much.

LAUREN MACDONALD: Thank you.

SENATOR DOYLE: The next speaker is Kristie Leff, then Rebekah Diamond, Peter Jones, Dan Rys.

Is Kristie Leff here? Yes, she is.

KRISTIE LEFF: Thank you, Senator Doyle, members of the Committee. My name is Kristie Leff. I'm an attorney at Bender, Anderson and Barba. I'm here to speak in favor of Raised Bill Number 6662.

Collection of monthly common charge assessments is vital to the effective operation and economic stability of condominium associations. The legislature recognized this in 1984 when it enacted the Common Interest Ownership Act. Section 47-258 of that Act allows condominium associations to foreclose when a unit owner does not pay common charges. Section 47-258(b) currently provides that the association's lien

has a priority to the extent of six months of common charges over the first or second mortgage.

Since 1984, when the Common Interest Ownership Act was first adopted, this scheme has operated effectively because it strikes an equitable balance between the needs of the condo association and the needs of the banks. Recently, however, certain big banks have set out to weaken the six-month priority lien. My law firm represents condominium associations throughout the state. In the past year or so we have seen an influx of challenges to the six-month priority scheme being lodged in the courts throughout the state.

This past November one Superior Court decision agreed with the bank challenge, and found that the six-month priority lien does not exist in instances when a bank foreclosure action and a second, or subsequent condominium foreclosure action are simultaneously pending. I've attached a memorandum of that decision to my -- the written testimony that I've submitted.

The effect of this decision is that a condominium would either have to wait until a bank foreclosure action is completed before it can assert its six-month priority lien, or the association would have to foreclose on the unit subject to the mortgage.

Because bank foreclosure actions can take years to complete due to paperwork glitches, mandatory mediation requirements, and other

things, the condominium association will lose all the common fee revenue from that unit until the bank action is completed, and then be limited to recovering only six months' worth of common fees. Or if the association forecloses on the unit subject to the mortgage, it has to make mortgage payments on a unit that may be worth less than what the bank is owed. Either way this court decision has now turned a statute that was meant to protect condominium associations into one that protects banks and forces the associations to be caretakers of the bank's collateral. Effectively the association is forced to forego common fees on the unit to subsidize the bank.

I'm in support of the Raised Bill 6662 because increasing the priority lien from 6 months to 12 months would allow the association to recoup a greater share of its lost revenue in situations where the association has to wait until a bank foreclosure action is completed.

Alternatively I've attached to my written testimony a proposed change to the statutory language whereby the six month lien is unchanged, but the language clarifies that the six-month priority lien may be asserted by the association in each and every action it brings to foreclose for unpaid common charges. That's the last page of my written testimony submission.

This language addresses the specific challenges that condominium associations are encountering in the courts. This proposed language would

restore the status quo regarding the way these foreclosure actions have been handled since 1984, and preserves the intent of the statute which is to protect the financial stability of condominium associations.

Thank you for your time, and I'll answer any questions if there are any.

SENATOR COLEMAN: Are there questions for Ms. Leff? You've apparently been thorough in your comments. No questions. Thank you for your testimony.

KRISTIE LEFF: Thank you.

SENATOR COLEMAN: Rebekah Diamond.

REBEKAH DIAMOND: Good afternoon, Senator Coleman, Representative Fox and members of the Committee. My name is Rebekah Diamond. I am a student at UConn School of Social Work, and I've worked with developmentally disabled adults for the past five years.

Today I am here in support of H.B. 6641, AN ACT CONCERNING THE SEXUAL ASSAULT OF PERSONS WHOSE ABILITY TO COMMUNICATE LACK OF CONSENT IS SUBSTANTIALLY IMPAIRED. In removing the wording "developmentally defective" from the Connecticut General Statutes, Section 1 through 4, and replacing it with impaired because of -- of mental disability or disease, I believe that you would be returning power to those who have been marginalized for so long.

SENATOR COLEMAN: Dan Rys, "rice", R-Y-S.

A VOICE: "Reece".

SENATOR COLEMAN: "Reece," thank you.

DAN RYS: Good afternoon. My name is Dan Rys. I'm a vice president with Windsor Federal Savings and Loan. I've been in the banking and financial services industry in Connecticut for 39 years. I've been a senior loan officer of two Connecticut banks, responsible for all residential, consumer, and commercial lending, as well as all parts of loan servicing which also includes collections and foreclosures.

I support the Proposed Bill H.B. 6662.

However, I'd like to propose an amendment that calls for the six-month priority to apply for each foreclosure action.

For the past ten years I've been concentrating my career on providing loans to community associations to help them finance capital improvement projects. This loan helps the unit owners pay the assessment over time rather than paying sometimes a large lump-sum payment. The banks that I am working for and have worked for in the past providing these loans have relied on the fact that the State of Connecticut provides a six-month lien priority to the community association for past due common fees ahead of the first mortgage in each foreclosure action. This system has worked well since

1984, even though foreclosures in the process sometimes lasted more than six months.

This has been the pattern in practice of residential and commercial lenders in the industry, and the banks' lobby has been silent on this issue until now.

A recent court decision challenged the validity of the six-month lien priority in every foreclosure action, and stated that the priority applies only once for the life of the mortgage. The lender can then leave the foreclosure in process for as many years as they like. The result of this decision puts the burden of maintaining the unit on the remaining unit owners in the community.

Now let's suppose I'm a unit owner in a community association, and I have a mortgage on my unit, and I stop paying my mortgage and common fees. Based on this decision, my lender can start a foreclosure, pay the six-month common fees to the association just once. The lender can take the amount of the fees paid, the past-due payments, the cost of the legal action and add them to the end of my mortgage. I can make arrangements with the lender to leave the foreclosure in place, and pay the lender my monthly payments which will make it easy for me now that I don't have to pay common fees. The rest of the unit owners will pay to maintain my units and the lender's collateral. Several years from now, when and if I build equity in my unit, I can either sell it; the lender can complete their foreclosure; or the

association can pay the legal fees to foreclose.

Community -- community associations represent on average one-fourth of the households in Connecticut. For example, 35 percent of the households in Stamford are in community associations. By not amending this bill, or approving legislation to make the six-month lien priority valid for every foreclosure lien, the burden of maintaining the lender's collateral will rest on the remaining unit owners in each community. You have an opportunity here by amending this bill to help one-fourth of the households in your districts by relieving them of an unnecessary financial burden that could last for several years. Amending this bill will put things back to the status quo. Thank you.

SENATOR COLEMAN: Thank you. Are there questions for Mr. Rys? Thank you for your testimony.

DAN RYS: Thank you very much.

SENATOR COLEMAN: Kristin Ferguson.

KRISTIN FERGUSON: Did you want me up here? I just keep hearing my name.

SENATOR COLEMAN: Kristin Ferguson?

KRISTIN FERGUSON: I am.

SENATOR COLEMAN: You may proceed.

positive attitude in our Village will suffer. Property values are likely to fall from excessive penny pinching, and we may be burdened with sudden assessments to correct false economy. Heritage Village has never had an assessment up to now.

So please don't make budget rejection easier. Maintain your present well-developed, well-thought out system. Thank you very much. I appreciate your time, and I don't know how you do it.

REP. FOX: Well you're here today too, so, no, thank you very much.

DAVID ROBERTS: Thank you.

REP. FOX: And we appreciate it, and we'll have to talk about this. A lot of response today in the public hearing process.

DAVID ROBERTS: Thank you.

REP. FOX: Geralyn Laut. Hello.

GERALYN LAUT: Hi. My name is Geralyn Laut.

REP. FOX: Laut; I'm sorry.

GERALYN LAUT: I live at 126 South Mill Drive in South Glastonbury which is one of 87 units in the South Mill Condo Association. Just briefly I just want to recap my support of H.B. 6662 with the amendment to include the evergreen clause.

SB 1101    SB 1145  
HB 6513    HB 6641

I would like to personally oppose H.B. 1101 concerning security cameras. Quite honestly one does lose an element of privacy living in a multi-unit development, and I don't personally think I would like my neighbors to see me coming and going from my back porch or side common area. I think that should be something that would be left up to an individual association and not the gentleman's concern.

I would also oppose 1145 and 6513. I have attended board meetings and I, too, avow for the time and energy that's put into a voluntary position as the board of directors. I would trust their judgment regarding decisions for the long-term benefit of a community such as South Mill, and quite honestly, after hearing testimony earlier -- I was not here to testify on behalf of 6641, but I would like to support that bill in honor of those people that are not able to be here because of physical and developmental problems to support such an effort.

Thanks for your time and energy.

REP. FOX: Well thank you. That sometimes happens. People sit here all day. They listen to another bill and they end up testifying on that. So that's great.

GERALYN LAUT: Yeah. No. That certainly seems like something that should be addressed.

REP. FOX: Well thank you.

GERALYN LAUT: Thank you.

REP. FOX: That concludes my public sign-up list. I will go back. I see Attorney William Ward is here, so good afternoon, Bill, and thanks for making the trip.

WILLIAM WARD: Thank you, Chairman. Thank you, members of the Committee. I apologize for being late, and I thank you for the opportunity to speak out of turn. I've submitted written testimony on three different bills: 1145, 6666, and 6662. I will just hit the highlights in deference to your time.

On 1145, I'm against the provision trying to make boards ensure compliance by property managers. It creates a new duty. It's difficult to get board members to volunteer now. I don't know what it means to "ensure." Does it mean you can sue board members as a whole, or individually? I just think it will create all sorts of issues. Currently the statute allows for -- or prohibits management companies from indemnifying themselves for negligence, which was always standard in management contracts, so now management companies are being held accountable when they make mistakes. I don't think you need to add that language.

I also oppose the five day -- strict five days' notice requirement of board meetings. Many of the associations, to save time and money, publish the schedule of the meetings annually

I see my time is up. There's lots of people who have spoken on 6662, so I don't have to speak on that as well.

And 6666, I just ask you to look at the issues that I raised. I'm all in favor of some sort of alternative dispute resolution program. I think there are a lot of issues that need to be addressed before it can be successful.

REP. FOX: Thank you, Attorney Ward. Thanks for making the trip, like I said, from Stamford. You've always been a valuable resource for me on -- on these issues, and I know that we'll continue to talk as we go forward. So even though you're the last person testifying, I know the room -- we don't have as many Committee members because they're all over the place right now, but I did ask Representative Albis to speak with you, and I saw that he did because he's working on a lot of these bills as well. So we do very much want to hear from people who actually have to implement the laws that we pass, and -- so we look -- we thank you for being here.

Are there questions or comments? Okay, well thanks.

WILLIAM WARD: Thank you.

REP. FOX: Okay. Take care.

That is the end of our public sign-up sheet. If there's anybody in the room who has not had

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TESTIMONY OF SCOTT J. SANDLER, ESQ.  
CONCERNING RAISED BILL NO. 6662  
AN ACT CONCERNING THE RECOUPMENT OF MONEYS OWED TO A  
UNIT OWNERS' ASSOCIATION DUE TO NONPAYMENT OF ASSESSMENTS

I. SUMMARY OF TESTIMONY:

Raised Bill No. 6662 is designed to protect the associations of common interest communities and the owners living in these communities. The bill would make it possible for associations to collect a greater portion unpaid assessments owed by delinquent owners through the foreclosure process.

For the reasons set forth below, the Connecticut General Assembly should revise and adopt Raised Bill No. 6662.

II. BIOGRAPHY OF SCOTT J. SANDLER:

Mr. Sandler is a graduate of the State University of New York at Albany (B.A., Economics, 1997) and Quinnipiac College School of Law (J.D., 2000). He was an Associate Editor of the Quinnipiac Law Review.

Mr. Sandler is a member of the American Bar Association, the Connecticut Bar Association and the Hartford County Bar Association. He is also a member of the Executive Committee of the Real Property Section of the Connecticut Bar Association.

Since 2001, Mr. Sandler has focused on representing condominium, community and homeowners associations.

Mr. Sandler is a past President of the Connecticut Chapter of the Community Associations Institute. He is presently the Chairman of the Chapter's Legislative Action Committee.

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Mr. Sandler is a partner in the law firm of Perlstein, Sandler & McCracken, LLC, in Farmington, Connecticut, which currently provides legal services to approximately 450 condominium and homeowner associations throughout the State.

**III. ANALYSIS:****The General Assembly SHOULD revise and adopt Raised Bill No. 6662.**

Raised Bill No. 6662 was introduced to better protect community associations and their members. The bill is designed to allow associations to collect more of the unpaid assessments owed by a delinquent unit owner, through the foreclosure process.

**A. Association liens enjoy a limited priority over first and second mortgages on units.**

All community associations in Connecticut are governed, at least in part, by the Connecticut Common Interest Ownership Act ("CIOA"). CIOA is largely based on the Uniform Common Interest Ownership Act ("UCIOA").

Section 47-258 of CIOA presently provides that unpaid assessments levied by an association against a unit constitute a lien on that unit.

Under Subsection 47-258(b) of CIOA, the association's lien enjoys complete priority over all other liens and encumbrances on the unit, except for the following:

- 1 Real estate taxes and assessments;
- 2 Liens and encumbrances recorded prior to the creation of the community, and
3. A first and second mortgage on the unit.

Subsection 47-258(b) further provides the association's lien is prior to a first or second mortgage, in an amount equal to the common expenses that accrued during the six months prior to an action to enforce either the association's lien or the first or second mortgage. In other words, the association's lien enjoys a limited priority over the first and second mortgage, and Subsection 47-258(b) provides a method of calculating the amount of that priority.

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**B. The priority lien provides protections for associations and the unit owners.**

Associations perform necessary functions for their communities. They maintain the infrastructure and, typically, the buildings in which the units are located. They insure the common property and, in most communities, the units as well.

Associations raise the funds necessary to perform these functions through assessments levied against the units. Typically, these assessments are an association's only source of income. When an owner fails to pay the assessment, the association can only look to the other owners to make up the lost revenue.

This issue is discussed at length in a law review article titled Meaner Lienor Community Associations: The "Super Priority" Lien and Related Reforms Under the Uniform Common Interest Ownership Act, by James L. Winokur, 27 Lake Forest L. Rev. 353 (1992), attached hereto as Exhibit A. Mr. Winokur observed as follows:

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, and the financial and personal management experience of their elected officers. The main source of financial and interpersonal strain on association boards is the association's inability to collect unpaid assessments.

Mr. Winokur also observed as follows:

[A]ssociations typically compete unsuccessfully for foreclosure sale proceeds with lenders who hold mortgages on [Common Interest Community] units. Typically, the foreclosure sale bid will be equal to no more than the foreclosing lender's debt, leaving no foreclosure sale proceeds remaining to pay any of the association's lien. In a weak market, where the unit's value would be lower than the amount of the senior mortgage, the association'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.

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Mr. Winokur stated, "To further support collection of [Common Interest Community] assessments, the UCIOA creates a *perpetually renewable* association lien . . ." [Emphasis added].

Mr. Winokur discusses the relationship between associations and mortgage lenders as follows:

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 -- will typically undertake to protect its security . . . This norm of lender responsibility for insurance, maintenance, and property taxation costs after default should also apply to [Common Interest Community] homes. Imposing lender responsibility for security preservation costs . . . is appropriate because . . . this obligation would merely call upon the lender to protect its own security . . . Furthermore, the lender is able to protect itself against losses on its loan in ways community associations cannot. Unlike most associations, the lender can investigate and disapprove of the 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. These safeguards are not available to community associations. 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.

Thus, in order to protect the association's income stream, and in acknowledgment that the mortgage lender should pay for its share of protecting the unit that secures its loan, CIOA provides that at least a portion of the lien enjoys priority over the mortgage.

C. **Raised Bill No. 6662 should be revised to clarify that the priority portion of association liens are "evergreen" in nature.**

As cited above, the association lien for unpaid common charges is a perpetually renewable lien. Such liens are referred to as "evergreen" liens.

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Despite this, some mortgage lenders are now arguing that if the lender pays the outstanding balance in full on behalf of the unit owners, they have permanently satisfied the priority lien. All future assessments levied by the association would enjoy no priority over the mortgage.

This argument runs contrary to the very purpose of the priority lien. Nevertheless, at least two Connecticut Superior Courts have agreed with the lenders. If this argument were to be Connecticut law, it would essentially eviscerate the protections afforded by granting associations a priority lien.

As contemplated by Mr. Winokur, the economy is presently in a weak state where the value of homes have fallen below the outstanding balances of the mortgages. Furthermore, for a number of reasons, it is taking lenders far longer than ever before to complete their foreclosures. It now is not uncommon for an association to have to bring two or more foreclosures against a unit owner during the pendency of a single mortgage foreclosure against the same owner.

If the lender pays once and the association's lien no longer enjoys any priority over the mortgage, then as observed by Mr. Winokur, the association has no real ability to foreclose and all future assessments essentially become uncollectible.

In the attached article, Mr. Winokur addressed the lenders' argument as follows.

[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 . . . While the super priority provision contemplates a six-month maximum at any given moment, it contemplates no limit over time. 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 actions is initiated in year three -- or at *any* future time. [Emphasis supplied].

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Raised Bill No. 6662 should be revised to make it clear that the priority lien is an evergreen lien. Attached hereto as Exhibit B is language that, if added to the bill and adopted by the General Assembly, would address this issue

It is worth noting that the Connecticut Chapter of the Community Associations Institute is working with the Connecticut Bankers Association to reach an agreement on the final language of the attached draft.

**D. The amount of the priority lien should be increased from six to twelve months' worth of common charges.**

As stated above, the economy is presently in a weak state and it is taking lenders longer to complete their foreclosures

Because an association lien has priority over the mortgage for only six months' worth of the outstanding assessments, it likely that any charges in excess of six months' worth will become uncollectible. Therefore, associations must move swiftly to foreclose the lien in order to minimize the amount of common charges that may become uncollectible

By increasing the amount of the priority lien to twelve months' worth of common charges, associations are under less pressure to move swiftly to foreclose the lien. They can give lenders more time to complete their own foreclosures, rather than having to rush forward with separate foreclosure actions

Increasing the amount of the priority also better protects the association and the unit owners by ensuring that a larger portion of the unpaid charges owed by a delinquent owner can be collected through the foreclosure process, rather than being shared by the other owners in the community.

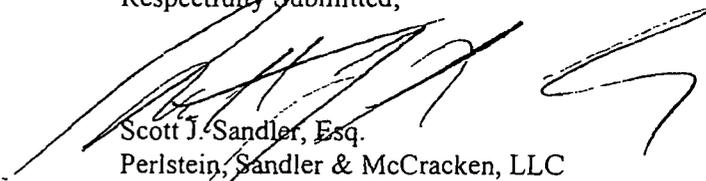
For the reasons set forth above, the General Assembly should revise and adopt Raised Bill No 6662.

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If I can furnish the Committee with any further information or assistance, please do not hesitate to contact me

Respectfully Submitted,



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# Exhibit A

27 Wake Forest L. Rev. 353

Wake Forest Law Review

1992

Symposium Issue Uniform Real Property Acts

MEANER LIENOR COMMUNITY ASSOCIATIONS THE "SUPER PRIORITY" LIEN AND  
RELATED REFORMS UNDER THE UNIFORM COMMON INTEREST OWNERSHIP ACT<sup>21</sup>*James L. Winokur*<sup>aa1</sup>

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## \*354 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,<sup>1</sup> planned communities<sup>2</sup> and cooperatives<sup>3</sup> The consolidation of acts regulating these three different ownership forms is based on the Uniform Laws Conference's accurate perception<sup>4</sup> that, substantively, all three forms share a fundamental common trait: in all these forms unit owners beneficially<sup>5</sup> 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 \*355 common interest community<sup>6</sup> Thus, CICs include condominiums, town-houses, 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<sup>7</sup> While condominium development may have peaked temporarily in some areas,<sup>8</sup> the overall number of common interest communities is expected to grow substantially again during the 1990s.<sup>9</sup>

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 \*356 maintenance of facilities, but also services such as trash collection, snow removal, street maintenance and cleaning,<sup>10</sup> with community associations both obligated and empowered to perform them or contract for their performance<sup>11</sup> 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,<sup>12</sup> and the financial and personal management experience of their \*357 elected officers<sup>13</sup> The main source of financial and interpersonal strain on association boards is the association's inability to collect assessments<sup>14</sup>

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,<sup>15</sup> have provided that the association holds a lien against each unit to secure payment of owner assessment obligations There is common law authority<sup>16</sup> that these assessment liens \*358 have priority over all unit mortgages<sup>17</sup> However, state statutes<sup>18</sup> and declaration provisions<sup>19</sup> 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,<sup>20</sup> leaving no foreclosure sale proceeds remaining to pay any of the association's lien.<sup>21</sup> In a weak market, where the unit's value would 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.<sup>22</sup> 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.<sup>23</sup>

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.<sup>24</sup> 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.<sup>25</sup>

Faced with this dilemma, some associations attempt to defer the 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.<sup>26</sup> 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,<sup>27</sup> the worst CIC maintenance crises lie ahead.<sup>28</sup>

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<sup>29</sup>--will typically undertake to protect its security.<sup>30</sup> 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.<sup>31</sup> Prominent among these burdens is the payment of property 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.<sup>32</sup> Unlike most associations,<sup>33</sup> 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.<sup>34</sup> These safeguards are not available to community associations.<sup>35</sup> 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.<sup>36</sup>

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 importance<sup>362</sup> 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.<sup>37</sup> Consequently, UCIOA enables more efficient collection of common assessments from all unit residents.<sup>38</sup> 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.<sup>39</sup>

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.

## \*363 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."<sup>40</sup> This bolsters a community association's "'governmental' functions as the ruling body of the common interest community,"<sup>41</sup> but it would be far more effective if it also addressed the often paralyzing specter of attorney fees for enforcement of assessment obligations.<sup>42</sup> 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<sup>43</sup> for late payment of assessments, as authorized by UCIOA, will cover only a small fraction of enforcement expenses.

### *B Association Lien with Split Priority*<sup>44</sup>

To further support collection of CIC assessments, the UCIOA creates a perpetually renewable association lien for unpaid assessments or fines, \*364 "from the time the assessment or fine becomes due" or, where an assessment \*365 is due in installments, "from the time the first instalment [[[sic] thereof becomes due" <sup>45</sup> 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. <sup>46</sup>

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 <sup>47</sup> In its most controversial provision, UCIOA grants the \*366 assessment lien a further limited priority over such first mortgages <sup>48</sup> The lien and its statutory priority may not be waived <sup>49</sup>

*1 Super priority versus first mortgages*

In its most heralded break with traditional law, <sup>50</sup> 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" <sup>51</sup> 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, <sup>52</sup> which are hereinafter referred to as the "Prioritized Lien" and the \*367 "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, <sup>53</sup> 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" <sup>54</sup> 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 <sup>55</sup> 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 <sup>56</sup> However, for any assessments or other charges to be included within the Prioritized Lien, there must have been a properly adopted <sup>57</sup> 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 \*368 action to enforce the [association's] lien" <sup>58</sup> 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," <sup>59</sup> 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" <sup>60</sup> 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 <sup>61</sup>

\*369 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.<sup>62</sup> 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<sup>63</sup> of the Uniform Act expressly singled out for application to associations existing before enactment of UCIOA.<sup>64</sup> 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."<sup>65</sup> Clearly, new CICs created after enactment of UCIOA in a given state will be generally subject to UCIOA, including its lien assessment provisions.<sup>66</sup>

In communities predating enactment of UCIOA,<sup>67</sup> UCIOA's association \*370 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.<sup>68</sup> 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 generically defined, state condominium or CIC statute.<sup>69</sup> 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,<sup>70</sup> 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 \*371 provision in the declaration "invalidates" the declaration's subordination provision in violation of UCIOA's applicability section.<sup>71</sup> 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,"<sup>72</sup> 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.<sup>73</sup>

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.

\*372 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.<sup>74</sup> 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]]]"<sup>75</sup> By the better view, according "super priority" to the association lien over a post-UCIOA mortgage would limit, but not "invalidate,"<sup>76</sup> the declaration's subordination of the assessment lien. Far from \*373 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]]]"<sup>77</sup>

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<sup>78</sup> 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.<sup>79</sup> That clause is the principal reason UCIOA's impact was so narrowly limited in its application to preexisting common interest communities.<sup>80</sup> The only parties in preexisting contractual relationships addressed by this application of UCIOA are associations seeking \*374 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.<sup>81</sup> The parties burdened by the "super priority" lien are those mortgage lenders whose mortgage contracts with unit owners were created after enactment of UCIOA.<sup>82</sup> Therefore, UCIOA's impact on these mortgage contracts is not retroactive, as required for violation of the U.S. Constitution's "contract clause."<sup>83</sup> Regardless of the lenders to which it is applied, the "super priority" lien's constitutionality is further bolstered by its relatively insubstantial,<sup>84</sup> remedial<sup>85</sup> impact requiring merely the prioritizing of six months' worth of assessments. This is a very narrowly tailored<sup>86</sup> method of addressing "a broad, generalized economic or social problem."<sup>87</sup>

### 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.<sup>88</sup> Under most states' mechanics' and \*375 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.<sup>89</sup> 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,<sup>90</sup> section 3-116(b) compares perfection (recordation) of the mortgage with the date the assessment became delinquent<sup>91</sup> 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.<sup>92</sup> 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<sup>93</sup> Therefore, the use of its comparison date would seem contrary to the drafters' intentions

#### \*376 C Foreclosure and Redemption Options

UCIOA provides that the association lien may be foreclosed "in like manner as a mortgage on real estate"<sup>94</sup> or, pursuant to optional language, by power of sale<sup>95</sup> However, power of sale foreclosure is unavailable in many states<sup>96</sup> 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<sup>97</sup>

The distinction between judicial and power of sale foreclosure, important in all foreclosure settings,<sup>98</sup> 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<sup>99</sup> can generate additional assessment defaults several times the amount of the assessment default first foreclosed upon.<sup>100</sup> The relatively small stakes in an assessment foreclosure may also generate a hostile judicial response to devoting court time to such cases<sup>101</sup> On the other hand, a statutory grant of power of sale foreclosure authority raises several problems,<sup>102</sup> among which would be the more likely application of constitutional due process safeguards to \*377 a power of sale created by statute than to one privately conferred<sup>103</sup> On balance, however, it is excessively burdensome to restrict associations to judicial foreclosures in a state where power of sale foreclosure is permitted<sup>104</sup> 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<sup>105</sup> The Prioritized Lien can receive no portion

of the foreclosure \*378 sale proceeds without participating in the foreclosure. However, payment of the Prioritized Lien-- which, unlike the Less-Prioritized Lien, should survive this foreclosure<sup>106</sup> 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<sup>107</sup> or VA.<sup>108</sup>

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.<sup>109</sup> 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 \*379 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.<sup>110</sup> 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.<sup>111</sup> 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.<sup>112</sup> 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.<sup>113</sup> 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.

\*380 Facing the threat of even a relatively efficient foreclosure,<sup>114</sup> 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.<sup>115</sup> 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.<sup>116</sup>

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.<sup>117</sup> 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.<sup>118</sup> On the other hand, the mortgagee seeking redemption would have no right to redeem an interest junior to its mortgage,<sup>119</sup> 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 \*381 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*"<sup>120</sup> --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*.<sup>121</sup> 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 over-all 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.<sup>122</sup> 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* \*382 time.<sup>123</sup>

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.<sup>124</sup> Phrased, differently,<sup>125</sup> 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 unencumbered, 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.<sup>126</sup> 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<sup>127</sup> To allow the mortgagee to purchase this lien, so \*383 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<sup>128</sup> levying taxes Like the government, it must collect assessments from its residents to perform critical functions which clearly resemble governmental responsibilities<sup>129</sup> Like the government, the association has \*384 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<sup>130</sup>

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,<sup>131</sup> 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 statutory \*385 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<sup>132</sup> 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<sup>133</sup> 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<sup>134</sup>

### 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.<sup>135</sup> In many states, recording of a delinquency notice has been deemed necessary to perfect any lien for unpaid assessments.<sup>136</sup> 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<sup>1386</sup> 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.<sup>137</sup> In place of requiring recording of individual delinquencies, UCIOA requires recording of only the declaration<sup>138</sup> and a formalized assessment status reporting system.<sup>139</sup> 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.<sup>140</sup>

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."<sup>141</sup> 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,<sup>1387</sup> 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.<sup>142</sup> 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.<sup>143</sup>

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<sup>144</sup> for assessments then outstanding, but without

affecting the \*388 association's unsecured claim against the unit owner<sup>145</sup> 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<sup>146</sup> Of course, if delinquencies continue to mount, the new delinquencies would become part of a renewable<sup>147</sup> 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<sup>148</sup> 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 \*389 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,"<sup>149</sup> 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<sup>150</sup> 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<sup>151</sup> 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<sup>152</sup> 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<sup>153</sup> and allowing boards leeway to govern without fruitless disruption by unrepresentative, disgruntled residents<sup>154</sup>

#### 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<sup>155</sup> \*390 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<sup>156</sup> 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.<sup>157</sup> Lenders' and developers' attorneys in states \*391 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.<sup>158</sup>

#### *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.<sup>159</sup> 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.<sup>160</sup> The expectation of \*392 escrow requirements was one basis for limiting the Prioritized Lien to equal no more than six months assessments.<sup>161</sup> However, some experience with the super priority lien suggests that lenders may not ordinarily impose any escrow requirement on CIC unit purchasers.<sup>162</sup>

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,<sup>163</sup> we can no longer casually view community associations as a convenient place to transfer unwanted local governmental responsibilities<sup>164</sup> 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.<sup>165</sup> 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.<sup>166</sup> Such potential liability seems very far fetched under UCIOA and the standard language of the vast majority of title policies.

\*393 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."<sup>167</sup> 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])."<sup>168</sup>

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.<sup>169</sup> 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 \*394 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 \*395 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<sup>177</sup>) 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.

#### Footnotes

- a1 Copyright 1992 by James L. Winokur
- aa1 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.
- 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.
- 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)
  - 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 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.
- 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.





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 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 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 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 § 866, 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).
- 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 § 34-36-1-101 to 34-36-1-420 (1982). *But see* Act of March 9, 1992, ch. 8, 1992 R. I. PUB. LAWS 8 (recently amending R. I. GEN. LAWS § 34-36-1-316 (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) (subordination 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
- 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 Manon 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



- 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
- 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 Senes, 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
- 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



- 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 matenalmen'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
- 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 of sale, in a few cases, even statutorily creating the power of sale. Jack Jones and J. Michael Ivins, *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)
- 103 See, e.g., *Northrup 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 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.
- 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
- 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 Charpiloz*, 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.
- 120 UCIOA § 3-116(b), 7 U.L.A. at 351 (1982)
- 121 *Id.*
- 122 *Id.*
- 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 foreclose 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 prohibited, 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 because it had been purchased for adequate consideration. However, the term "agreement" itself, describing a prohibited 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, 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 foreclosure 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 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.
- 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.

- 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
- 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.
- 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), Kormgold, *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)
- 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 Titles 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 Contanno & 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 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 (CAL, 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 Corporation (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 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)
- 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
- 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 I GURDON BUCK, CONDOMINIUM DEVELOPMENT § 8 66, at 8-117 (1991)
- 175 *See supra* text at notes 142-49
- 176 *Cf* I GURDON BUCK, CONDOMINIUM DEVELOPMENT § 8 66, at 8-121 (1991)
- 177 UCIOA § 1-204, 7 U L A at 266 (1985)

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# **Exhibit B**

**Proposed Revision to Subsection 47-258(b) of the Common Interest Ownership Act to Clarify the Association's Priority Lien**

Proposed deletions are shown [in brackets] Proposed additions are underlined

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

(1) 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,

(2) a first or second security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent, or, in a cooperative, a first or second 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

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

In each and every action brought to foreclose a lien under this section<sup>1</sup> or a security interest described in subdivision (2) of this subsection,<sup>2</sup>[T]the lien is also prior to all security interests described in subdivision (2) of this subsection to the extent of

(A) an amount equal to the common expense assessments based on the periodic budget adopted by the association pursuant to subsection (a) of section 47-257 which would have become due in the absence of acceleration during the twelve [six] months immediately preceding institution of an action to enforce either the association's lien or a security interest described in subdivision (2) of this subsection and

(B) the association's costs and attorney's fees in enforcing its lien

A lien for any assessment or fine specified in subsection (a) of this section shall have the priority provided for in this subsection in an amount not to exceed the amount specified in subparagraph (A) of this subsection. 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

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<sup>1</sup> This phrase refers to the association's lien for unpaid assessments, etc

<sup>2</sup> This phrase refers to first and second mortgages.

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TESTIMONY OF WILLIAM W. WARD, ESQ.  
BEFORE THE JUDICIARY COMMITTEE  
MARCH 25, 2013

REGARDING RAISED BILL NO. 6662  
AN ACT CONCERNING THE RECOUPMENT OF MONEYS OWED TO UNIT OWNERS'  
ASSOCIATION DUE TO NONPAYMENT OF ASSESSMENTS

I. SUMMARY OF TESTIMONY:

Raised Bill No. 6662

- A. I support the provisions of Raised Bill No. 1145 (Section 1 – Subsection (b) of section 47-258), which seeks to extend the priority lien given to common interest unit owners' associations from six to twelve months and provides greater statutory protections to unit owners' associations seeking reimbursement for unpaid assessments incurred during the pendency of a foreclosure action.
- B. I also submit a proposed modification to C.G.S. Section 47-258(b) to ensure that unit owners' associations are not limited to only one six month priority lien

II. BIOGRAPHY OF WILLIAM W. WARD:

William W. Ward is a graduate of Fairfield University (B.A. 1978 – magna cum laude) and the Columbus School of Law at The Catholic University (J.D. 1981), where he was a member of the Law Review. He clerked for the Honorable C. Murray Bernhardt in the United States Court of Claims (1981 – 1983). He was admitted to the bars of the State of Connecticut, State of Maryland, and District of Columbia and currently practices solely in Connecticut. He is a member of the Connecticut Bar Association, Fairfield County Bar Association, and the Federal Bar for the District Court for the State of Connecticut. He serves as a Special Master for the Connecticut Superior Court. He is currently a member of the Board of Directors for the Connecticut Chapter of the Community

## ACKERLY & WARD

Association Institute His practice concentrates on common interest communities, common interest community developments, and civil litigation

Mr. Ward has lectured on legal issues involving community associations for the Connecticut Bar Association, Fairfield County Bar Association, Community Association's Institute, Connecticut Housing Finance Authority, and community associations. He has also published multiple articles concerning community association's legal issues for local and state publications.

Mr. Ward lived in a condominium for 10 years, served on its Board of Directors for 6 years, and has represented condominium associations, individual unit owners, and developers for twenty-nine years. Mr. Ward is a principal in Ackerly & Ward in Stamford, Ct, which provides legal services to over 150 community associations.

### BACKGROUND AND PERSPECTIVE

I am testifying today from a unique viewpoint. I lived in a 200-unit condominium for 10 years and was on the Board of Directors for 6 years. I represent individual Unit Owners in disputes with Associations, over 150 Community Associations, and developers in developing a 53 Unit project in Stamford and up to 600 Units in Moodus. Therefore, my opinion on the proposed legislation is based upon viewing the issues from all perspectives.

In my experience, as with any subset of the population, there are extremes. In my 29 years of dealing with Associations and Unit Owners there is a very small percentage of Unit Owners, who view their ownership of a Unit as having all of the rights that they would have if it were a single-family home, which creates tension between them and the Board. There are also some Boards, who do not enforce the documents, but make decisions based upon what they believe are reasonable. The vast majority, however, probably eighty-five to ninety percent (85-90%) of Unit Owners and Associations, operate within the prescriptions of the law and their rights and responsibilities under the condominium documents. Therefore, my opinion is that changes, which create more duties and responsibilities for the volunteers on the Board of Directors are unnecessarily burdensome and will result in qualified owners refusing to sit on the Board of Directors and needless disputes with unit owners.

### II. ANALYSIS:

#### A Extending the Six Month Priority Lien to Twelve Months

I support the testimony submitted by other proponents of the extension – specifically Karl Kuegler, Jr. of Imagineers. During the last foreclosure crisis in the late 1990's, a foreclosure action lasted only 4 – 6 months. This allowed associations to receive all, or most, of the common charges owed. Therefore, a six-month priority lien was a reasonable amount. Today, however, foreclosures continue for 12 months and often longer. Since associations cannot statutorily commence a foreclosure until a unit owner is delinquent in an amount equal to two months of common charges, the need for increasing the priority lien is self-evident since the association continues to bear the costs

of insuring and maintaining the property, management fees, landscaping, snow removal, utilities, etc., but are now limited to recovering only six months of those charges

In addition, often associations impose assessments while a foreclosure is pending. Due to the length of foreclosure actions, those assessments are not recovered in the current six-month priority lien. Therefore, the extension to twelve months and allowing recoupment of assessments incurred during the pendency of the foreclosure action should be adopted.

B. Amending C.G.S. Section 47-258(b) to Ensure the Repeated Applicability of the Six or Twelve-Month Priority Lien Until a New Owner Obtains Title to the Property

Currently several banks are arguing that they only have to pay one six month priority lien as long as their mortgage foreclosure does not proceed to judgment and title pass to a new owner. The net effect is that currently the bank pays the association its six-month priority and then fails to pursue its foreclosure to judgment to ensure it does not obtain title and have to pay common charges as the new owner. The net effect is that other owners, current in their common charges, are forced to cover the expenses of the delinquent owner as a result of the bank failing to proceed to judgment in its foreclosure actions

Since 1984 the remedy for associations was to commence its own foreclosure and/or repeated foreclosures if the bank did not proceed to judgment in its foreclosure action. The current practice of several banks, however, render that approach fruitless since the association will not recover any of its delinquent common charges or the costs and fees incurred in foreclosing

Therefore, I respectfully submit that C.G.S Section 47-258(b) be amended to include the following language: "For the purposes of this section, priority liens shall mean all six month lien periods established in accordance with this section, and shall not be limited to one six month lien period, whether or not the lien periods are successive."

Thank you for the opportunity to testify concerning this bill. If you need additional information or assistance, which I am able to provide, please contact me.

Respectfully Submitted,



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## TESTIMONY IN SUPPORT

**GENERAL ASSEMBLY BILL No. 6662 - AN ACT CONCERNING THE RECOUPMENT OF MONEYS OWED TO A UNIT OWNERS' ASSOCIATION DUE TO NONPAYMENT OF ASSESSMENTS**

MARCH 25, 2013

I am Richard Mellin, Mellin & Associates LLC, a property management firm based in the Danbury area. My partner and I manage large condominiums with a total of more than one thousand residents. We have been managing community association properties for over 25 years.

Mellin & Associates LLC is registered with the Department of Consumer Protection as a Community Association Manager holding Registration # CAM.0000082.

Mellin & Associates LLC is a proud member of the Connecticut Chapter of Community Associations Institute. I serve on the organization's Legislative Action Committee and Chair the organization's Manager's Council which is comprised of fellow community association managers in CT.

I wish to express my support of Bill No. 6662, but wish to see additional language included to address other deficiencies in the current statute.

(1) I would like to see an increase in the Priority Lien from 6 months to 12 months. The Associations we manage are unable to collect fees as a result of extended foreclosure efforts. Rarely if ever do foreclosure efforts get resolved within the 6 months. This results in all the remaining unit owners having to make up the difference through increased fees or loss of services. This is not "fair, balance or equitable".

(2) Legislature must make it clear that the priority lien is meant to protect associations and their unit owners. Banks that delay finalizing a foreclosure effort end up forcing unit owners to subsidize the banks asset because the association maintains the common elements related to their unit. Further, some banks are now not paying common charges permanently after paying the priority lien. This is not fair or balanced to the other unit owners.

If you have any questions, please do not hesitate to contact me. Thank you.

Respectfully Submitted,

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In Support of

**H.B. 6662 AN ACT CONCERNING THE RECOUPMENT OF MONEYS OWED TO A UNIT OWNERS' ASSOCIATION DUE TO NONPAYMENT OF ASSESSMENTS.**

My Name is Bob Gourley I served as President of the Board of Directors for the CT Chapter of the Community Associations Institute My term began on January 1, 2010 and ended December 31, 2011

I also serve as President of the Board of Directors of Captain's Walk, a 20-unit Planned Unit Development (PUD) in West Haven, CT. I have served on the Board as President since 2003 As a PUD, Captain's Walk is governed identically to most condominiums and HOAs in the state of CT Residents hold common interest in the community, pay common fees, are bound to unit by-laws and regulations, and are subject to provisions outlined in the Common Interest Ownership Act (CIOA)

Prior to living at Captain's Walk, I was an individual unit owner at Pilgrim's Harbor in Wallingford from 1985 to 1993

I am a principal partner in a business called, MyEZCondo My business produces newsletters for condominium and community associations throughout the country, including Connecticut

Testimony on the Bill

**I support H.B. 6662.**

I applaud the State Legislature for protecting the rights of citizens who live in Connecticut's condominium communities by extending the common expense assessment due period to 12 months. Common fees are the lifeblood of the condominium association. These "non-profit" corporations exist only to serve the best interests of unit owners within common interest communities. These "non-profit" corporations are governed by unpaid volunteers who are themselves dues paying members of the community. The idea that a "for-profit" corporation like a bank should be able to withhold payment of common fees while at the same time preventing a potential common fee-paying owner from becoming an owner is truly unacceptable and violates a core principal of common unit ownership Everyone should pay their fair share. No more, no less, just fair.

Over the past few years, large "for-profit" financial institutions have profited at the expense of "non-profit" corporations that exist only to govern common interest communities by withholding common fees that the association expects to collect While it is unfortunate that these financial institutions have found it necessary to foreclose on their clients, it is not the responsibility of the "non-profit" corporation to simply not collect the common fees which they were expecting to collect from the occupier of the unit. By stalling or delaying the foreclosure process, the financial institutions have created a way to simply occupy the unit and not contribute their fair share to the common expenses of the association While this bill does not fully alleviate the problem, the additional six months of common fees this bill allows the associations to collect does allow them the opportunity to fulfill their 12 month budget projections and fulfill the financial responsibilities of all of the other dues paying members.

While I would like to see the legislature go even further to protect the rights of "non-profit" corporations that govern community associations - specifically amend this bill to include language which allows associations to be given the priority lien for each action - I think this bill is a step in the right direction. I encourage all legislators to vote in favor of this measure.

Very Truly Yours

Bob Gourley Past President (2010-11) of the Board of Directors, CT Chapter of the Community Associations Institute, President (2003-13) of the Board of Directors, Captain's Walk PUD, Founder, MyEZCondo

March 25, 2013

To: Judiciary Committee

Fr: Connecticut Bankers Association  
Contacts: Tom Mongellow, Fritz Conway

Re: H.B. No. 6662 An Act Concerning The Recoupment Of Moneys Owed To A Unit Owners' Association Due To Nonpayment Of Assessments.

Position: Oppose As Drafted

This bill would double the priority lien for condominium fees from 6 months to 12 months and potentially allow for an additional "evergreen" priority liens for those fees.

The CBA and the banks it represents around the State clearly understand the need for Condominium Owners Associations (COA's) to collect regular payments from their unit owners. **Banks are stakeholders in that process** too, as the underlying viability and value of the complex is dependent upon the COA's upkeep of the facilities.

That underlying viability is also greatly enhanced by the ability of owners to secure mortgage financing for the purchase of individual condominium units. That **financing ability continues to be available in large part due to the secondary mortgage market** which provides guarantees for up to 70 percent of state's condominium mortgages, through Fannie Mae and Freddie Mac underwritten loans. This process works because **investors are willing to buy these Connecticut mortgages due to prudent underwriting standards that create an acceptable level of lending risk.**

When a **condominium mortgage is delinquent or in foreclosure, banks and servicers must still pay the investor, taxes and insurance** - which means additional and until a resolution is obtained – continued and real losses on the property sustained by the bank.

**The reality is that bank's provide the financing and financial stability that allows many complexes to thrive** and should not be viewed as the "deep pockets" to recoup Association fees just because they hold or service the mortgage.

While the Committee may hear complaints from COA's due to borrowers not paying fees, the banking industry receives complaints **that mortgages are sometimes not available on complexes that don't have the secondary market approval.** Those Fannie Mae and Freddie Mac approvals (and subsequent availability of loans) may be more difficult to achieve if the provisions of this bill are enacted.

Existing law provides for a priority lien of 6 months of COA fees. **Lenders, to protect the underlying asset for the investors, wind up paying those six months of fees** (and many times, the association's legal fees and additional arrearages) in the event of a foreclosure. This is yet an **additional cost the lender has to cover and cannot be recouped as part of the borrower's debt**, in a deficiency judgment.

The provisions of the bill would double that time frame **which will increase the costs and risks of making condo mortgages throughout the state.**

Over ten years ago, the **legislature enacted a 12 month priority condo lien and Fannie Mae communicated that they would stop accepting condominium mortgages from Connecticut** due to increased costs and risk. The **legislature correctly reversed its action and repealed the 12 month priority lien provision** leaving it at 6 months to this day.

**Judicial Foreclosure System in Connecticut is the third slowest in the country.** This complex system with its many moving parts is in need of repair. Delays can be caused by mandatory state and federal foreclosure assistance programs, borrower's defenses, lenders complying with those mandatory assistance programs,

mediation and judicial actions. *The banking industry is working with the Legislature, the Administration and all stakeholders in the foreclosure process to make positive changes to that system and significantly reduce those delays.*

Because the Connecticut system is so slow, *Fannie Mae and Freddie Mac are currently proposing a 52% increase in guarantee fees for all mortgages they guarantee in the State (70%).*

The provisions of S.B. 6662 will be viewed as increasing the risks and costs of the State's Condominium mortgages. Based on recent actions, we can only surmise that there will be a negative reaction from the secondary market. If that is the case, *the ability to get consistent and affordable condominium mortgages in Connecticut may be reduced.*

The CBA has entered into discussions with Committee members and the statewide COA representatives and we look forward to developing a workable solution.

Testimony of  
Kim McClain

Before the Judiciary Committee  
Friday, March 25, 2011  
11:00 a.m.

**H.B. 6662 AN ACT CONCERNING THE RECOUPMENT OF MONEYS OWED TO A  
UNIT OWNERS' ASSOCIATION DUE TO NONPAYMENT OF ASSESSMENTS**

Summary

H.B. 6662 proposes to extend to 12 months the current six month priority lien.

Kim McClain

I currently serve as the Executive of the Connecticut Chapter of the Community Associations Institute (CAI-CT). CAI-CT is the educational and resource entity for community associations and their service providers in Connecticut. We are one of 60 chapters of a National organization. Through this alliance we are able to provide up-to-the-minute information on the issues and trends affecting associations, programs to enable community association managers to obtain professional credentials for licensure and access to hundreds of publications which provide tools to assist association members in their operations.

I am submitting comments, to present my insights into how the proposed bill will affect the more than 5,000 common interest communities in Connecticut, and the hundreds of thousands of people who live in them.

Background

For many years, Connecticut has lead the way for other states in the protection of community associations. The six month priority lien has been one example. Up until recently, the practice for banks has been to continue to pay the monthly common charges for the units undergoing the mortgage foreclosure process. This has clearly made sense since these payments have helped to protect the bank's property and also met the commitment to pay its fair share of fees required of all the other unit owners in any given development.

Unfortunately, recent actions of some larger banks have been to undermine what we believe should be clarified as an "evergreen" priority lien. Some banks are contending that as long as its foreclosure process is ongoing, a bank needs to pay an association the priority lien only once, after which the association loses all priority over the mortgage for as long as the mortgage foreclosure continues. If this contention is accepted, a bank can pay an association an amount equal to the six month priority lien and then force the all the other unit owners to in essence subsidize the banks, as the association must continue to pay for insurance on the unit, maintain and repair the building containing the unit and otherwise preserve the value of the unit as collateral for the bank's mortgage. There are a growing number of cases where the bank has taken years to complete the foreclosure. This places an extraordinary unfair burden on all the other unit owners to "cover" the bank's monthly fees for what can be a very protracted length of time.

There is great potential for devastation of the financial condition of associations if common fee assessments are not paid for an extended period of time. It is important to note, that in Connecticut, the majority of community associations are small - sometimes only 4-6 units. In these types of small associations, the association could easily lose 1/6 of its income - thus transferring the burden for maintaining and repairing the building to the 5 other owners, requiring an increase in their monthly assessment of 20%.

At least one Superior Court decision has accepted this contention, and it is being repeated in a number of other cases before the Superior Court. The problem is very real and is continuing to worsen. The statute needs to be clarified.

The addition of language which calls for the six month priority lien to be "evergreen" is essential to the short and long term health of community associations in our state. As such, the banks would be required to honor the six month priority lien for each action. Like all other unit owners, the banks would be obligated to pay the common charges to ensure that the association's financial security is not put into jeopardy.

HB 6662 as it is currently written, falls short of achieving the objective that the priority of the lien be "evergreen."

The General Assembly can easily remedy this situation by adopting appropriate language in subsection (b) of Section 47-258. Unfortunately, the language in the raised bill does not accomplish the most important intent of the original creation of the priority lien - to protect the financial health of community associations.

We would be happy to further discuss with you this issue, or any others affecting common interest communities in Connecticut. Please do not hesitate to contact us with any questions or concerns. I can be reached at 860-633-5692 or email [caictkmcclain@sbcglobal.net](mailto:caictkmcclain@sbcglobal.net)

Thank you for your consideration.

Respectfully submitted,

Kim McClain

Testimony in support of HB 6662

H.B. 6662 AN ACT CONCERNING THE RECOUPMENT OF MONEYS OWED TO A UNIT OWNERS' ASSOCIATION DUE TO NONPAYMENT OF ASSESSMENTS.

My name is Daniel Rys. I am a Vice President of Windsor Federal Savings and Loan. I have been in the banking and financial service industry in Connecticut for 39 years. I have been the Senior Loan Officer of two Connecticut Banks responsible for residential, consumer, and commercial lending and all parts of loan servicing including collections and foreclosures.

I support proposed bill HB 6662 however I would like to propose an amendment that calls for the 6 month priority to apply to each foreclosure action.

For the past 10 years I have concentrated my career on providing loans to community associations to help them finance capital improvement projects. The loan helps unit owners pay the assessment over time rather than paying a sometimes large lump sum assessment.

The banks I have worked for providing these loans have relied on the fact the State of Connecticut provides a 6 month priority lien to the community association for past due common fees ahead of a residential first mortgage in each foreclosure action. This system has worked well for many years even though the foreclosure process sometimes lasted longer than six months. This has been the pattern and practice for the residential and commercial lenders in the industry and the banks' lobby has been silent on this issue.

A recent court decision challenged the validity of the 6 month lien priority in every foreclosure action and stated the priority only applies once for the life of the mortgage. The lender can then leave the foreclosure in process for as many years as they would like. The result of this decision puts the burden of maintaining the unit on the remaining unit owners in the community.

Let's suppose I am a unit owner in a community association and I have a mortgage on my unit and then I stop paying my mortgage and common fees. Based on this new decision, my lender can start a foreclosure and pay the 6 months of common fees to the association once. The lender will take the amount of the fees it paid, the past due payments and the costs of legal action and add them to the end of my mortgage. I can then make an arrangement with the lender to leave the foreclosure in place and pay the lender my monthly payments which will be easier to make now that I do not have to pay common fees to the association. The rest of the unit owners will pay to maintain my unit and the lender's collateral. Several years from now when and if I build equity in my unit I can either sell it, the lender will complete their foreclosure, or the association can pay the legal fees to foreclose.

Community associations represent on average one fourth of the households in each Connecticut Town. For example, 35% of the households in Stamford are in community associations. By not amending this bill or approving legislation to make the 6 month lien priority valid for every foreclosure action, the burden of maintaining a lender's collateral will rest on the remaining unit owners in each community.

You have an opportunity here by amending this bill to help one fourth of the households in your districts by relieving them of an unnecessary financial burden that could last for years. Amending this bill will put the system back to the status quo.

Thank you for your time.

TESTIMONY IN SUPPORT OF GENERAL ASSEMBLY BILL No. 6662 - AN ACT  
CONCERNING THE RECOUPMENT OF MONEYS OWED TO A UNIT OWNERS'  
ASSOCIATION DUE TO NONPAYMENT OF ASSESSMENTS

MARCH 25, 2013

Good morning Senator Coleman, Representative Fox, Senator Doyle, Representative Ritter, Senator Kissel, Representative Rebimbas and members of the Judiciary Committee. Thank you for the opportunity to provide testimony on behalf of Woodfield Village Unit Owners Assoc. of Fairfield.

My name is Laura OBrien and I am the President of Woodfield Village Unit Owners Assoc. in Fairfield, with more than 15 years of experience on our condominium board. I have some very serious concerns about bills that are up for consideration in the legislature this year that could have a significant effect on condominium associations, detailed below:

I support this bill to extend the number of months for which common expense assessments due a common interest unit owners' association may be counted for purposes of a lien. However I feel that this should be amended to make it an "evergreen" lien until the foreclosure is completed. Something must be done to keep big banks from avoiding their responsibility to maintain their units during the foreclosure process. The cumulative effect of the new legal strategy banks are taking on the communities of this state will be devastating. Smaller proportions of owners will have to pay larger shares of the cost to cover the increasing number of units in default for years at a time, causing financial burden and deteriorating property values which can lead to even more foreclosures. And through it all, the banks will enjoy free services to preserve their collateral at the expense of everyone else in the community who had nothing to do with their neighbor's mortgage. Please support a bill which extends this priority lien in favor of condominium associations.

Laura OBrien  
178 Glengarry Rd  
Fairfield CT 06825

[obrien-laura@sbcglobal.net](mailto:obrien-laura@sbcglobal.net)

Committee on Judiciary  
Public Hearing – March 25, 2013

Statement of Support for Appropriately Modified Language in HB 6662

William Cibes, Hartford, CT

My name is William Cibes. I am a member of the Board of Directors, and Treasurer, of the Woodland House Condominium Association in Hartford. On behalf of our Association, I urge your support for passage of HB 6662, AAC The Recoupment of Moneys Owed to a Unit Owners' Association Due to Nonpayment of Assessments, if the language is revised to ensure that the priority of the condo association's lien for nonpayment of common expense assessments renews each time the owner fails to pay the assessments.

As attorneys representing the Community Association Institute of Connecticut will explain, the language of the bill as currently written fails to achieve the objective that the priority of the lien be "evergreen."

The problem that has recently arisen is that some banks are contending that as long as its foreclosure process is continuing, a bank needs to pay an association the priority lien only once, after which the association loses all priority over the mortgage for as long as the mortgage foreclosure continues. If this contention is accepted, a bank can pay an association an amount equal to the six month priority lien and then force the association to pay to insure the unit, maintain and repair the building containing the unit and otherwise preserve the value of the unit as collateral for the bank's mortgage, for the length of time it takes until the bank decides to complete the foreclosure.

At least one Superior Court decision has accepted this contention, and it is being repeated in a number of other cases before the Superior Court – so this is not a hypothetical issue. The statute needs to be clarified.

There is real potential for devastation of the financial condition of associations if common fee assessments are not paid for a lengthy period of time. In a small association of only six units, for example, the association could easily lose 1/6 of its income – thus transferring the burden for maintaining and repairing the building to the 5 other owners, requiring an increase in their monthly assessment of 20%.

The General Assembly can easily remedy this situation by adopting appropriate language in subsection (b) of Section 47-258. Unfortunately, the language in the raised bill does not do the trick. New language, which will be submitted by the CAI-CT's attorney today, should provide that the priority of the association's lien should renew each time the common fee assessment is not paid.

The CAI-CT has told me that 20% of homeowners in Connecticut are condo unit owners. In Stamford, that percentage is 33%. So this is a problem that needs to be resolved.

## TESTIMONY IN SUPPORT

**GENERAL ASSEMBLY BILL No. 6662 - AN ACT CONCERNING THE RECOUPMENT OF MONEYS OWED TO A UNIT OWNERS' ASSOCIATION DUE TO NONPAYMENT OF ASSESSMENTS**

MARCH 25, 2013

I am Richard Mellin, Mellin & Associates LLC, a property management firm based in the Danbury area. My partner and I manage large condominiums with a total of more than one thousand residents. We have been managing community association properties for over 25 years.

Mellin & Associates LLC is registered with the Department of Consumer Protection as a Community Association Manager holding Registration # CAM.0000082.

Mellin & Associates LLC is a proud member of the Connecticut Chapter of Community Associations Institute. I serve on the organization's Legislative Action Committee and Chair the organization's Manager's Council which is comprised of fellow community association managers in CT.

I wish to express my support of Bill No. 6662, but wish to see additional language included to address other deficiencies in the current statute.

(1) I would like to see an increase in the Priority Lien from 6 months to 12 months. The Associations we manage are unable to collect fees as a result of extended foreclosure efforts. Rarely if ever do foreclosure efforts get resolved within the 6 months. This results in all the remaining unit owners having to make up the difference through increased fees or loss of services. This is not "fair, balance or equitable".

(2) Legislature must make it clear that the priority lien is meant to protect associations and their unit owners. Banks that delay finalizing a foreclosure effort end up forcing unit owners to subsidize the banks asset because the association maintains the common elements related to their unit. Further, some banks are now not paying common charges permanently after paying the priority lien This is not fair or balanced to the other unit owners.

If you have any questions, please do not hesitate to contact me. Thank you.

Respectfully Submitted,

Richard E. Mellin  
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Michael S. AlexanderTELEPHONE: (203) 248-6440  
FACSIMILE: (203) 288-9054†Admitted to the CAI  
College of Community Association Lawyers**TESTIMONY OF KRISTIE LEFF, ESQ.  
IN SUPPORT OF RAISED BILL NO. 6662  
AN ACT CONCERNING RECOUPMENT OF MONEYS OWED TO A  
UNIT OWNERS' ASSOCIATION DUE TO NONPAYMENT OF ASSESSMENTS**

The collection of monthly common charge assessments is vital to the effective operation and economic stability of condominium associations. The legislature recognized this in 1984 when it enacted the Common Interest Ownership Act. Section 47-258 of that Act allows condominium associations to foreclose when a unit owner does not pay common charges. Section 47-258(b) currently provides that the association's lien had a priority to the extent of six months of common charges over the first or second mortgage.

Since 1984 when the Common Interest Ownership Act was first adopted, this scheme has operated effectively because it strikes an equitable balance between the needs of the condo associations and the needs of the banks.

Recently, however, certain big banks have set out to weaken this six-month priority lien. My law firm represents condominium associations throughout the state. In the past year or so we have seen an influx of challenges to the six-month priority scheme being lodged in courts throughout the state. This past November, one superior court decision agreed with the bank challenge and found that the six-month priority lien does not exist in instances when a bank foreclosure action and a second condominium foreclosure action are simultaneously pending. I have attached that memorandum of decision to my written testimony. (See Exhibit A).

The effect of this decision is that a condominium would either have to wait until a bank foreclosure is completed before it can assert its six-month priority lien, or the association would have to foreclose on the unit subject to the mortgage. Because bank foreclosure actions can take years to complete due to paperwork glitches and mandatory mediation requirements, the condo association will lose all the common fee revenue from that unit until the bank action is completed, and then be limited to recovering only 6 months worth of common fees. Or, if the association forecloses on the unit subject to the mortgage it has to make mortgage payments on a unit that may be worth less than what the bank is owed.

Either way, this court decision has now turned a statute that was meant to protect condominium associations into one that protects banks and forces the associations to be caretakers of the bank's collateral. Effectively, the association is forced to forego common fees on the unit to subsidize the banks.

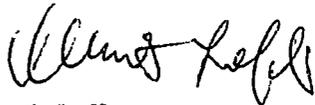
Testimony of Kristie Leff – page 2

I am in support of HB 6662 because increasing the priority lien from six months to twelve months would allow the association to recoup a greater share of its lost revenue in situations where the association has to wait until a bank foreclosure is completed.

Alternatively, I have attached to my written testimony a proposed change to the statutory language whereby the six month lien is unchanged but the language clarifies that the six month priority lien may be asserted by the association in each and every action it brings to foreclose for unpaid common charges. (See Exhibit B). This language addresses the specific challenges condominium associations are encountering in the courts.

This proposed language restores the status quo regarding the way these foreclosure actions have been handled since 1984 and preserves the intent of the statute which is to protect the financial stability of condominium associations

Respectfully submitted,



Kristie Leff  
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**EXHIBIT A**

No. NNH-CV-11-6021568-S : SUPERIOR COURT  
 LAKE RIDGE CONDOMINIUM : JUDICIAL DISTRICT OF NEW HAVEN  
 ASSOCIATION, INC.  
 V. : AT NEW HAVEN  
 HARRY VEGA, JR., ET AL : NOVEMBER 30, 2012

**RULING ON  
 MOTION FOR SUMMARY JUDGMENT AND  
CROSS MOTION FOR SUMMARY JUDGMENT (# 124.00 & 130.00)**

On June 8, 2011, the plaintiff, Lake Ridge Condominium Association, Inc. (Lake Ridge) commenced this action against the defendants, Harry Vega (Vega), the homeowner, and Bank of America, National Association as successor by merger to LaSalle Bank National Association, as trustee for the Registered Holders of GSAMP Trust 2005-HE6, Mortgage Pass-through Certificates, Series 2005-HE6 (BOA), the first mortgage holder, seeking a foreclosure of condominium assessment liens. BOA filed an answer and special defense dated November 1, 2011 (#115.00).

On July 13, 2012 Lake Ridge filed the operative motion for summary judgment as to liability (#124.00). On October 18, 2012 BOA filed it's own cross motion for summary judgment on its special defense (#130.00). The sole issue is whether when a first mortgagee and a condominium association are simultaneously foreclosing their respective security interests in a specific condominium unit, the six months priority conferred on liens for delinquent condominium common charge assessments by Conn Gen. Stat. § 47-258(b) is

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permanently extinguished if the foreclosing first mortgagee pays the association the then outstanding common charges, late fees, attorney's fees and court costs; or whether the priority applies again if a subsequent common charge delinquency occurs during the pendency of the first mortgagee's foreclosure.

#### FACTS

The facts underlying this dispute are not contested. At the request of the court the parties have provided a stipulation of facts (#135.00) from which the court finds the following facts material.

The defendant, Vega, is the record owner of the subject property, Unit #28, 1555 North Colony Road, Meriden, Connecticut (Property), a condominium unit and part of the Lake Ridge Condominium Association. The defendant, BOA, instituted an action to foreclose its first mortgage on the Property by writ, summons and complaint returnable on December 22, 2009, bearing docket no. NNH-CV09-6006452-S (Mortgage Foreclosure). The plaintiff, Lake Ridge, is a defendant in the Mortgage Foreclosure action by virtue of its lien for unpaid common charges pursuant to Conn. Gen. Stat. §47-258. The Mortgage Foreclosure action remains pending.

Prior to commencing this action and subsequent to the commencement of the Mortgage Foreclosure action, Lake Ridge initiated a prior foreclosure action for unpaid common charges pursuant to Conn. Gen. Stat. §47-258 against Vega by writ, summons and complaint dated September 28, 2010, bearing docket number NNH-CV10-6015267-S (Prior

Foreclosure). BOA was named as a defendant in the Prior Foreclosure action by virtue of its first mortgage on the Property. On December 20, 2010 the court entered a judgment of strict foreclosure in the Prior Foreclosure action. The court found that the total debt due to the Plaintiff was \$1,680.00. The court found that the priority debt was \$1,260.00. The court awarded \$1,750.00 for attorney's fees plus court costs. The court assigned a law date of February 22, 2011 and subsequent law days in inverse order of the defendants' priorities. On January 20, 2011, a non-lawyer assistant at Hunt, Leibert, Jacobson, P.C., counsel to BOA in the Mortgage Foreclosure and the Prior Foreclosure, requested two figures from Plaintiff's counsel: the redemption figures on behalf of the Vega to redeem on the Vega's law day set for February 22, 2011 and redemption figures on behalf of BOA to redeem on its law day of February 23, 2011. On January 26, 2011, in response to that request, counsel for Lake Ridge sent counsel for BOA a letter wherein it states that "[s]hould [Bank of America] wish to pay in full for the debtor [(Vega)] in the above referenced action the following amounts are due . . . \$4,682.20" and "[s]hould [Bank of America] wish to redeem on [its] law day, my client, is due their [sic] statutory priority debt as follows . . . \$4,052.20." Lake Ridge's counsel received a check dated January 27, 2011 drawn on an account from Ocwen Loan Servicing LLC in the amount of \$4,682.20, which equaled the amount due on behalf of the Vega. On February 2, 2011 the Lake Ridge filed a satisfaction of judgment with the Court stating that the "Judgment entered by the Court on Plaintiff's Complaint in the [Prior Foreclosure Action] has been fully paid and satisfied by the defendant, Bank of America

on behalf of the Defendant, Harry Vega, Jr., on January 31, 2011, prior to his assigned law day." Title to the Property remained and continues to remain vested in Vega.

By writ, summons, and complaint dated June 8, 2011, with a return date of July 5, 2011, the Lake Ridge instituted the instant action against Vega in which BOA is also named as a party defendant to foreclose upon its common charge lien pursuant to Conn. Gen. Stat. §47-258. In this action, Lake Ridge alleges that the monthly condominium common expenses on the Property continues to go unpaid. As noted above, the Mortgage Foreclosure action remains pending. On November 11, 2011, BOA filed an Answer and Special Defense in this Action alleging payment and discharge of the priority portion of the lien and that no new condominium lien prior in right to its mortgage arises.

#### DISCUSSION

"Summary judgment is a method of resolving litigation when pleadings, affidavits, and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . The motion for summary judgment is designed to eliminate the delay and expense of litigating an issue when there is no real issue to be tried." (Citations omitted.) *Wilson v New Haven*, 213 Conn. 277, 279, 567 A.2d 829 (1989).

Prior to the filing of the subject motions for summary judgment, Lake Ridge filed a motion to strike BOA's special defense of payment and discharge of the priority portion of the condominium lien, testing the legal sufficiency of BOA's defense. In denying the

motion to strike the court (*Zemetis, J.*) ruled the defense legally sufficient, stating, "The motion to strike addresses whether CGS 47-258 prevents the plaintiff from asserting the 'superpriority' lien, *Linden Cond Assn, Inc v. McKenna*, 247 Conn 575, 585 (1999), on multiple occasions during the course of a single action by a mortgagee. The Court rejected the argument that a condo assn could initiate a foreclosure on delinquent common expense assessments every six months thereby obtaining statutory 'superpriority', *Hudson House Condo Assn v Brooks*, 223 Conn. 610, 614-15 (1992). As noted there, the statute limits the priority lien to six months of common expense assessments. Neither that court, nor this, is inclined to question the legislative wisdom of granting a condo assn a 'superpriority' then limiting the same to a six month period. Parties seeking a different statutory scheme must find their relief in the legislature. CGS 47-258 limits the six month 'superpriority' granted to a condo assn to being asserted in an action to enforce either the association's lien or a security interest described in subdivision (2) [a first priority mortgage such as is being foreclosed by the defendant in CV096006452]. As the defendant asserts that the plaintiff has previously satisfied its 'superpriority' lien and this court finds that CGS 47-258 allows the assertion of that lien only once during the pendency of either an action to enforce either the association's lien or a security interest (first priority mortgage), the same would be a valid Special Defense." *Lake Ridge Condominium Association v. Vega Et Al*, Docket No. CV116021568S, judicial district of New Haven (June 25, 2012, *Zemetis, J.*) Lake Ridge is now asserting the same legal arguments it tested in the motion to strike, this time within the

context of a motion for summary judgment. This court agrees with the reasoning and ruling of the court (*Zemetis, J.*) that the defense is valid.

General Statute § 47-258 provides in relevant part, "(a) The association has a statutory 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 delinquent. . . (b) A lien under this section is prior to all other liens and encumbrances on a unit except (1) liens and encumbrances recorded before the recordation of the declaration. . . (2) a first or second security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent, . . . and (3) liens for real property taxes and other governmental assessments or charges against the unit . . . The lien is also prior to all security interests described in subdivision (2) of this subsection to the extent of (A) an amount equal to the common expense assessments based on the periodic budget adopted by the association pursuant to subsection (a) of section 47-257 which would have become due in the absence of acceleration during the six months immediately preceding institution of an action to enforce either the association's lien or a security interest described in subdivision (2) of this subsection and (B) the association's costs and attorney's fees in enforcing its lien. A lien for any assessment or fine specified in subsection (a) of this section shall have the priority provided for in this subsection in an amount not to exceed the amount specified in subparagraph (A) of this subsection. 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."

"This statute is based substantially upon Section 3-116 of the Uniform Common Interest Ownership Act, which Connecticut adopted effective January 1, 1984 (Conn Gen Stat. §§ 47-200 to 47-295). Commentators . . . have characterized Section 30-116 as creating a special 'split priority' for common charge assessment liens. That is while the entire lien is prior to all other encumbrances except (a) those which pre-date the declaration of the condominium development, (b) first and second mortgages filed before the common charge delinquency arose, and (c) taxes and other governmental assessments, there is a further, 'super priority' provided to a portion of the lien, even with respect to senior first and second mortgages."

"The Official Comment to Section 3-116 of the Uniform Act recognizes the unique status given to the common charge assessment lien: '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.' 7 Unif. Laws Anno. at 354."

"What this statute does, by granting a six months priority to a condo association, is to accommodate the competing needs of a condo association faced with delinquent assessments, and a lender simultaneously seeking to protect the priority of its security interest."

"If the plaintiff's interpretation of this statute were to prevail, the six month limitation on the priority would be ineffectual, because after the original delinquency is paid in full, and the foreclosure is withdrawn, a new priority would arise as soon as there is any further delinquency, effectually extending the six months indefinitely, even though the defendant's foreclosure action is still pending."

"Such an interpretation and result would be a distortion of the statute and a subversion of the policy underlying it. 'A statute should be construed so that no word, phrase, or clause will be rendered meaningless.' *Verrastro v. Silversten*, 188 Conn. 213, 221 (1982) (citations omitted). The facts that this court looks to in construing a statute include 'its legislative history, its language, the purpose it is to serve, and the circumstances surrounding its enactment.' *Verrastro*, supra, p. 221 (citations omitted) See also *Fahy v. Fahy*, 227 Conn. 505, 512 (1993)."

"The defendant throughout has been pursuing its own first mortgage foreclosure. The statute provides that the priority is limited to 'the six months immediately preceding institution of an action to enforce either the association's lien or a security interest' (referring to a first mortgage lien prior to the association lien), such as the defendant's in this case. Therefore, if the plaintiff were allowed to create a new six-month priority by starting a new foreclosure action after the defendant has already satisfied one six month delinquency, and while the defendant's foreclosure action is still pending, the defendant would have to absorb

more than one priority during the pendency of its foreclosure, which does violence to the statutory language.

In construing a statute, 'we follow the 'golden rule of statutory interpretation' . . . that the legislature is presumed to have intended a reasonable, just and constitutional result.' (Emphasis added.) *Sanzone v. Board of Police Commissioners*, 219 Conn. 179, 187, 592 A.2d 912 (1991)."

"Furthermore, if the plaintiff's position is upheld, it would deter first mortgage lenders from paying condo associations some portion of the delinquency. As stated in the Official Comment of Section 3-116 of the Uniform Common Interest Ownership Act: 'To ensure prompt and efficient enforcement of the association's lien for unpaid assessments, such liens should enjoy statutory priority over most other liens. . . As a practical matter, secured lenders will most likely pay the six months assessments demanded by the association rather than having the association foreclose on the unit.' 7 Uniform Laws Anno. at 354."

"Why would any secured lender pay off the priority amount if, by so doing, a new priority was created. Instead, the secured lender would wait as long as possible to avoid the very thing that the plaintiff seeks to obtain in this case. They would be better off waiting until their law day to redeem, thereby frustrating the very propose of the statute." *River Glen Condominium Assoc. v Woulfe*, Superior Court, judicial district of Litchfield, Ct.Sup. 3900, 14 CLR 101 (April 120 1995, *Walsh, J.*).

The court finds the facts of the instant case analogous to those of the *River Glen* case and is persuaded by its reasoning. Because BOA's mortgage foreclosure has been pending continuously and because BOA has already satisfied the priority portion of Lake Ridge's condominium liens during the pendency of the mortgage foreclosure the court finds that the six month priority portion of the lien has been satisfied and discharged by operation of the provisions of General Statute § 47-258(b).

#### CONCLUSION

For the foregoing reasons the court finds that no genuine issues as to material facts exist and that judgment should enter on behalf of BOA on its special defense. Lake Ridge's motion for summary judgment (#124.00) is therefore ordered DENIED. BOA's cross motion for summary judgment (#130.00) is ordered GRANTED.



Michael G. Maronich, Judge

**EXHIBIT B**

Proposed Revision to Subsection 47258(b) of the Common Interest Ownership Act

(changes are underlined)

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

except

(1) 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,

(2) a first or second security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent, or, in a cooperative, a first or second 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

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

In each and every action brought to foreclose a lien under this section or a security interest described in subdivision (2) of this subsection, the lien is also prior to all security interests described in subdivision (2) of this subsection to the extent of

(A) an amount equal to the common expense assessments based on the periodic budget adopted by the association pursuant to subsection (a) of section 47-257 which would have become due in the absence of acceleration during the six months immediately preceding institution of an action to enforce either the association's lien or a security interest described in subdivision (2) of this subsection and

(B) the association's costs and attorney's fees in enforcing its lien.

A lien for any assessment or fine specified in subsection (a) of this section shall have the priority provided for in this subsection in an amount not to exceed the amount specified in subparagraph (A) of this subsection. 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

TESTIMONY IN SUPPORT OF GENERAL ASSEMBLY BILL No. 6662 - AN ACT  
CONCERNING THE RECOUPMENT OF MONEYS OWED TO A UNIT OWNERS'  
ASSOCIATION DUE TO NONPAYMENT OF ASSESSMENTS

MARCH 25, 2013

Good morning Senator Coleman, Representative Fox, Senator Doyle, Representative Ritter, Senator Kissel, Representative Rebinbas and members of the Judiciary Committee. Thank you for the opportunity to provide testimony on behalf of Imagineers, LLC ("Imagineers").

I am Karl Kuegler, Jr. of Imagineers, LLC where I serve as the Director of Property Management for our common interest community management division. From our offices located in Hartford and Seymour, we serve about 178 Connecticut common interest communities comprising about 17,000 homes. Imagineers is registered with the Department of Consumer Protection as a Community Association Manager holding registration number 0001 and has been serving Connecticut common interest communities for 32 years. I have over 23 years experience in common interest community management and hold a Certified Manager of Community Associations designation from the National Board of Certification for Community Association Managers. Imagineers is a member of the Connecticut Chapter of Community Associations Institute. I serve on the organization's Legislative Action Committee and chair the organization's annual state educational conference.

Imagineers is in favor of the bill, but would like additional language added to address other deficiencies in the current statute. I would also like to mention that the Insurance and Real Estate Committee is entertaining a bill this session regarding the statutory lien for assessments on condominium units. Listed below is summary of thoughts and additional concerns with the current statute:

**INCREASE IN THE PRIORITY LIEN FROM 6 MONTHS TO 12 MONTHS:**

Section 1 (b) of 6662 provides for the increase in the priority lien amount from its current amount of 6 months to 12 months immediately preceding institution of an action to enforce the association's lien or a security interest. We certainly support the increase from 6 to 12 months. We understand the increase would not pose an issue or restrict mortgage options for owners financing properties in common interest communities. Connecticut is in compliance with current Fannie Mae Selling Guidelines. Section B4-2.1-06 of the guidelines dated August 21, 2012 indicates:

*Fannie Mae allows the greater of six months of regular common expense assessments, or the maximum amount permitted under applicable state law, to have limited priority over Fannie Mae's mortgage lien if the condo or PUD project is located in a jurisdiction that has enacted*

- *the Uniform Condo Act,*
- *the Uniform Common Interest Ownership Act, or*
- *other similar statutes that provide for regular common expense assessments, as reflected by the project's operating budget, to have such priority over first mortgage liens*

Connecticut common interest communities routinely are unable to collect fees as a result of extended foreclosure efforts. Rarely if ever do foreclosure efforts resolve within the 6 months. The association is restricted by state law from even instituting a foreclosure effort until at least 2 months of fees are delinquent. Ultimately the other homeowners of the community that are

fulfilling their obligations in paying fees to the association need to make up the difference through increased fees or loss services. Common interest communities budget income only great enough to offset expenses. Associations are not to make a profit. When the income budgeted is not received, the association has no option but to increase fees or cut services to their association. An increase in the statutory lien would help reduce the negative impact of foreclosures on associations and their members.

#### CURRENT DEFICIENCIES IN THE STATUTE NOT ADDRESSED

A separate issue pertaining to this statute has become a major and potentially devastating issue for common interest communities in our state. Some banks are employing a legal strategy during foreclosure action that negatively impacts community associations and will have a significant negative impact on community associations if it were to continue.

Historically, when banks/mortgage companies brought action to foreclose on a unit, Connecticut state law ensured that a portion of the association's lien is not foreclosed out by the mortgage foreclosure. This has been an important protection for associations because it ensured that if a bank obtained foreclosure judgment, the bank would become the new owner of the unit and still be subject to the priority portion of the association's lien. This protection provided under a "priority lien" guaranteed that the bank, as the new owner, would be required to pay a minimum of six months worth of common fees plus reasonable court costs and attorney fees (as determined by the court) and then pay the monthly common charges to the association from the date it took title to the unit going forward.

In at least two cases, the Connecticut courts have agreed with the bank's position to eliminate its additional financial responsibility to the association. Apparently, the legal strategy for the bank has been to pay the six-month priority lien without taking title to the unit and then seek the court's interpretation that it applies only once during the lawsuit or even the lifetime of the mortgage. The bank then just sits back and lets the foreclosure sit uncompleted, often for many years. In the meantime, the association is obligated to provide services to the unit as it does to all other units. In addition to the landscaping, snow removal and other maintenance services, some associations are also obligated to provide heat, water and other services to the unit if provided to other units as part of its responsibility. It is suspected that the delays could be a result of the sheer size of the banks, the disorganization that is resulted as the banks attempted to adjust to the many mergers and acquisitions that took place at the height of the mortgage meltdown, improper practices of the people who made the loans and the way in which the loans were administered, and quite possibly, that some of the banks have simply determined that there is no point in taking title to condominium units and paying their share of the cost of maintaining the condominiums, unless the bank can dispose of the condominium unit almost immediately

Even if the defaulting unit owner eventually works out a deal with the bank to reinstate the mortgage, some of these banks have asserted that the mortgage continues to trump priority lien going forward if the owner becomes delinquent again with the payment of fees to the association. The association could start its own foreclosure, but under the bank's theory, it would have to take title to the unit and also repay the mortgage on it, which would often cost more than the unit is worth.

**If the Connecticut General Assembly does not make it clear that the priority lien is meant to protect associations and their unit owners, Connecticut associations will be severely impacted.** Every time a unit owner abandons a unit, or just stops paying their mortgage and common charges, Connecticut associations and their homeowners will be obligated to carry the defaulting unit and will in effect be subsidizing the bank's asset. **In this instance everyone else in the community needs to make up the difference for the lost income resulting from the**

bank's delay in finalizing the foreclosure effort while subsidizing the bank by maintaining the bank's asset with no obligation of the bank to pay for the expense. The extra funds necessary to keep the association financially solvent come directly from the other homeowners. There are no other sources of income to save the day for our common interest communities. With increasing expenses due to aging infrastructure and economically driven factors, associations are already facing financial challenges and hardships not experienced previously. The added burden of subsidizing big banks as they take advantage of associations may be too great for some associations to survive.