

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Banking and Insurance Committee

BILL: SB 1986

INTRODUCER: Senator Ring

SUBJECT: Homeowners' Associations/Lien Claims

DATE: April 11, 2008

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Herrin	Yeatman	CA	Favorable
2.	Sumner	Maclure	JU	Favorable
3.	Emrich	Deffenbaugh	BI	Favorable
4.				
5.				
6.				

I. Summary:

The bill provides that the lien of a homeowners' association has priority as of the date of the filing of the covenants and restrictions. However, the lien of the association is subordinate to that of a first mortgage that was recorded prior to the filing of a notice of lien. The bill provides a form to record a notice requiring a homeowners' association to enforce a recorded claim of lien against a parcel within 90 days or the lien is void.

Homeowners' associations are authorized to bring an action to foreclose a lien for assessments and to recover a money judgment for unpaid assessments, including reasonable attorney's fees. A court may order a parcel owner, who remains in possession following a foreclosure judgment, to pay a reasonable rent. Also, a homeowner's association is entitled to the appointment of a receiver to collect the rent during the pendency of a foreclosure proceeding.

This bill limits the liability of a first mortgagee, or its successor or assignee, for unpaid homeowner's association assessments when title to a parcel is acquired by foreclosure or a deed in lieu of foreclosure. It clarifies there is a 45-day window after the notice or demand for unpaid assessments is mailed for a parcel owner to pay in full and an additional 45 days must follow an association's notice of its intent to foreclose and collect the unpaid amount. The 45-day notice of an association's intent to foreclose and collect unpaid assessments does not apply in certain circumstances.

A qualifying offer is voidable at the election of the association if a parcel becomes the subject of a foreclosure action or a notice of tax certificate sale while a qualifying offer is pending. If the parcel owner is a debtor in a bankruptcy proceeding, while the offer is pending, the qualifying offer becomes void. Also, the filing of the qualifying offer cannot exceed a specified timeframe.

The bill also specifies a timeframe for making a qualifying offer and prescribes a form for such offer.

This bill substantially amends section 720.3085, Florida Statutes.

II. Present Situation:

Chapter 720, F.S., governs “homeowners’ associations” and defines that term as a Florida corporation responsible for the operation of a subdivision in which voting membership is made up of parcel ownership and the association is authorized to impose assessments that, if unpaid, may become a lien on the parcel. Under current law, a homeowners’ association lien may be foreclosed as any other lien.

In 2007, the Legislature created s. 720.3085, F.S., to address a number of issues related to unpaid homeowners’ association assessments, filing a lien on a parcel for those unpaid assessments, and foreclosing on the parcel.

Priority of Association Lien

Current statutory law does not specifically address the priority of the lien of a homeowners’ association as it relates to any other lien. The priority of the lien of a homeowners’ association is contingent upon the language of the covenants that create the obligation and the lien. Where the covenants are silent as to the priority, then the association’s lien will be as of the date of the filing of a claim of lien. Only where the association documents specifically provide that a claim of lien shall be considered a lien as of the date of the filing of the covenants does that claim take priority over mortgages and other liens filed.¹

From a practical matter, institutional lenders have long required a clause in homeowners’ association documents providing that first mortgage takes priority over the general association lien that is not in the form of a claim of lien. Where an association failed to have that clause in its documents, many lenders would refuse to write mortgages for homes in the neighborhood, which affects marketability. Thus, developers have traditionally included such a clause in association documents.

Form for Claim of Lien

In order to secure the priority of a lien against a specific parcel, a homeowners’ association files a claim of lien with the county recorder. Current law does not specify the form of such document, nor does it require any specific information. In general, no claim of lien, or any form of lien, is effective unless the claim contains sufficient information for other persons to be on notice of the lien. At a minimum, the claim must name the owner or owners so that the lien may be indexed, include a legal description of the property, state that it is a lien, and identify who holds the lien.

¹ See *Holly Lake Association v. Federal National Mortgage Association*, 660 So.2d 266 (Fla. 1995); *Association of Poinciana Villages v. Avatar Properties, Inc.*, 724 So.2d 585 (Fla. 5th DCA 1998).

Parcel Owner Contest of Lien

Under current law, a claim of lien is valid and is a cloud on the title of the property until the statute of limitations has expired. In general, the statute of limitations for enforcement of a contractual obligation is five years.² Nothing in current law compels a homeowners' association to pursue foreclosure on a claim of lien.

Foreclosure of an Association Lien

A homeowners' association may bring an action to foreclose a lien for unpaid assessments on a parcel. Foreclosure is the legal process to terminate an owner's interest in property, instituted by a lienholder either to gain title or to force a sale in order to satisfy the unpaid debt secured by the property. An association may not file a claim of lien against a parcel owner unless a written notice or demand for the past due assessments has been provided to the parcel owner. The parcel owner has 45 days to make payment for all amounts due. An association's action to foreclose on the parcel may not be brought until 45 days after the parcel owner has been provided notice of the intent to foreclose.³

Liability of a First Mortgagee

Current law does not provide for the liability of a first mortgage holder to pay homeowners' association assessments after a foreclosure sale of the property. The condominium law, in s. 718.116, F.S., provides that the liability of a first mortgage holder of a condominium or his or her successor who acquires title to a unit by foreclosure or by deed in lieu of foreclosure is the lesser of either the unit's unpaid common expenses and periodic assessments which came due six months immediately preceding the acquisition of the title for which full payment has not been received, or 1 percent of the original mortgage debt.

Qualifying Offer

A qualifying offer is a written offer to pay all amounts secured by the lien of the association, plus interest accruing during the pendency of the offer. If the parcel owner is not subject to bankruptcy, mortgage foreclosure, or a tax certificate sale, following the service of summons on a complaint to foreclose a lien on the parcel owner, then the parcel owner may provide one qualifying offer before the entry of the foreclosure judgment. The offer can be hand delivered or sent by certified mail, return receipt requested. Upon filing the qualified offer with the court, the foreclosure proceeding may be stayed for no more than 60 days to allow the owner to pay the qualifying offer plus any interest that accrues during that time.⁴

The qualifying offer must be in writing, signed by the owner, state the total amount due the association, state that the association is entitled to foreclose the lien, state that the parcel owner will not endanger the priority of lien of the association or the amounts secured by the lien, and state the actual date or dates the association will receive the total amount due. If a parcel owner breaches a qualifying offer, then the stay will be vacated and the association will obtain the foreclosure judgment against the parcel for the amount due plus any amounts which accrued after the date of the qualifying offer.⁵

² Section 95.11(2), F.S.

³ Section 720.3085(4)-(5), F.S.

⁴ Section 720.3085, F.S.

⁵ *Id.*

III. Effect of Proposed Changes:

Section 1. Amends s. 720.3085, F.S., to clarify that when authorized by the governing documents, a homeowner's association has a lien on each parcel to secure payment of assessments and such lien has priority as of the date of the filing of the covenants and restrictions. However, the lien of the association is subordinate to that of a first mortgage that was recorded prior to the filing of a notice of lien. The bill specifies what constitutes a valid claim of lien which includes the parcel description, names of the owner and association and due date.

The bill provides a form, i.e., "Notice of Contest of Lien," for a parcel owner or the parcel owner's agent or attorney to record a notice requiring the association to enforce a recorded claim of lien against the parcel within 90-days after the association receives notice from the clerk of the circuit court. If the association fails to enforce the lien within the 90-day period, the claim of lien is void. However, the 90-day period is tolled should any automatic stay of bankruptcy prevent the filing of an action to enforce the lien.

Homeowners' associations are authorized to bring an action to foreclose a lien for assessments, in the same manner in which a mortgage of real property is foreclosed, and to recover a money judgment for unpaid assessments, including reasonable attorney's fees. A court may order a parcel owner, who remains in possession after a foreclosure judgment has been entered, to pay a reasonable rent. If the parcel is rented or leased during the pendency of the foreclosure, the association is entitled to the appointment of a receiver to collect the rent. The receiver's expenses must be paid by the non-prevailing party in the foreclosure action. This bill authorizes the association to purchase the parcel at the foreclosure sale and hold, lease, mortgage, or convey the parcel.

In situations where the first mortgagee filed suit against a parcel owner and initially joined the homeowners' association as a defendant in the foreclosure action, the bill limits the liability of a first mortgagee, or its successor or assignee, for unpaid homeowners' association assessments when the title to a parcel is acquired by foreclosure or by deed in lieu of foreclosure, to the *lesser* of:

- The parcel's unpaid common expenses and regular or special assessments that accrued during the 12 months preceding the acquisition of title; or
- One percent of the original mortgage debt.

Joinder of the association is not required if the association was dissolved or did not have an office for service of process at a location known to be reasonably discoverable by the mortgagee on the date the complaint was filed.

The bill clarifies that the 45-day period for a parcel owner to pay all amounts due begins the day the association's notice or demand for past due assessments is deposited in the mail. Also, an association's action to foreclose a lien for unpaid assessments may not be brought until 45 days after parcel owner has been provided notice of intent to foreclose and collect the unpaid assessments. An association may recover interest, late charges, and costs, in addition to reasonable attorney's fees incurred in a lien foreclosure action. The 45-day notice of a

homeowners' association's intent to foreclose and collect unpaid assessments does not apply if the parcel is subject to a foreclosure action or forced sale of another party, or if the parcel owner is a debtor in a bankruptcy proceeding.

The bill allows a qualifying offer to be made by the parcel owner if the trial or trial docket for the lien foreclosure is not set to begin within 30 days. The term "qualifying offer" means a written offer to pay all amounts secured by the lien plus amounts accruing during the pendency of the offer. The qualifying offer is voidable at the election of the association if, while the offer is pending, the parcel is the subject of a mortgage foreclosure action or a notice of tax certificate sale. If the parcel owner becomes a debtor in the bankruptcy proceedings while a qualifying offer is pending, the offer becomes void. A stay of the foreclosure action that results from the filing of a qualifying offer cannot exceed 60 days following the date of service of the qualifying offer and no sooner than 30 days before the date of trial, arbitration, or the beginning of the trial docket, whichever occurs first. The qualifying offer must be signed by all parcel owners, including any spouse residing in or claiming a homestead interest in the parcel.

Finally, the bill prescribes a qualifying offer form, i.e., "Qualifying Offer Automatic Stay Invoked Pursuant to s. 720.3085, F.S." The qualifying offer form provides, in part, that the parcel owner(s) admit:

- The total amount due is secured by the lien of the association;
- The association is entitled to foreclose its lien claim and obtain a foreclosure judgment if the parcel owner breaches the qualifying offer by failing to pay the amount due by the date specified;
- That the parcel owner will not permit the priority of lien to be endangered;
- The date the association will receive the specified amount and the total amount due, which must be no later than 60 days after the date of service of the qualifying offer and at least 30 days before the trial or arbitration date;
- That the parcel owner has received a breakdown from the homeowners' association of all amounts due and the qualifying offer is equal to or greater than that amount; and
- The qualifying offer operates as a stay to all portions of the foreclosure action.

All parcel owners must sign the qualifying offer form which must be notarized.

Section 2. This bill takes effect July 1, 2008.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

This bill requires additional notice of foreclosure filings by homeowners' associations, which may result in additional copying, postage, and legal costs. Institutional lenders will benefit under the bill's provisions because it clarifies that an association lien is subordinate to that of a first mortgage under specified circumstances and limits the liability of a first mortgage holder to pay homeowners' association assessments after foreclosure.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.