Encouraging Cooperation: Harmonizing the Battle of Association and Mortgagee Lien Priority in America’s Common Interest Communities

Christian J Bromley, Emory University

Available at: http://production.sw.works.bepress.com/christian_bromley/1/
INTRODUCTION

Against the backdrop of failing banks, crippling mortgage delinquencies, and falling stock values, the ripple effects of the Great Recession only compounded the devastation caused to the true core of many American neighborhoods: the homeowners’ and condominium associations that govern over 300,000 common interest communities across the United States.

With millions of homeowners delinquent on both mortgage payments and association assessments, competition between the priority of association and mortgagees’ liens came to a head in 2008. Homeowners’ inability to make mortgage payments occurred simultaneously with their failure to pay association assessments. As the number of delinquent owners increased, many associations faced bankruptcy and were left unable to properly maintain communities. The result is a deterioration cycle, with foreclosures reducing the value of surrounding properties and unpaid association fees forcing communities into decay as maintenance falls behind.

Protecting property values, the community, and the association’s ability to maintain its obligations are in the interest of every party: mortgagees, homeowners, and associations alike.


5 See Condo Associations Forced into Bankruptcy as Fees Dry Up, supra note 4.

6 Casey Perkins, Privatopia in Distress: The Impact of the Foreclosure Crisis on Homeowners’ Associations, Nev. L. J. 562, 574 (2010). “The community depends on assessments being timely paid to provide services and to maintain the improvements that drew the owners to the community. It is not fair to those who pay on a timely basis, especially considering the value of money over time, when some owners do not timely pay assessments. This may place a community association in an awkward position when foreclosing on a neighbor’s property; however, if the association does not act, the association is doing a disservice to the other owners.”

7 Id. at 574.
Common interest communities are residential neighborhoods governed by an association for the benefit of owners and residents. Ownership of property in a common interest community mandates membership in the community’s association. In exchange for the owners’ financial obligation to pay assessments, the association provides services including management of the community and amenities with presumably positive effects on property values. Common interest communities are founded upon a Declaration of Covenants, Conditions, and Restrictions ("CC&Rs") or a Master Declaration that governs the functions of the association in relation to the community’s residents. Recording of the declaration by the developer establishes the association lien’s basic priority by virtue of being recorded prior to all subsequent conveyances. When individuals or entities purchase units governed by an association declaration, the recordation of the purchaser’s deed constitutes the purchasers’ automatic association membership and initiation of an inherently interdependent relationship: the association relies on each owner’s payment of monthly, quarterly, or yearly assessments and the owner relies on the association’s services and maintenance of the community.

Both associations and mortgagees hold liens on a given property and respectively retain the right to seek enforcement of a lien through foreclosure. When an owner is in significant arrears for assessments, foreclosure provides a viable route of recovery for the association. Recovery by either mortgagee or association through foreclosure, however, is dependent on the priority of each lien in relation to any other lien held by a mortgagee or association. A survey

---

9 Id. at 3.
14 See FLA. STAT. ANN. § 720.3085(5) ("The association may bring an action in its name to foreclose a lien for unpaid assessments secured by a lien in the same manner that a mortgage of real property is foreclosed . . ."); Societe Generale v. Charles & Co. Acquisition, Inc., 597 N.Y.S.2d 1004, 1009 (N.Y. App. Div. 1993); D. KIRK DRUSSEL, MORTGAGES AND MORTGAGE FORECLOSURE IN NEW YORK § 22:16 (2013) ("In the event that unpaid common charges are due, any member of the board of managers may file a notice of lien . . . . The lien may be foreclosed by suit authorized by and brought in the name of the board of managers acting on behalf of the unit owners, in a similar manner as a mortgage of real property . . . .").
throughout the United States reveals inconsistent approaches to determining an association’s priority, or lack thereof, against the liens of any mortgagees.\textsuperscript{17}

Under the basic common law “first in time, first in right” doctrine, the lienholder with priority is the only party able to initiate foreclosure proceedings.\textsuperscript{18} Thus, unless the association has priority over the lien of any mortgagee, an association can only seek foreclosure of the property to recover delinquent assessments if it first pays off those superior liens and acquires priority.\textsuperscript{19} Despite typically being recorded after an association lien, mortgage liens are often superior to those of associations because of one or both of the following: (1) statutorily the association lien is perfected at the time the developer records the declaration, but the lien does not arise until unpaid assessments come due;\textsuperscript{20} or (2) the mortgagee(s) refused to originate a mortgage without guaranteed priority of the mortgage over the association.\textsuperscript{21}

Beginning with the Uniform Common Interest Ownership Act (UCIOA), association lien priority has been altered throughout the country inconsistently by various states.\textsuperscript{22} The discontinuity of state-by-state approaches, however, create inconsistent procedures to when the association lien arises, if the association lien includes charges beyond unpaid assessments, and most importantly, what priority, if any, the association lien has over other encumbrances.

The UCIOA promoted a six-month super-priority lien for associations over all other encumbrances except tax liens.\textsuperscript{23} Some states have adopted the UCIOA in full and others have adopted a six-month priority scheme similar to that under the Act.\textsuperscript{24} States such as Georgia and Illinois have no increased priority.\textsuperscript{25} Vermont’s version of the UCIOA also provides six-month super-priority, but recent case law has confused the state’s priority structure by interpreting the statutory priority as six months of dues before an action to enforce the lien plus all assessments that came due until the actual foreclosure sale.\textsuperscript{26} Other states have actually expanded priority beyond the six-month scheme promoted by the UCIOA; Florida increased available priority

\textsuperscript{17} See Unif. Common Interest Ownership Act § 3-116; GA. CODE ANN. § 44-3-109 (West 2012); VT. STAT. ANN. tit. 27A, § 3-116 (West 2012); ILL. COMP. STAT. ANN. § 605/9 (West 2012); FL. STAT. ANN. §§ 718.116 and 720.3085 (West 2012).
\textsuperscript{18} Id. at 87-88.
\textsuperscript{19} BAC Home Loan Servicing, LP v. Fulbright (Washington) and RCW 64.34.364. See 765 ILL. COMP. STAT. ANN. § 605/1 et seq.
\textsuperscript{20} J. Martin Knaust, Article: Guilt by Association: Assessment Liability to Homeowners’ Associations After Foreclosure, 41 Stetson L. Rev. 835, 841-42 (2012) (“Crucially, many declarations contain some form of provision subordinating the HOA’s rights to assessments to a first mortgage.”).
\textsuperscript{21} See supra note 17. [notes on UCIOA and states]
\textsuperscript{22} Unif. Common Interest Ownership Act § 3-116 (West 2012).
\textsuperscript{23} See infra notes 69-70. [notes on states adopting UCIOA]
\textsuperscript{24} GA. CODE ANN. § 44-3-109 (West 2012); 765 ILL. COMP. STAT. ANN. § 605/9 (West 2012).
during a 2010 legislative initiative from six months to twelve months or one percent of the mortgage.27

Association and mortgagee’s respective liens on delinquent residential real estate should foster a system of cooperation, not priority competition. In the event that a property owner is delinquent on payments and the association or interested mortgagees are pursuing enforcement of their liens through foreclosure, two interests exist: that of the association which has not received assessments due on the property for a given period and that of any mortgagees who hold security interests in the property. The priority of such liens against one another vary by state and neither increasing nor decreasing the priority of an association lien in relation to the liens of interested mortgagees adequately protects the association. Reducing the priority battle rests first upon clarifying priority statutes to specifically provide for both a defined period from which an association may seek recovery as well as the specific types of charges they may include, whether just unpaid assessments or all fees and even litigation costs.

While associations and mortgagees may seem at odds, the association’s stability has a direct effect on community property values which in turn have a direct effect on mortgagees’ investments secured in the real property of that community. When associations are strapped financially and face potential insolvency, a cooperative system managing the priority of association and mortgagee liens serves to share the burden of protecting the community, its property values, and the respective interests of associations and mortgagees. First, priority is based on the existence of an association lien that arises at the time the association recorded its declaration without additional notice requirements. Second, a statutory super-priority over mortgagee liens for association liens of up to twelve months of regular assessments or one percent of the otherwise first priority mortgage for unpaid assessments provides extended recovery in the event delinquent fees exceed the reserves collected by the association and/or the foreclosure proceedings are protracted. Third, associations and mortgagees are encouraged to mitigate their respective liabilities; associations through more stringent requirements on collecting budget reserves and mortgagees through either establishing an escrow of the maximum liability (twelve-month or one-percent) or requiring that the borrower prepay the potential liability to effectively ensure the mortgagee is never actually subordinate to an association lien.

This Article proceeds in four parts. Part I examines the structure of association liens, examining the rise of common interest communities governed by associations in the United States. Part II provides a survey of lien priority schemes throughout the country to highlight the intrastate inconsistencies. Primarily analyzing the approach of the UCIOA and applicable statutes in Georgia, Vermont, Illinois, and Florida, it gives particular attention to each jurisdiction’s requirement for an association lien to arise, the fees and charges the association is permitted to include within this lien, and the priority this lien has in relation to those of mortgagees. Part III presents the negative externalities resulting from America’s foreclosure crisis to assess both the need to protect the solvency of community associations and the widespread effect of these externalities on associations, mortgagees, other owners in the community, and even the broader potential population of potential purchasers. Part IV considers

the potential solutions proposed for this lien priority competition, followed by a three-part alternative proposal that champions cooperation between association and mortgagee (in lieu of) a competition determining which party deserves priority.

I. The Structure of Association Liens

Common interest communities became an embedded institution across the landscape of America’s residential communities over the course of the last four decades. This section considers the rise of common interest communities throughout the last four decades of the previous century and their continued growth even in the face of the Great Recession. This explosion of privately governed neighborhoods is contemplated in the context of these communities’ benefits. Finally, the structure of these communities and the associations that govern them provides a foundation for analyzing the complexity of association lien priority.

A. Privatization of the American Community

Ownership of residential property in a common interest community mandates membership in the community association, providing private management of the community and placing a financial obligation upon members to maintain both the association and the community it facilitates. In 2012, the Community Associations Institute reported the existence of 323,600 common interest communities in the United States, representing 25.9 million housing units with 63.4 million residents. With the substantial influence these communities represent in America, over 20 percent of the U.S. population resides in a common interest community.

Since the 1960s, “common interest communities have evolved from an innovation in suburban residential development to its main staple.” Housing only one percent of America’s total population in 1970, common interest communities have seen a dramatic increase in recent years.

---

28 COMMUNITY ASSOCIATION INSTITUTE, supra note 8.
29 Id. at 6.
30 MARC W. DUNBAR, supra note 10 (“Automatic and mandatory homeowners associations are part of an overall concept of residential property ownership. Purchase of the home or lots brings with it membership in the association which provides the structure for operation and management of the residential community concept. Membership includes certain mandatory obligations, financial responsibilities and a commitment to abide by the use restrictions and rules of the association.”).
31 COMMUNITY ASSOCIATIONS INSTITUTE, supra note 2.
The real estate boom of the early 2000s provided a large impetus for growth, increasing the number of residents in these communities from 48.0 million in 2000 to 59.5 million within just eight years. The Foundation for Community Association Research identified four reasons for the growth of community associations: (1) the value of collective management; (2) the privatization of public functions; (3) the expansion of affordable homeownership; and (4) the minimization of social costs and fostering of market efficiencies. Significantly, even the 2008 crash of the residential real estate market did not halt the continued growth of common interest communities across the United States.

The creation of these communities, whether residential subdivisions or condominiums, absorbed and privatized many of the functions otherwise funded by property taxation and federal, state, and local governments. This impetus for common interest communities and privatization has been explained as the result of the U.S. government’s “load-shedding” policy, “public service exactions,’ meaning that local governments, as a condition of land-use approval of new residential subdivisions, often require developers to establish a homeowners association as the mechanism to carry out functions and services that traditionally were the responsibility of the municipality itself.” The benefit of a common interest community’s positive externalities spread from the original developer far beyond the actual homeowners to the surrounding city, alleviating duties otherwise burdening local governments.

35 COMMUNITY ASSOCIATIONS INSTITUTE, supra note 2 (referring to statistics from 2000 and 2008).
37 COMMUNITY ASSOCIATIONS INSTITUTE, supra note 2.
38 Andrea J. Boyack, Community Collateral Damage: A Question of Priorities, 43 LOY. U. CHI. L.J. 53, 72 (“Until recently, federal, state, or local governments maintained most of those areas that could not be divided and privatized.”).
40 Id. at 1113. “That the privatization of local government is often the conscious product of public policy decisions made by government itself is made plain in a number of land-use codes. Some municipal land-use ordinances require, quite explicitly, the establishment of homeowners associations as a condition of land-use approval.” In New Jersey for example, planned communities are responsible for “the replacement and repair of all private utilities, street lighting, sidewalks, landscaping, common open space and recreational facilities and equipment.” Id. at 1120.
41 See Pena, supra note 11, at 332.
First, developers employ carefully designed development practices to produce housing units that are more marketable and attractive than traditional housing. Additionally, after developing the planned community, the POA [(property owners association)] allows the developer to exit the project without the continuing responsibility of managing and maintaining the development. Second, POAs provide homeowners, as purchasers of individual units, a wide selection of communities and service packages. Creative marketing by developers allows a variety of POAs to meet the special needs of homeowners. The amenities offered by POAs enhance and preserve the owners’ investments in their homes. Finally, municipalities reap the benefits of a larger tax base of the virtually self-financed developments created by POAs. Because POA property typically did not provide routine services such as police patrols, road maintenance, and trash collection. Therefore, local governments and tax payers are relieved of the responsibility to finance and provide services for these developments.42

Founded upon much government support for this shifting, Professor James Winokur agrees that these communities have a broader benefit.43 He explains “[t]hese communities provide substantial and costly public facilities and services which end up being financed by developers of such servitude regimes and, ultimately, by the residents who buy homes and pay assessments to support these amenities.”44

Community associations function like private governments, performing services and representing the ‘citizens’ from whom they receive payment.45 Beyond providing the infrastructural components of the community, associations are also often responsible for repair and maintenance, especially in the condominium context.46 As a proverbial private government, “the community association process preserves the nature and character of the development. The documents creating the condominium or homeowners’ association usually include architectural and environmental standards, but more importantly, they include a mechanism and procedure for establishing and enforcing standards that reflect the aesthetics of the community.”47 Thus, the privatization of a governing association creates an identity for the community to “enhance and preserve the owners’ investments in their homes.”48

A community association serves to establish not only necessary infrastructure and services for the community, whether roads or access to recreational facilities, but also a

42 Id.
43 Winokur, supra note 33, at 1139.
44 Id. (“The public facilities provided range from park-like open spaces to streets, lighting, water and sewer facilities and recreational facilities.”).
45 See HYATT, supra note 13, at 6-7.
46 Id. at 7.
47 Id. at 8.
48 Franzese, supra note 39, at 1113.
forced network of shared ownership and responsibility.\textsuperscript{49} After debate for many years in American courts, it is now well established that community associations create assessment covenants that run with the land and obligate all purchasers.\textsuperscript{50} The reciprocal relationship between owners and associations is suitably described:

\begin{quote}
[\text{t}he \text{right of the Association to exercise the control of the easements and to maintain them in condition so that they can be mutually used and enjoyed by all property owners has long been settled by the courts. Inherent in its right of management is the right to maintain. Maintenance costs money. Those who are entitled to enjoy the easements are the ones who must pay the cost of maintenance.}]\textsuperscript{51}
\end{quote}

Thus, there is an inherent interdependency. The association provides vital necessities to the community that will be dramatically affected, should some or all be eliminated if the association is unable to sufficiently fund them. The association is simultaneously dependent on the property owners’ payment of dues in order to maintain these necessities.

At the center of a vast number of American residential subdivisions and condominiums, the continued funding and operation of the association governing common interest communities is essential to both their survival and their success.

B. \textit{Structure of Common Interest Community Associations}

The community association that governs the common interest community is simply defined as an “organization in any form of real estate development with a mandatory membership association to which, through individual deeds, individual unit purchasers automatically become members subject to its procedures and policies.”\textsuperscript{52} Common interest communities are created when the developer records the community’s declaration with the local county(s) in which the community is located.\textsuperscript{53} The declaration runs with the land, attaching immediately with the recordation of each unit or parcel’s deed and continuing in perpetuity regardless of ownership transfers.\textsuperscript{54} The declaration must provide for specific allocations of assessments.\textsuperscript{55} For condominiums, this includes a percentage of interests in common elements

\textsuperscript{49} HYATT, \textit{supra} note 13, at 9.
\textsuperscript{50} ROBERT G. NATELSON, \textit{LAW OF PROPERTY OWNERS ASSOCIATIONS} 219 (Little Brown & Co. eds. 1989). For an explanation of covenants running with the land, see Pinkerton, \textit{infra} note 54.
\textsuperscript{51} NATELSON, \textit{LAW OF PROPERTY OWNERS ASSOCIATIONS} at 219–20 (quoting \textit{Sea Gate Association v. Fleicher}, 211 N.Y.S.2d 767, 778 (Sup. Ct. 1960)).
\textsuperscript{52} HYATT, \textit{supra} note 13.
\textsuperscript{53} Unif. Common Interest Ownership Act §§ 1-103 and 2-101.
\textsuperscript{55} Unif. Common Interest Ownership Act § 2-107.
and expenses, as well as some portion of votes in association decisions.\footnote{Id. § 2-107(a)(i).} In a planned community governed usually by a homeowner’s association, this includes a percentage of the common expenses and votes in the association.\footnote{Id. § 2-107(a)(iii).} It is through the declaration that associations are able to enforce the obligation to pay assessments on owners of individual units or parcels.\footnote{See, e.g., FLA. STAT. ANN. § 718.111 (West 2012) (“The association has the power to make and collect assessments and to lease, maintain, repair, and replace the common elements or association property; however, the association may not charge a use fee against a unit owner for the use of common elements or association property unless otherwise provided for in the declaration of condominium or by a majority vote of the association or unless the charges relate to expenses incurred by an owner having exclusive use of the common elements or association property.”).} However, unless otherwise permitted by statute for specific circumstances, the association is limited to levying only those assessments included in the declaration and has no power to enforce additional charges upon owners.\footnote{See e.g. FLA. STAT. ANN. § 718.111 (West 2012).}

Associations rely on assessments charged to owners of property in the condominium or homeowner’s association community to fund the continued maintenance and infrastructure of the community.\footnote{See Pena, supra note 11, at 323.} There are generally four types of assessments: (1) regular assessments charged continuously on a monthly or other reoccurring schedule that are most commonly associated with condominiums and homeowners’ association and provide services throughout the community; (2) special assessments charged on an irregular basis for extraordinary expenses beyond the association’s budget; (3) neighborhood assessments for individual services to an area affecting the community at large; and (4) specific assessments charged for personal services to individual owners.\footnote{Wayne S. Hyatt & Jo Anne P. Stubblefield, The Identity Crisis of Community Associations: In Search of the Appropriate Analogy, 27 REAL PROP. PROB. & TR. J. 589, 612 (1993).} In order to secure payment of these assessments guaranteed by the declaration and thus, the declaration also commonly includes the imposition of a lien against the property.\footnote{Courtney Newsom, Note: No Free Ride: An Equitable Remedy to Protect Homeowners’ Associations from Delayed Foreclosures, 46 LOY. L.A. L. REV. 361, 370-71 (2012) (“In all HOAs, regular assessments are the responsibility of all the members and are the main source of income for the HOA. In fact, the HOA budget is based solely on assessment income. Regular assessments are figured on an annual basis when an HOA’s board of governors prepares the yearly operating budget for the HOA.”)} The recordation of the declaration gives rise to the association’s contractual lien for any assessments included in the declaration if an owner of record subsequently fails to pay any or all of such assessments.\footnote{Pena, supra note 11, at 339.}
II. COMPETING LIEN PRIORITY

Associations’ ability to enforce the payment of assessments upon delinquent owners rests on the association’s lien against each parcel and that lien’s priority with respect to other encumbrances on the property. This section examines the inconsistent approaches to lien priority throughout the country based on a survey of the UCIOA and statutory laws in Georgia, Illinois, Vermont, and Florida. This Act and the statutes of these states reveal the varied answers to the three questions presented here. First, when does the association lien arise? Second, can association liens include fees in addition to unpaid assessments? And finally, what priority does the association lien have?

In broad terms, an association “lien is the recording of a legal claim by the association against the unit. The act of recording establishes the priority of the association’s claim as to all other creditors who file a claim after the association.” Recordation, or registration, of association and mortgagee liens alike also gives rise to the association lien.

In light of the differing state statutes which govern the issues of association liens and their priority in separate jurisdictions, the UCIOA was introduced in 1976 and adopted by the National Conference of Commissioners on Uniform State Laws in 1982 as an attempt to provide a clear priority scheme and aid associations in the recovery of unpaid assessments. The UCIOA presented an attempt to strike an equitable balance between the recovery interests of both mortgagees and community associations when an owner falls into foreclosure. Despite this step towards uniformity nearly forty years ago, states’ individual approaches as to the questions of when an association lien arises, what charges are included in the debt secured by the lien, and most importantly for consideration here, what priority that lien has in regards to those of interested mortgagees, remain varied.

---

64 KOVITZ SHIFRIN NESBIT, supra note 12.
65 See, e.g., St. Paul Federal Bank for Sav. V. Wesby, 501 N.E.2d 707 (Ill. App. 1986) (“[A] condominium lien is to be foreclosed in the same manner as a mortgage. A mortgage is considered perfected upon recordation or registration, as the case may be . . . ”).
68 Cf. Id. at § 3-116, with GA. CODE ANN. § 44-3-109 (West 2012) and 765 ILL. COMP. STAT. ANN. § 605/9 (West 2012).
69 See AMERICAN BANKERS ASSOCIATION, ULC PROJECT TO AMEND LIMITED-PRIORITY LIENS FOR ASSOCIATION FEES (Nov., 1 2013), available at http://www.abacom/Groups/ABAEAC/docs/UCIOAULCAdmProjectOverviewofStatePriorityLienLaws11012013.pdf. See also Alaska: ALASKA STAT. § 34.08.470 (West 2012) (six-month limited priority); Colorado: COLO. REV. STAT. ANN. § 38-33.3-316 (West 2012) (six-month limited priority); Connecticut: CONN. GEN. STAT. ANN. § 47-258 (West 2012) (six-month limited priority, plus association’s costs and attorney fees in enforcing its lien); Delaware: DEL. CODE ANN. tit. 25, § 81-316 (West 2012) (six-month limited priority); Minnesota: MINN. STAT. ANN. § 515B.3-116(c) (West 2012) (six-
have enacted lien priority statutes grounded on similar priority structures\textsuperscript{70} and others maintain a completely different statutory priority.\textsuperscript{71}

A. When Does the Association Lien Arise?

The date upon which an association’s lien for assessments arises is of two-fold significance: (1) it determines priority of the association lien in relation to all interested mortgagees and (2) in states with defined recovery periods, it affects the amount the association is able to recover through a valid foreclosure. The inclusion of assessments and a lien in order to recover unpaid assessments within an association declaration provides the association a right to the lien, but this right is not always synonymous with when the lien arises such that the association may actually seek to recover on the debt it secures.\textsuperscript{72}

The procedure for a lien to arise is consistent throughout the state statutes and UCIOA surveyed by this Article. The salient issue deriving from when a lien arises is based on the restrictions and stipulations on the means by which an association must enforce these liens; this aspect bears heavily on the subsequent analysis of lien priority.

Although the language varies slightly, the UCIOA and state statutes are in general agreement that an association lien arises upon the recordation of the association’s declaration.

\textsuperscript{70} See Alabama: ALA. CODE § 35-8A-316(b) (six-month limited priority); District of Columbia: D.C. CODE § 42-1903.13(a)(2) (2012) (six-month limited priority); Florida: FLA. STAT. §§ 718.116(1)(b), 720.3085(2)(c) (West 2012) (twelve-months limited priority or one percent of the original mortgage debt); Illinois: 765 ILL. COMP. STAT. ANN. § 605/9(g)(4) (West 2012) (six-month limited priority); Maryland: MD. CODE ANN., REAL PROP. § 11B-117(c) (West 2012) (four-month limited priority); Massachusetts: MASS. GEN. LAWS ANN ch. 183A, § 6(c) (West 2012) (six-month limited priority); Missouri: MO. ANN. STAT. § 448.3-116(2) (West 2012) (six-month limited priority plus fines due at time of subsequent refinancing); New Hampshire: N.H. REV. STAT. ANN. § 356-B:46(I) (2012) (six-month limited priority); New Jersey: N.J. STAT. ANN. § 46:8B-21 (West 2012) (six-month limited priority); Pennsylvania: 68 PA. CONS. STAT. ANN. § 5315(b) (West 2012) (six-month limited priority for planned community association assessment lien); id. § 3315(b) (West 2012) (six-month limited priority for condominium association assessment lien); id. § 4315(b) (West 2012) (six-month limited priority for cooperative association assessment lien); Rhode Island: R.I. GEN. LAWS ANN. § 34-36.1-3.16(b) (West 2012) (six-month limited priority); Vermont: VT. STAT. ANN. tit. 27A, § 3-116(b) (West 2012) (six-month limited priority); Tennesee: TENN. CODE ANN. § 66-27-415(b) (West 2012) (six-month limited priority); and Washington: WASH. REV. CODE ANN. § 64.34.364(3) (six-month limited priority).

\textsuperscript{71} E.g., GA. CODE ANN. § 44-3-109 (West 2012); 765 ILL. COMP. STAT. ANN. § 605/9 (West 2012).

The UCIOA provides in plain language, recording the declaration constitutes not only the association’s right to a lien for unpaid assessments, but also “record notice and perfection of the lien. No further recordation of any claim of lien for assessment under this section is required.” Vermont fully adopted the UCIOA and follows an identical approach. Significantly, this was a divergence from Vermont’s common law approach. Without any state cases on point, the Vermont Supreme Court held in 1993 that an association’s lien must “attach and become[ ] choate” in order to be perfected, meaning that “nothing more needs to be done to perfect it and make it enforceable.” The adoption of the Uniform Act clarified this position to unambiguously require nothing beyond recordation of the declaration for the lien to perfect.

Relevant Georgia, Illinois, and Florida statutory law approach how liens arise with congruency. Under the Condominium Act and the Property Owner’s Association Act, an association lien in Georgia arises through the initial recording of the association’s declaration; the association benefits from a continually existing and perfected lien against every unit or parcel from that date. The Georgia statute provides “[t]he recording of the declaration pursuant to this article shall constitute record notice of the existence of the lien, and no further recordation of any claim of lien for assessments shall be required.” In Illinois, an association lien arose based on two requirements before enactment of the Illinois Condominium Property Act: the “existence of a debt and registration of the lien.” The Act amended the effective date of such liens to provide that an owner’s failure to pay expenses, when due, constituted a lien on the property. The intent here, as explained during a debate in the Illinois General Assembly, was to provide associations with “a perfected lien where they have not physically filed a notice of lien.” The inclusion of “when due” simply clarifies that while the lien arose with recordation, it cannot be pursued until owners actually miss a payment. Florida handles the perfection and all other aspects of condominium and homeowners’ association liens under separate statutes. Association liens either are effective on each unit or parcel as of the date of the original declaration filing if the

---

73 Unif. Common Interest Ownership Act § 3-116(e).
75 VT. STAT. ANN. tit. 27A, § 3-116(e) (West 2012).
76 See Georgia Condominium Act, GA. CODE ANN. § 44-3-70 et seq. (West 2012); Georgia Property Owners’ Association Act, GA. CODE ANN. § 44-3-20 et seq. (West 2012).
77 GA. CODE ANN. §§ 44-3-109 and 44-3-232 (West 2012).
78 Id.
80 765 ILL. COMP. STAT. ANN. § 605/9(g)(1).
81 83 ILL. GEN. ASSEM., House Proceedings (June 12, 1984).
community’s declaration that attaches to each individual deed provides for the right to such a lien.\footnote{83} Restrictions on the enforcement of such continually existing liens, or more specifically the right to the lien, are apparent but inconsistent amongst these examples presented here. Under the UCIOA, the lien that arose upon recordation cannot be foreclosed by the association until the owner is delinquent on a sum equal to at least three months of association assessments.\footnote{84} Thus, owners are on notice of the association’s lien throughout their ownership of the property, but they are only at risk of the lien being foreclosed when the sum they owe reaches a minimum of that equal to three months of regular assessments. Vermont’s adoption of the UCIOA provides the same protection of the three-month threshold preventing pursuit of foreclosure until a sum equal to at least three months worth of assessments is due.\footnote{85}

States not adopting the UCIOA similarly restrict lien enforcement, but diverge with nuanced approaches to outlining the restrictions. While an association lien in Georgia continually exists, foreclosure by the association is permitted no sooner than thirty days after the association mails notice of unpaid assessment to the owner.\footnote{86} Thus, the association has a right to the lien, allowing the association to pursue unpaid assessments when the owner becomes delinquent, but not without this added notice stipulation. Illinois’s statute makes clear that the lien is not enforceable until the unpaid assessment is due and that an association file notice of the lien before pursuing foreclosure.\footnote{87} In Florida, both the Condominium Act and the Homeowner’s Association Act, however, restrict the power of homeowner’s associations to enforce this lien.\footnote{88} If the property is encumbered by a mortgagee’s superior lien or first mortgage, the lien is only effective in relation to the first mortgage when a “claim of lien” is recorded by the association in public records.\footnote{89} The Homeowner’s Association Act also requires any lien for unpaid assessments be recorded no sooner than forty-five days after assessments are unpaid and notice of delinquency is sent to the owner.\footnote{90}

\footnote{83}{FLA. STAT. ANN. §§ 718.116 and 720.3085 (West 2012).}
\footnote{84}{In order to “commence an action to foreclose a lien,” the Act requires “(1) the unit owner, at the time the action is commenced, owes a sum equal to at least [three] months of common expenses based on the periodic budget last adopted by the association pursuant to Section 3-115(a) and the unit owner has failed to accept or comply with a payment plan offered by the association; and (2) the executive board votes to commence a foreclosure action specifically against that unit.” Unif. Common Interest Ownership Act § 3-116(n).}
\footnote{85}{VT. STAT. ANN. tit. 27A, § 3-116(m)(1) (West 2012).}
\footnote{86}{GA. CODE ANN. §§ 44-3-109(c) and 44-3-232(c) (West 2012).}
\footnote{87}{765 ILL. COMP. STAT. ANN. § 605/9(h) (West 2012) (“Notice of the lien may be recorded by the board of managers, or if the developer is the manager or has a majority of seats on the board of managers fails to do so, any unit owner may record notice of the lien. Upon the recording of such notice the lien may be foreclosed by an action brought in the name of the board of managers in the same manner as a mortgage of real property.”)}
\footnote{88}{See FLA. STAT. ANN. §§ 718.116 and 720.3085 (West 2012).}
\footnote{89}{FLA. STAT. ANN. § 720.3085 (West 2012).}
\footnote{90}{Id.}
The enforcement stipulations and the apparent variation from requirements such as three months of unpaid assessments under the UCIOA or thirty days notice in Georgia, establish the foundations for examining lien priority. Even before considering priority in a given jurisdiction, the procedural requirements for lien enforcement determine the threshold across which each association must cross before even asserting the priority, or lack thereof of the association lien.

B. Can Associations Recover Unpaid Assessments and Additional Fees?

Associations commonly charge additional fees, such as late fines for missed payments or their own litigation costs in the enforcement of a lien as well as special assessments, outside the scope of routine assessment dues. These added fees began to surge in $100,000 in some situations. Depending on the priority of each lien relative to any others against a given property, whether an association lien includes the right to seek recovery of unpaid assessments plus additional fees drastically alters the potential allocation of funds between association and mortgagee(s) from a foreclosure sale. Generally, statutes permit associations to include numerous additional fees in assessment liens.

Under the UCIOA, recovery of court costs, expenses of selling the property, costs incurred from protecting and preserving the unit, reasonable attorney’s fees and fines is possible in addition to unpaid assessments. In states that have adopted the UCIOA, associations are statutorily permitted to seek recovery of large sums, plus interest, thus increasing the potential recovery from a foreclosure sale. However, mortgagees are protected under the UCIOA from an association seeking recovery of any amount of these additional charges if the association is not also seeking recovery for delinquent assessments. Thus, if an owner is not behind on assessments, the association cannot use its lien or a foreclosure of such a lien to recover only additional costs; the association must seek recovery of unpaid assessments as a

92 E.g., FLA. STAT. ANN. §§ 718.116 and 720.3085 (West 2012); GA. CODE ANN. §§ 44-3-109 and 44-3-232 (West 2012); 765 ILL. COMP. STAT. ANN. § 605/9 (West 2012); VT. STAT. ANN. tit. 27A, § 3-116(a) (West 2012).
93 JOINT EDITORIAL BOARD FOR UNIFORM REAL PROPERTY ACTS, supra note 66 at 1 (June 1, 2013). Unif. Common Interest Ownership Act § 3-116(a) (“Unless the declaration otherwise provides, reasonable attorney’s fees and costs, other fees, charges, late charges, fines, and interest charged . . . and any other sums due to the association under the declaration, this [act], or as a result of an administrative, arbitration, mediation, or judicial decision are enforceable in the same manner as unpaid assessments under this section.”).
94 Unif. Common Interest Ownership Act § 102(a)(11) and (12).
96 Unif. Common Interest Ownership Act § 3-116(p) (“If the only sums due with respect to a unit are fines and related sums imposed against the unit, a foreclosure action may not be commenced against the unit unless the association has a judgment against the unit owner for the fines and related sums and has perfected a judgment lien against the unit . . . .”)

14
threshold. The charges are also limited by the undefined requirement of reasonability, which effectively provides only a term about which owners and associations, or owners and mortgagees, can litigate should such charges be enforced and a debate as to their legitimacy arise.

As with determining when a lien arose, Vermont’s full adoption of the UCIOA permits associations to include late charges, fines, attorney’s fees and other costs in addition to unpaid assessments. By adopting the UCIOA, Vermont associations are also subject to the reasonability requirement imposed upon these additional charges.

Georgia and Illinois have not adopted the UCIOA, but both states statutorily permit associations to recover additional charges that potentially increase lien amounts far in excess of the unpaid assessments accrued to that point. Georgia, like Vermont, limits the possible charges to those that are “reasonable” in addition to the unpaid assessments. Georgia also places a cap on the interest that can be charged, mandating that it not be “in excess of the greater of $10.00 or 10 percent” of each amount unpaid and “[a]t a rate not in excess of 10 percent per

---

97 Id.
98 The association “may impose charges for late payment of assessments and, after notice and an opportunity to be heard, may impose reasonable fines for violations of declarations, bylaws, and rules of the association.” The association may also “impose reasonable charges for the preparation of amendments to the declaration, resale certificates required by Section 4-109, or statements of unpaid assessments.” Unif. Common Interest Ownership Act § 102(a)(11) and (12).
99 VT. STAT. ANN. tit. 27A, § 3-116(a) (West 2012) ("The association has a statutory lien on a unit for any assessment attributable to that unit or fines imposed against its unit owner. Unless the declaration otherwise provides, reasonable attorney's fees and costs, other fees, charges, late charges, fines, and interest charged pursuant to subdivisions 3-102(a)(10), (11), and (12) of this title, and any other sums due to the association under the declaration, this title, or as a result of an administrative, arbitration, mediation, or judicial decision, are enforceable in the same manner as unpaid assessments under this section.").
100 See supra text accompanying note 98. See also VT. STAT. ANN. tit. 27A, § 3-102(a)(11) and (12) (West 2012).
101 Georgia permits an association lien for unpaid assessments to include “[a]ll sums lawfully assessed by the association against any unit owner or condominium unit, whether for the share of the common expenses pertaining to that condominium unit, for fines, or otherwise, and all reasonable charges made to any unit owner or condominium unit for materials furnished or services rendered by the association at the owner’s request to or on behalf of the unit owner or condominium unit.” GA. CODE ANN. §§ 44-3-109(a) and 44-3-232(a) (West 2012). Illinois similarly permits the additional inclusion of “any interest, late charges, reasonable attorney fees incurred enforcing the covenants of the condominium instruments, rules and regulations of the board of managers, or any applicable statute or ordinance, and costs of collections.” 765 ILL. COMP. STAT. ANN. § 605/9(g)(1) (West 2012).
102 GA. CODE ANN. §§ 44-3-109(a) and 44-3-232(a) (West 2012).
annum.” In contrast, Illinois permits the inclusion of “any” fees and interest which expands the potential charges that accrue against the property beyond just the unpaid assessments.

Florida’s Condominium and Homeowners’ Association Acts respectively provide for the inclusion of additional charges. When a condominium or homeowners’ association files a claim of lien, it “secures all unpaid assessments . . . as well as interest and all reasonable costs and attorney’s fees incurred. . . .” The association’s ability to secure these additional charges with the lien, however, is predicated on the association filing the claim of lien. Interest accrues on unpaid condominium assessments and if not specified, it is eighteen percent per annum beginning on the date of delinquency.

States such as Maryland stand in contrast to Florida, Georgia, Illinois, Vermont, and even the UCIOA which all permit the additional recovery of fines beyond unpaid assessments in association liens. Effective October 1, 2013, condominium and homeowners’ association liens in Maryland are statutorily prohibited from seeking to enforce a lien that includes charges other than unpaid assessments, regular or special, and “reasonable costs and attorney’s fees directly related to the filing of the lien and not exceeding the amount of the delinquent assessments.” Unlike other states, penalty charges and fines are prohibited.

A given state’s allowance or restriction on associations’ ability to include additional charges within liens for unpaid assessments greatly affects an association’s potential recovery and the amount that remains for any junior lienholder. As with the presence of statutory restriction on the procedure for enforcing an association lien, the states surveyed herein all statutorily consider these charges, but with no consistency. Each of the statutes discussed above specifically contemplates what charges are permitted. The UCIOA and Vermont both permit the inclusion of fines, but restrict such charges only by the caveat that they be

---

103 GA. CODE ANN. §§ 44-3-109 and 44-3-232 (West 2012).
104 765 ILL. COMP. STAT. ANN. § 605/9(g)(1) (West 2012).
106 FLA. STAT. ANN. §718.116(5)(b) (West 2012). For homeowners’ associations, a "claim of lien secures all unpaid assessments that are due and that may accrue subsequent to the recording of a claim of lien and before entry of a certificate of title, as well as interest, late charges, and reasonable costs and attorney’s fees incurred by the association incident to the collection process.” FLA. STAT. ANN. § 720.3085(1)(a) (West 2012).
107 FLA. STAT. ANN. §§ 718.116 and 720.3085 (West 2012). See supra text accompanying note
108 FLA. STAT. ANN. §§ 718.116(3) and 720.3085(3) (West 2012).
110 MD. CODE ANN., REAL PROP. §14-204 (West 2012).
112 See discussion supra Part II.A.
“reasonable”. Illinois permits late charges and while Florida prohibits fines, it allows “late fees.” Georgia and Florida also limit the amount of interest that can accrue on the charges. None of these attempts to categorize the specific sources from which associations can increase the sum of its lien achieve a restriction on the costs to the degree provided under a new Maryland statute. Maryland limits lien amounts with the most significant restriction lying in its requirement that whatever additional fees are included cannot exceed the delinquent assessment amount. Maryland retains the right of associations, however, to include litigation expenses and attorney’s fees despite their attempted limitation otherwise. Thus, an association in these jurisdictions is able to seek recovery from the foreclosure of its lien for more than only the sum of the owner’s unpaid assessments; at a minimum, the lien can include Maryland’s allowance of litigation expenses and attorney’s fees.

An association lien is first and foremost a lien for unpaid assessments and when these charges are coupled with additional fees, mortgagees would be justified in their concern that unchecked, an association lien could grow exponentially and depending on lien priority, greatly affect their potential foreclosure sale recovery. In addition to the requirements for the enforcement of an association lien, the parameters of what charges these liens can include is the second vital piece in the foundational analysis before considering the priority of association liens.

C. What Priority Does the Association Lien Have?

Under basic common law principles of the “first in time, first in right doctrine,” the lien with superior priority is that which was recorded first. A lien has priority when it arises first, meaning it exists prior to all those subsequent. Unless altered by the declaration or statute, the recording of the association’s declaration establishes the priority for the association against all subsequently recorded interests. As this Article alluded to earlier, a declaration that in fact determines the priority of an association may also alter this priority for its own purpose or at the

114 765 ILL. COMP. STAT. ANN. § 605/9(g)(1) (West 2012).
115 FLA. STAT. ANN. § 720.3085(3)(b) (West 2012).
116 GA. CODE ANN. §§ 44-3-109 and 44-3-232. (West 2012)
117 FLA. STAT. ANN. §§ 718.116(3) and 720.3085(3) (West 2012).
118 See MD. CODE ANN., REAL PROP. §14-204 (West 2012).
119 See MD. CODE ANN., REAL PROP. §14-204(d)(2)(i)(1).
120 In Maryland, associations “may foreclose on a lien against a unit owner or lot owner only if the damages secured by the lien: (i) [c]onsist solely of: 1. Delinquent period assessments or special assessments; and 2. Reasonable costs and attorney’s fees directly related to the filing of the lien and not exceeding the amount of the delinquent assessments; and (ii) Do not include fines imposed by the governing body or attorney’s fees related to recovering the fines.” MD. CODE ANN., REAL PROP. §14-204(d)(2) (West 2012).
122 See id.
123 KOVITZ SHIFRIN NESBIT, supra note 12.
requirement of mortgagees and subordinate the association lien if it would otherwise have priority over any later mortgagee.\(^\text{124}\) The Practical Real Estate Lawyer’s Model Homeowners Association Declaration of Covenants, Conditions, and Restrictions illustrates an example of a potential alteration that increases the priority of mortgagees’ liens over an association.\(^\text{125}\) In pertinent part, the Model provides that the foreclosure of a first mortgage or other lien in favor of that mortgagee extinguishes a lien for any association assessment before and until a foreclosure sale.\(^\text{126}\) Beyond changes to declarations, the state statutes that commonly alter the standard priority scheme throughout the country reveal an inconsistent approach to determining lien priority.\(^\text{127}\)

If an association lien is otherwise subordinate under common law priority, the UCIOA provides a strict six-month limited super priority to association liens against all other encumbrances, including a first mortgage.\(^\text{128}\) The Act, thus creates two essential powers for the association: (1) the super priority over all mortgagee liens and (2) the incentive to pursue delinquent homeowners for the unpaid assessments.\(^\text{129}\) Because an association is guaranteed at least partial recovery up to six months, it is to the association’s advantage to seek enforcement of its lien and foreclosure of the property.\(^\text{130}\) While any association faced with delinquent owners will desire collection of those unpaid assessments, the guarantee provided under the UCIOA identifies to owners that the association is incentivized to pursue an expeditious foreclosure.

In an attempt to secure recovery for association’s with liens either subordinate in time to a mortgagee or due to an agreement with the mortgagee that it’s lien would be subordinate, the UCIOA’s allowance of six-month priority for associations is founded on a two-fold rationale: “(1) the association is an involuntary creditor that is obligated to advance services to owners in return for a promise of future payments; and (2) the owner’s default in these payments could impair the association’s financial stability and its practical ability to provide the obligated

\(^\text{124}\) See Coral Lakes Community Ass’n, Inc. v. Busey Bank, N.A., 30 So. 3d 579, 581 (Fla. 2d Dist. App. 2010) (Under the association’s declaration, the association was subordinate to subsequent first mortgages: “This section was likely added to the Declaration to induce lenders to aid homeowners purchasing property in the community by awarding them priority over the HOA’s claims for unpaid assessments.”).


\(^\text{126}\) Id. (“[T]he sale or transfer of any Lot pursuant to mortgage foreclosure or any proceeding in lieu thereof for the benefit of any First Mortgagee shall extinguish the lien of such Assessments as to payments which became due before such sale or transfer.”).

\(^\text{127}\) Under New York law, N.Y. REAL PROPERTY LAW § 339-z, “a condominium board’s lien for unpaid common charges has priority over any lien except a first mortgage. A condominium board’s lien is prior to a second mortgage even if the condominium’s lien is recorded subsequent to the recording of the second mortgage.” Societe Generale, 597 N.Y.S.2d at 1007 (N.Y. App. Div. 1993).


\(^\text{129}\) Pinkerton, supra note 54, at 137-38.

\(^\text{130}\) Id.

\(^\text{131}\) Id.
services.”132 This rationale fully anticipates the situation faced by many associations in recent years. The drafters saw the UCIOA’s six-month priority as advantageous for all parties involved. In a recent analysis by the Joint Editorial Board for Uniform Real Property Acts, the Board explained the drafters “believed that the six-month association lien priority struck a functional balance between the need to protect the financial integrity of community associations and the legitimate expectations of first mortgage lenders.”133

Reiterating the benefits of this six-month priority scheme, Professors Cornelius van der Merwe and Luis Muniz-Arguelles identified the potential disaster for American common interest communities without this priority, leaving associations obligated to maintain and provide facilities absent any funds to do so, even if the association’s recovery is limited to only six months of assessments during foreclosure proceedings.134 They found the UCIOA to be a “genuine attempt to protect the financial vitality of [property] associations, which are now performing many functions traditionally carried out by local authorities in the United States.”135 Under normal market conditions, this would likely have been the result of the six-month rule, but the persisting stagnation and delinquency in American real estate markets since 2008 brings the six-month limited superior priority’s ability to adequately make an association whole into question.

The drafters offered an explanation of their intention to facilitate an equitable balance between mortgagees and common interest community associations: The Joint Editorial Board recommended an amendment to the UCIOA in light of the current market conditions that the 1976 drafters could not have considered. As the Board states,

[m]any common interest units are ‘underwater,’ with values below the outstanding first mortgage balance. Furthermore, and particularly in states with judicial foreclosure, there are long delays in the completion of foreclosures. During these delays, neither the defaulting unit owner nor the first mortgagee typically pay the assessments on the unit. . . . To account for the unpaid assessments, the association must either increase the assessment burden upon the remaining unit/parcel owners or reduce the services the association provides.136

This solution is unnecessary for an association benefiting from absolute priority over any interested mortgagees, but this does become relevant when the association is in someway subordinate to a previously filed mortgagee lien, made subordinate as a condition to the mortgagee lending to the borrower, or subordinate as dictated by the association’s declaration.

133 Id.
135 Id. at 153-54.
With the high foreclosure rates experienced since 2008 and the likelihood that owners are behind on both mortgage and association payments, 137 any foreclosure that takes longer than six months only produces a possible recovery of any substantive nature for the first mortgage holder. 138 The association is limited to only six months of assessments under the UCIOA. Despite the apparent advantage of the lien’s “priority,” a foreclosure sale might occur years after the foreclosure proceedings began and of more concern to the association, years after the assessment payments ended. 139 In this context, the six-month priority may be less effective in escaping the tragedy of the commons created when property owners’ association dues are in arrears and foreclosure proceedings are increasingly prolonged.

In contrast to the UCIOA, Georgia provides no increased statutory priority for association liens. If the association declaration specifically avails itself of the Georgia Condominium Act or the Georgia Property Owner’s Act, 140 the priority of an association lien is no longer governed by the first-in-time principle. Under both Acts, the association is permitted to foreclose before a superior lien, such as those held by a mortgagee that required subordination of the otherwise preexisting and superior in time association, but all those liens superior to the association’s will remain attached to the property and encumber subsequent purchasers. 141 The statutory lien for assessments afforded under both Acts has priority, but it is subordinate to any lien for real estate property taxes, a first mortgage, which is first by virtue of its priority, and any junior mortgage provided by the seller when the property was transferred to the current owner. 142

While a statutory lien exists in favor of the association in Georgia, it is subordinate to both liens, those for property taxes and a first mortgage, that are most likely to also be enforced against the property and quite possibly for amounts far beyond the foreclosure sale purchase price. Association liens arise through the original recordation of the declaration and can include additional costs such as fees and even fines against the owner, but with no priority to the funds of

137 Brennan, supra note 3.
138 JOINT EDITORIAL BOARD FOR UNIFORM REAL PROPERTY ACTS, supra note 66, at 4.
139 Id. at 1.
140 The Georgia Property Owners’ Association Act does not automatically apply to property encumbered by an association. The original developer through the declaration of covenants for the community, or alternatively the association through a later amendment to the declaration, must choose to avail the community of the Act. See Mindy C. Waitsman, Benefits of the Georgia Property Owners’ Association Act, Moore Reese, available at http://mooreandreese.com/wp-content/uploads/2013/05/Moore-Reese-Benefits-of-the-Georgia-Property-Owners’-Association-Act.pdf.
141 See GA. CODE ANN. §§ 44-3-109 and 44-3-232 (West 2012).
142 GA. CODE ANN. §§ 44-3-109(a) and 44-3-232(a) (West 2012) (“All sums lawfully assessed by the association . . . constitute a lien in favor of the association on the condominium unit prior and superior to all other liens whatsoever except: (1) [l]iens for ad valorem taxes on the condominium unit; (2) [t]he lien of any first priority mortgage covering the unit and the lien of any mortgage recorded prior to the recording of the declaration; (3) [t]he lessor’s lien provided for in Code Section 44-3-86; and (4) [t]he lien of any secondary purchase money mortgage covering the unit, provided that neither the grantee nor any successor grantee on the mortgage is the seller of the unit.”).
a foreclosure sale. Georgia associations are left with two options, both of which are significantly less deferential to the association than the priority offered under the UCIOA: (1) the association can foreclose its lien independently of the other liens on the property, including any superior mortgage, but this is likely to reduce any price obtainable at the foreclosure sale since the title transferred remains encumbered by any lien that was superior to the association; and (2) pursue foreclosure with other superior lienholders, but the association risks recovering only what remains, and potentially nothing, after foreclosure sale proceeds pay for any property tax lien and any superior mortgage lien that have priority.

The Illinois Condominium Property Act specifically provides for the priority of association liens based upon the date that the owner becomes delinquent on assessment payments. This date gives the association lien priority over all subsequent encumbrances. The statute essentially eliminates all priority for the association; its lien is not prior to liens for taxes and, most importantly, any “encumbrances on the interest of the unit owner recorded prior to the date of such failure or refusal [to pay] which by law would be a lien thereon prior to subsequently recorded encumbrances.” The association is also not without further obligations to mortgagees and other lienholders; at any time lienholders with an interest in property encumbered by association assessments may submit a written request detailing any unpaid regular assessment and if the association fails to comply within twenty days, any unpaid assessments up to the request day are automatically subordinated to the enquiring lienholder. Effectively, the association is provided no priority and this is especially the case with interested mortgagees. Mortgage liens are perfected upon recording and the existence of a debt, meaning the moment of recordation because by definition the mortgage secures a debt to be repaid. Thus, the lien of any mortgagee whether first or junior, will more than likely be prior to the date that the owner became delinquent on association assessments and superior to any association lien.

Vermont provides statutory priority for an association lien as a result of its full adoption of the Uniform Act. Thus, an association in Vermont benefits from a statutorily provided six-month super priority over all other encumbrances. As discussed previously, association liens in Vermont prior to the adoption of the Uniform Act followed common law priority that considered solely the date upon which each lien interest became perfected.

---

144 See Ga. Code Ann. §§ 44-3-109(a) and 44-3-232(a) (West 2012).
149 The Uniform Common Interest Ownership Act has been adopted in full in Connecticut, Delaware, and Vermont. See supra note 95. In West Virginia’s 2013 legislative session, it was also introduced by Senator Snyder as S.B. 611. (available at: http://www.uniformlaws.org/Act.aspx?title=Common%20Interest%20Ownership%20Act%20(2008)).
151 See supra text accompanying note Error! Bookmark not defined..
Act, Vermont association liens have super priority for the “six months immediately preceding institution of an action to enforce the lien.”\(^{152}\)

As explained in the comments of the statute, the drafters sought to “strike[] an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security of lenders.”\(^{153}\) The Vermont legislature, however significantly explains that in a practical sense, “secured lenders will most likely pay the six months’ assessments demanded by the association rather than having the association foreclose on the unit.”\(^{154}\)

While the six-month super priority appears to benefit associations by both guaranteeing recovery over other lienholders and providing an unambiguous six months of assessments from which to calculate that recovery, recent case law interprets priority and increases the association’s potential advantage farther. For example, in *Chase Home Finance, LLC v. MacLean*, the Superior Court of Vermont found that:

> It makes more sense to construe the statute as providing for an association lien for assessments to have a priority over a first mortgage for the period from 6 months prior to the association’s filing of its first foreclosure action throughout the pendency of the action. This explains why the statute is silent as to that period: the priority of the association lien is created by the statutory scheme, and the 6 month provision expands its reach retroactively to 6 months prior to filing. It is an expansion of the priority, and not an exception to it.\(^{155}\)

If the approach in *MacLean* is in fact the intention of § 3-116, it potentially yields a much more substantive recovery for associations. It also serves to solve a possible inequity of the Uniform Common Interest Ownership Act that is likewise present in Vermont as a result of the Act’s adoption.\(^{156}\) In the event of delinquency, the association may only avail itself of the six-month priority by commencing a foreclosure action *after* the property owner “owes a sum equal to at least three months of common expense assessments based on the period budget last adopted by the association.”\(^{157}\) Although the lien automatically exists through the original filing of the declaration and associations are free to seek enforcement of payment to enforce the lien, the

\(^{152}\) *Vt. Stat. Ann. tit. 27A, § 3-116(c) (West 2012)* (“(c) A lien under this section is also prior to all security interests described in subdivision (b)(2) of this section to the extent of the common expense assessments based on the periodic budget adopted by the association pursuant to subsection 3-115(a) of this title which would have become due in the absence of acceleration during the six months immediately preceding institution of an action to enforce the lien. Subsections (b) and (c) of this section do not affect the priority of mechanics' or materialmen's liens, or the priority of liens for other assessments made by the association. A lien under this section is not subject to the provisions of 27 V.S.A. chapter 3.”).


\(^{154}\) *Id.*


association can only recover its statutorily assured six-months of payment once an owner is delinquent on at least half of this amount. If the association is limited to six months and § 3-116 is not applied with the extended *MacLean* priority, the association is practically guaranteed to receive an inadequate recovery. Unless the foreclosure proceedings are concluded inside three months, the association cannot be made whole. Extending the potential recovery to the *MacLean* rule – entire period from foreclosure filing to foreclosure sale – offers greater certainty that an association will be made whole and possibly recover an amount over the total number of delinquent months.

The Vermont statute states that the association has priority “during the six months immediately preceding institution of an action to enforce the lien,” but as the Superior Court of Vermont identified in *MacLean*, the Section is silent on priority as to the assessments which accrue from the foreclosure filing until the subsequent foreclosure sale. This silence can be interpreted in two ways: (1) the association is granted priority only as to the six months of assessments that accrued prior to the filing; or (2) the court’s analysis that finds the six months to be an additional recovery beyond the amount accruing before the sale, all of which has priority. If this is in fact how § 3-116 is applied in Vermont, this interpretation may affect the Uniform Act and the other states in which § 3-116 has been adopted. The potential recovery for the association could vary greatly depending on the interpretation chosen, but in either case, Vermont places associations at a distinct advantage in comparison to their counterparts in states like Georgia and Illinois.

Despite Florida’s statutory provisions that specifically permit association liens to relate back to the filing of the declaration, a condominium or homeowners’ association lien is specifically subordinated to any first mortgagee that is “first” and superior either in-time or through a requirement of superiority by the mortgagee. The association, however, receives statutory super priority for up to twelve months of assessments or one percent of the first mortgage amount. Prior to a pivotal 2010 amendment to Florida law Florida association liens received a six-month statutory priority similar to that given under the UCOA. Previously, associations were permitted to recover the lesser of six months of regular assessments or one percent of the mortgage amount.

---

158 Vermont provides six-months of priority, which the association can enforce once an owner is delinquent for three months. Assuming the association enforces its lien immediately upon the third month of delinquency, the six-month priority will apply retroactively on that date. Since the owner is only behind on three months of payments, the association’s recovery of six months, the association will be made whole by the six-month priority rule if the foreclosure sale occurs within a maximum of three months, at which point a new, qualified owner would presumably be making assessment payment regularly. *VT. STAT. ANN.* tit. 27A, § 3-116 (West 2012).


162 See infra notes 164-166.

163 *A.C. Condominium Ass’n, Inc. v. SunTrust Bank*, 815 So.2d 720 (Fla. 5th DCA 2002).
Originally proposed by Former Senator Mike Fasano (R), Florida Bill 1196 extended the six-month priority to twelve. The six-month extension first appeared in the text of the bill on April 28, 2010. Negotiations over Bill 1196 occurred at the height of the mortgage crisis and effectively increased Florida’s already deferential treatment of associations. The respective statutory provisions now permit associations to recover the lesser of twelve months, not six, of assessments or one percent of the mortgage amount. In comparison to the confusion surrounding Vermont’s six-month rule, Florida’s statutes grant recovery for “[t]he unit’s unpaid common expenses and regular periodic assessments which accrued or came due during the 12 months immediately preceding the acquisition of title and for which payment in full has not been received by the association.” Instead of applying retroactively from the date of the lien’s enforcement, Florida bases recovery on the twelve months that immediately precede the transfer of title at the completion of the foreclosure. This system might better serves all parties, especially if Vermont associations recover only six months and not based on the MacLean rule, because it is not silent on the period from lien enforcement to foreclosure sale and it also allows the association full recovery during that period, as long as the foreclosure sale is not protracted beyond twelve months.

III. NEGATIVE EXTERNALITIES OF THE FORECLOSURE CRISIS

The lien priority debate is contextualized by the negative externalities of the foreclosure crisis that continue to be widespread and deeply felt around the country. Increased expediency and clearly defined priority for associations helps to alleviate the burden of the externalities on associations, mortgagees, owners, and potential purchasers of property in the community.

Between 2007 and 2008, the United States experienced the onset of the Great Recession, largely spurred by the stagnation of the residential real estate market across states that had otherwise experienced tremendous growth and soaring home values. Florida, an indisputably prime example of an area burdened by the Recession’s financial devastation, witnessed a proliferation of specialty mortgage devices, including adjustable rate mortgages, low or no document loans, interest-only and negatively amortizing loans, home equity lines of credit, and loans amortized over 40- or 50-year terms, which collectively produced a sizeable percentage of residential mortgages with a high probability of default. When these adjustable rate mortgages

---

164 Florida Bill 1196 (2010).
165 S.B. 1196, Gen. Assemb. (Fla. 2010).
166 See S.B. 1196, Gen. Assemb. (Fla. 2010).
167 Fla. Stat. § 718.116(b).
169 Id.
170 See E. Scott Reckard, U.S. Home Woes Mount, L.A. TIMES (Sept. 6, 2008) http://articles.latimes.com/2008/sep/06/business/fi-mortgage6 (“The decline of housing markets in California and Florida has led to record numbers of foreclosures and is causing even good borrowers to pay more for loans, according to analysis and statistics released [September 5, 2008].”).
“‘recast’ and require[d] full payments, three to five years after they were made, borrowers [found] themselves with sharply higher payments on higher loan balances than they started with, at a time when their home values [were] sharply lower.”172 At the onset of the crash and for the years immediately thereafter, the prospect for the mortgage market was dim and continued growing darker: “[t]he worst states [were] continuing to get much worse.”173

The 2013 foreclosure rates in the states with the highest levels reflect this persisting problem that continues to create both stagnation for economic recovery and a residual relevance for this Article’s discussion.174 A decline in foreclosure rates, both between August 2012 and August 2013, as well as between the yearly rates for 2012 and 2013, indicate that there has been substantive recovery at least in property owners’ ability to remain current on their mortgage payments.175 In the last year, homes in pre-foreclosure are down nearly forty percent, the number of homes at foreclosure auctions are down thirty five percent and bank owned properties are down twenty five percent.176 Despite these gains, the five states with the highest foreclosure rates still indicate that one in every 359 to 638 homes is in foreclosure.177

While homeowners behind on payments and association dues are clearly at the front line, numerous interested parties also felt the weight of properties falling into foreclosure. Beyond the financial strain felt by associations as assessments went unpaid and the damage caused by underwater properties to the portfolios of mortgagees nationwide, foreclosed properties damaged neighbor values, burdened surrounding owners, and stagnated markets by discouraging investment from new buyers. Initially, local governments were unsure about what party was even responsible for the increasing number of depressed properties.178 Neighbors in some cases began caring for properties, mowing lawns and cleaning swimming pools, but this self-help remedy presents new legal issues because the good Samaritans become trespassers.179 Depending on an association’s declaration, it may have the right to maintain the property and charge for this

172 Reckard, supra note 170.
173 Id.
176 See id.
177 See id.
179 Id. (“Often, the first responders are concerned neighbors, who haul their lawn mowers next door. But that carries risk. Being a good neighbor is also, legally, trespassing . . . .”).

25
service through special assessments.\textsuperscript{180} Such assessments, however, would simply amplify the delinquent owner’s indebtedness to the association and the overall amount for which the association would be forced to potentially recover with foreclosure.

Mounting unpaid assessments and an association’s spiral towards insolvency hurts owners of surrounding properties beyond the unfortunate decline in their property values. If an association is unable to collect sufficient funds from assessments to maintain the community and the success of enforcing a lien against the delinquent property for these assessments is either likely to be unsuccessful or inadequate, the association’s alternatives simply place increased burdens upon other owners. The association can (1) increase the regular assessments charged across the board, (2) charge a special assessment to all owners while not raising the regular assessment, or (3) attempt to reduce costs or eliminate services and amenities the association can no longer afford.\textsuperscript{181} These solutions are far from ideal and regardless of which is chosen, the association’s efforts to remain afloat will negatively impact the community’s property values. Increasing regular assessments without increasing the services or amenities provided simply raises the per-month expenses of owning real estate in the community with no added benefit, effectively discouraging new buyers from purchasing in the neighborhood. Alternatively, eliminating services to avoid raising regular assessments or charging a special assessment also results in a higher monthly expense for less in return; equally discouraging new buyers.

The negative externalities of association insolvency cause further decline in already burdened neighborhoods and produces prolonged stagnation in the marketplace.

**IV. Solutions to Lien Priority**

In light of the inconsistent approaches to association lien priority throughout the country\textsuperscript{182} and the negative externalities imposed on all interested parties when homeowners default on association dues,\textsuperscript{183} the need to establish a collectively beneficial priority scheme is apparent. First, this section considers the various solutions proposed by scholars who examined lien priority both before and since the foreclosure crisis began in 2008.\textsuperscript{184} Recent scholarship reveals a theme of competition, focused on an analysis of which party, mortgagee or association, is better served by garnering superior priority.\textsuperscript{185} This is contrasted by an alternative proposal based on fostering cooperation between associations and mortgagees through streamlining the process of perfecting the association lien and determining its relative priority, but also requiring associations to better protect themselves against foreclosure-induced insolvency and encouraging mortgagees to mitigate the potential risk of an association lien with limited priority over their secured interest.

---

\textsuperscript{180} A declaration may permit “specific assessments for personalized services to individual property owners or, in more unfortunate situations, to those whose action or inaction causes the association to take corrective action.” Hyatt, supra note 61, at 612.

\textsuperscript{181} Newsom, supra note 61, at 370. Perkins, supra note 6, at 575.

\textsuperscript{182} See discussion supra Part II.

\textsuperscript{183} See discussion supra Part III.

\textsuperscript{184} See discussion infra Part IV.A.

\textsuperscript{185} See discussion supra Part II.C.
A. Recent Proposals

While statutory protection of associations’ interests in real property is beneficial, the extensive equitable arguments for this protection cannot be viewed in a vacuum and instead, must be based upon a balanced structure that protects all interested parties, not just the association, to the highest possible degree. The survival of common interest communities in America and the continued recovery of the nation’s residential real estate market are largely affected by the degree to which both associations and mortgagees are made as substantively whole as possible, not one over the other. Associations and mortgagees should seek two things: (1) recovery for their loss in the event of an owner is behind on mortgage and assessment payments and (2) supporting the stability of the property values that dictate fair market value and the security their interests. A lien system that protects associations and mortgagees through recognition that cooperative partial recovery of their liens is advantageous to everyone in the aggregate versus a priority competition against one another, should be the primary step in achieving this goal.

Reports have repeatedly characterized the economic plight of the past six years as the worst the United States has seen since the Great Depression, but the issues of a depressed real estate market and suffering associations has certainly recurred more recently than 1929. In a student comment, Grahame K. Wells explained that the financial difficulties faced by condo associations after the market began declining in the late 1980s prompted an impetus to fortify the associations’ ability to collect assessments through super-lien statutes that placed the condo associations’ lien prior to mortgagees. Wells argued that super-priority for an association lien in the early 1990s provided an ideal structure to offer viable protection for condominium associations and created an “approach [that] fosters communication and cooperation between condo associations and lenders.”


188 Id. at 478 (“States employ the limited priority lien to encourage the first mortgagee to take a greater role in ensuring that unit owners pay their condo fees. In addition, the limited priority lien augments the condo association’s ability to recover delinquent fees from the proceeds of the first mortgagee’s foreclosure sale.”).

189 Wells basis her analysis on super-priority in Massachusetts under MASS. GEN. LAWS ANN. ch. 183A, § 6 (West 1994). This statute provides that the unit owner is personally liable for unpaid regular assessments, plus “late charges, fines, penalties, and interest assessed by the organization of unit owners and all costs of collection including attorneys’ fees, costs, and charges.” If delinquent for more than 60 days, the association must send notice to the owner and the first mortgagee. The association’s lien for these charges then benefits from six-month super priority over mortgagees. See id. at 477.

190 Id. at 497.
evident amidst the foreclosure rates twenty-five years ago, but these are heightened dramatically with the unprecedented market climate in post-2008 North America.

Recent scholarship has reexamined lien priority in light of the current market conditions since 2008, but each proposed solution focuses too heavily on maintaining the competitive status quo. Daniel Goldmintz’s student comment recognized that “associations now collect a fraction of the total maintenance dues and have to wait, unpaid until lenders finally decide to foreclosure.”191 His solution, however, eliminates partial super-priority status in lieu of a full priority system for associations.192 While the argument stands that mortgagees may be in a better position to bear the losses of a foreclosure and this effectively eliminates lien priority competition by preventing it, awarding full priority restructures the system to the sole advantage of associations and disregards the interests of mortgagees who provide the capital investments to make property ownership in common interest communities possible. This absolute or nothing approach ignores the co-existent nature of the financial interests that both an association and a mortgagor hold when payments become delinquent on a large scale throughout the community and the country.193

In another student comment, Rachel Furman proposed an alternative to the use of liens entirely, instead calling for association security deposits. In pertinent part, she argues:

Considering the options available to a HOA to strengthen its ability to collect assessments, the security deposit method provides the greatest incentive for homeowners to pay assessments on time and to ensure that the burden of unpaid assessments falls to the defaulting homeowner. The delinquent homeowners represent the ideal group to bear the burden of unpaid assessments, since they created the burden initially. Paying a security deposit also encourages

192 Id. at 290.
193 Scholars have also identified an additional popular solution: an analogizing of the priority for tax liens with those for associations. This solution too would essentially provide absolute priority to the association. As alluded to previously, associations are often viewed as the privatization of services traditionally provided by local and state governments. The vitality of tax liens to the larger government’s functionality is largely analogous to the common interest community and its association on a smaller scale. “Property tax revenues are critical for providing services . . . and delinquent payments of tax obligations can create budgetary shortfalls that threaten the provision of services.” Michelle Z. Marchiony, Making Debt Pay: Examining the Use of Property Tax Delinquency as a Revenue Source, 62 EMORY L.J. 217, 219 (2012). Association assessments are largely similar and often provide services in lieu of those facilitated by taxation from government. See Franzese, supra note 39, at 1113. Accordingly, “‘public service exactions,’ meaning that local governments, as a condition of land-use approval of new residential subdivisions, often require developers to establish a homeowners association as the mechanism to carry out functions and services that traditionally were the responsibility of the municipality itself.” Id. As a provider of such services, associations could receive a similar priority afforded to tax liens.
homeowners to quickly cure any defaults. Thus, HOAs should consider requiring security deposits from all homeowners upon purchase of a unit in HOA communities.\textsuperscript{194}

The security deposit provides more immediate relief for associations, but purchased real estate is fundamentally different from apartments and other leased units where a tenant behind on rent can be replaced with relative ease. To Goldmintz’s argument that mortgagees can better bear the burden of a foreclosure, homeowners, especially those acquiring financing from mortgagees to facilitate their purchase, are not in the best position to pay large security deposits. In order to cover an equivalent amount to that recoverable from a six-month limited super priority lien, for example, the homeowner would be required to significantly increase the readily available capital necessary for purchasing a unit or parcel. If this amount were less and thus, more affordable, it would likely be ineffective in providing substantive funding for associations facing unpaid assessments, especially in states like Florida with foreclosures taking years to complete.

Professor Andrea J. Boyack proposed an altered statutory lien priority. She states,

Statutes should be passed in each state to create proper incentives for lenders to monitor or pay assessment delinquencies. Rather than relying on limited-priority liens, this proposal – an eroding first priority for first mortgage liens – would treat the priority position of a lender’s first lien as conditioned upon foreclosure within a certain amount of time after mortgage default (e.g. six months). Thereafter, every month of unpaid assessments would become secured by a lien superior in payment priority to the first mortgage. Importantly, such a lien would have no upside cap meaning recovery by the association would theoretically be unlimited, while the maximum paid by the neighbors would be limited. Such an eroding mortgage approach would cap the loss to the association rather than the loss to the lender, which is appropriate because it is the lender who controls the timing of the foreclosure sale.\textsuperscript{195}

This strikes a balanced approach between protecting mortgagees and associations simultaneously, but lacks the definitive clarity of time periods for lien priority that benefits all parties. This is too similar to the complicated structures, such as the ambiguity prevalent in Vermont as a result of court confusion regarding application of the state’s statutory priority,\textsuperscript{196} that currently exist.

B. \textit{Encouraging Cooperation between Association and Mortgagees}

At the root of this discussion is the often-insufficient return for all interested lienholders from foreclosure sales. Foreclosures, “even under stable economic conditions, normally will not bring a price that will reflect the reasonable market value of the property if it were marketed

\textsuperscript{195} Boyack, \textit{supra} note 38, at 128.
\textsuperscript{196} \textit{See supra} text accompanying notes 149-58.
outside the foreclosure context.” If complete recovery is likely impossible, the question is not which party holds a superior interest, but how statutory law can most efficiently protect all interests, both mortgagee and association. This Article proposes to merge three requirements, partially adopting components of current approaches, to provide substantive recovery to an association, without which it faces potential insolvency at the detriment of the community it governs, and mortgagees, whose capital investments make property ownership possible for millions of Americans. The following three components collectively provide the most ideal situation for associations as well as mortgagees, encouraging cooperation between these entities in the event an owner/borrower falls behind on payments.

1. **How a Lien Arises**

   Apply the UCIOA’s requirement for perfection under which recording the association’s declaration constitutes both record notice and perfection of the lien. This would achieve a reduction in potential litigation expenses and costs before a foreclosure action begins on the part of the association because its lien arises through the original recordation without which it ceases to exist. As a result, fewer requirements to perfect the lien would contribute to a reduction in fees and charges accruing beyond unpaid assessments. Under this rule, purchase of the unit or parcel constitutes the owner’s acceptance of the property subject to the encumbrance of the association lien. Recordation of the individual deed functions as the owner’s notice of the encumbrance. This is supplemented by application of a notice scheme similar to Georgia’s requirement that while the lien arose with recordation, associations cannot pursue foreclosure until after a period of thirty days from providing notice to the property owner. This requirement, in combination with the procedure for a lien to arise explained above, provides an equitable balance for the interests of the association and the owner alike. The association’s lien continually exists from the date of the declaration’s recording, but the owner is also not automatically subject to foreclosure until assessments are unpaid and notice is provided of this non-payment.

2. **Lien Priority**

   Association liens should be granted a super twelve-month or one-percent priority similar to that provided in Florida. The specified period of super-priority initially introduced by the UCIOA and implemented through many similar state statutes remains at least a partially appropriate remedy. Florida’s extension from six-months priority to twelve or one percent of the mortgage aptly recognizes the risk of delays in foreclosure proceedings, which can serve a significant disadvantage in states such as Vermont where foreclosures must be complete within three months of filing in order to provide the association with complete recovery. This is possibly solved by applying the *MacLean* rule that awards Vermont’s six-month priority before the institution of a foreclosure, but the evident ambiguity presented by the mere fact that the court found the priority to extend beyond six-months lends support for rules with increased clarity and definitiveness. Florida’s twelve-month or one-percent priority, which contemplates the possible protraction of a foreclosure proceeding, simultaneously accounts for an extended recovery if necessary and encourages the foreclosing lender to expedite the process. This

---

197 **ANN M. BURKHART, ET AL., REAL ESTATE TRANSFER, FINANCE, AND DEVELOPMENT** (Thomas Reuters 2009).
statutorily defined period of super priority also benefits mortgagees and foreclosure sale purchasers who can evaluate their decisions based on a quantifiable sum: twelve months of unpaid regular assessments or one percent of the first mortgage amount.

3. **Mitigation of Risk**

Finally, policies to require associations to better protect themselves against potential liability of unpaid assessments and to encourage mortgagees avoid the effect of twelve-month or one-percent super priority liens would be implemented. In furtherance of the rationale provided by Illinois for the determination of an association’s necessary reserve accounts, associations would be required to provide for adequate reserves collected through regular assessments in their annual budget as a means of retaining additional funds in the event of not just unexpected maintenance and repair costs, but that one or multiple owners might fall behind on payments. Such funds would represent capital available to the association in the interim between the date of nonpayment and any future foreclosure sale recovery through enforcement of its super-priority lien. Additionally, during the notice period provided to the owner in the first component, the association could draw upon the reserves. Currently, Illinois statutorily requires that each association’s board include within their budget “reasonable reserves for capital expenditures and deferred maintenance for repair or replacement of the common elements.”\(^\text{198}\) The statute requires the board to consider a multitude of factors in determining reserve amounts that could prove beneficial in a similar determination of the necessary funds to additionally collect for the potential risk of assessment nonpayment. Currently, an Illinois board must consider the following:

To determine the amount of reserves appropriate for an appropriate for an association, the board of managers shall take into consideration the following: (i) the repair and replacement cost, and the estimated useful life, of the property which the association is obligated to maintain, including but not limited to structural and mechanical components, surfaces of the buildings and common elements, and energy systems and equipment; (ii) the current and anticipated return on investment of association funds; (iii) any independent professional reserve study which the association may obtain; (iv) the financial impact on unit owners, and the market value of the condominium units, of any assessment increase needed to fund reserves; and (v) the ability of the association to obtain financing or re-financing.\(^\text{199}\)

Mortgagees, alternatively, should be encouraged to mitigate or prevent their own risk resulting from the super-priority lien by either establishing an escrow of the twelve months of regular assessments or simply requiring payment of this amount in full. As such, the mortgagee is essentially guaranteed priority over the association lien as to twelve months worth of regular assessments or one percent of the first mortgage amount because in the event of foreclosure, the escrowed funds would suffice to extinguish the association lien, leaving the full foreclosure sale proceeds available for all other interested lienholders. Such a policy, however, will increase

\(^\text{198}\) 765 ILL. COMP. STAT. ANN. § 605/9(b)(2) (West 2012).
\(^\text{199}\) Id.
lending requirements and scrutiny, but this is balanced by the financial security provided to mortgagees. The specified period of lien priority, limited to a maximum of twelve months or one percent, permits collection of accrued dues at the conclusion of the foreclosure sale, but the association is otherwise left without payment until the sale. An escrow account, perpetually holding a sum equivalent to twelve months of assessments or one percent of the mortgage amount after the owner has either paid in full or provided the corresponding fractional amount during the first twelve months of the mortgage, protects the priority of the mortgage despite the statutory super priority afforded to the association.

**Conclusion**

The three-part system places the burden on both the mortgagee and the association to ensure that community infrastructure, associations, and property is protected. Both parties are interested in the individual real estate and maintenance of a stable community; each should contribute to guaranteeing this sustainability and stability. The statutory framework for organizing lien priority should be founded on a policy that most effectively protects both interests and facilitates cooperation, not competition. The interpretation provided by the Superior Court of Vermont in *MacLean* is just that, a judicial interpretation of Vermont’s priority statute reflecting potential confusion from the many statutes currently in place. Necessity for greater clarity is provided unambiguously in the twelve-month or one-percent rule offered by Florida. This strict period of priority considers the possibility that a foreclosure proceeding is more protracted than six months and allows for a potentially more adequate recovery, while still encouraging expediency in the foreclosure proceedings. In the interim and in consideration of the advantage provided by a twelve-month or one-percent super-priority lien, the association can rely on its own reserves in order to provide necessary funding during the effectuation of a foreclosure while it is not receiving payments. Similarly, mortgagees can mitigate their risk by collecting funds in escrow in the amount equivalent to twelve months of assessments or one percent, ostensibly eliminating the priority of the association and allowing the mortgagee to pay the association lien in full from capital provided by the borrower. The goal served by this tripartite priority scheme is cooperation between mortgagee and association, not an encouraging or discouraging of one party’s priority over the other.