



# How to Properly Handle and Foreclose a Condominium or HOA Lien

by David Byrne

**G**enerally speaking, New Jersey's condominiums and homeowners associations (HOAs) are empowered to record liens against units or homes, in the amount of the relevant unpaid common expenses and/or other charges. With respect to condominiums, this is statutorily set by virtue of New Jersey's Condominium Act.<sup>1</sup> For all intents and purposes, these liens act in a fashion akin to a recorded residential mortgage. For instance, it 'secures' the amounts, important in relation to bankruptcy law.<sup>2</sup> It 'clouds' the title connected with the unit or home in question, prohibiting one from consummating a proper, title-insured purchase.

Additionally, the relevant condominium or HOA may foreclose a lien, just as a mortgagee may foreclose a mortgage. In fact, the act sets forth expressly that a condominium may foreclose a lien for "unpaid assessments" in the "name of the asso-

ciation in the same manner as a foreclosure of a mortgage on real property."<sup>3</sup> Similar language is generally included in either a HOA's declaration or bylaws (or both). The uncontested foreclosure of a mortgage is subject to the jurisdiction of New Jersey's Office of Foreclosure (OF),<sup>4</sup> which reviews all foreclosure-related filings, recommending and approving the entry of orders and final judgments.<sup>5</sup> So too, then, is the uncontested foreclosure of a lien. However, despite the act and/or the similar provisions of a HOA declaration, there are procedures, issues and concerns unique to the foreclosure of a lien.

## The Lien

The OF will not countenance, and/or enter final judgment with respect to, an association's foreclosure of just any lien. For instance, the act authorizes a condominium to record a lien that contemplates only certain types of amounts.<sup>6</sup> For example, the act forbids condominiums from recording liens

“in which the unpaid assessment consists solely of late fees.”<sup>7</sup> The act allows for a condominium’s lien to include “fines” only if “authorized by the master deed or bylaws.”<sup>8</sup> In turn, the OF will not process the foreclosure of a lien that does not set forth, with precision, the characterization of each amount (*i.e.*, assessments, late fees, interest).

### **Goal of the Lien Foreclosure**

Counsel cannot properly represent an association in relation to a lien foreclosure unless he or she first determines the goal of the lien foreclosure his or her client desires be filed. For instance, is a sheriff’s sale planned upon entry of final judgment? If so, does the association expect a recovery from that sale? Does the association plan to use the foreclosure simply as a vehicle to procure (or validate existing) possession? Often the answers to these questions are found in counsel’s determination (even if informal) of whether the unit or home that is the subject of the lien foreclosure enjoys ‘equity’ or suffers from a ‘lack of equity.’ The goal of the lien foreclosure will drive almost every aspect of that foreclosure, including the identities and amounts of the necessary defendants; the extent of the association’s service of process obligations; and even how, when and if it seeks its final judgment of foreclosure.

### **Fair Foreclosure Act**

As above, the act and HOA declarations provide that an association may foreclose a lien in the same way one forecloses a mortgage on real property. However, that does not mean every single aspect and/or statutory control is relevant to the foreclosure of a lien. For instance, a lien foreclosure is not subject to New Jersey’s Fair Foreclosure Act (FFA).<sup>9</sup> The FFA imposes strict rules upon the foreclosure of a residential mortgage.<sup>10</sup> The best known aspect of the FFA is likely its ‘written notice of intent to foreclose’ mandate.<sup>11</sup> Absent proof that

the notice of intent to foreclose was delivered to the particular mortgagor(s), the OF will not enter a final judgment of foreclosure *vis a vis* residential mortgage foreclosure.<sup>12</sup> The OF takes no such position *vis a vis* the foreclosure of a lien.

### **Inclusion of Attorneys’ Fees in Foreclosure Judgment**

The act provides that a condominium’s lien includes not only the amount of unpaid common expenses but, “if authorized by the master deed or bylaws,” that condominium’s “reasonable attorney’s fees.”<sup>13</sup> Assuming the particular association’s master deed, declaration and/or bylaws so authorize it, the foreclosing plaintiff should seek a final judgment of foreclosure that includes not only the amount of unpaid common expenses but the amount of the association’s reasonable attorneys’ fees.

The OF will not include the amount of the association’s attorneys’ fees in its final judgment of foreclosure as a matter of course. An association is only entitled to an award equal to the amount of its reasonable attorneys’ fees. Only a court—not the OF—can render a decision on the reasonableness of any attorneys’ fees. In turn, any association that would like its final judgment of foreclosure to include an amount equal to its reasonable attorneys’ fees must first (prior to the filing of its final judgment application) file a formal, 16-day, motion with the chancery judge presiding in the county in which the particular unit or home is situated.

The handling of these motions is rather random and inconsistent among each of the state’s 21 counties. For instance, notice to the defaulted owner is required by some judges and not required by others. Further, there are chancery judges who generally award all amounts sought and others who generally award little to nothing. There are chancery judges who consider the amount of the desired attorneys’ fees

award in relation to the amount of the underlying common expense delinquency, and others who feel the underlying amount is irrelevant. A practitioner experienced in prosecuting lien foreclosures generally knows ahead of time whether to even bother filing such a motion in light of the chancery judge involved and, if deciding in favor of it, how to structure the application to maximize the amount of the award.

### **Incorporation of Subsequently Recorded Liens**

There is no difference between the amount of the unpaid mortgage at the start of the foreclosure and the amount of the unpaid mortgage when that foreclosure reaches its final stage. In contrast, it is often the case that unpaid common expenses accrue subsequent to the lien(s) subject of a pending lien foreclosure. Those unpaid assessments must be the subject of an additional recorded lien, as a lien can only include amounts that have already been assessed.<sup>14</sup> However, the OF cannot include in the association’s final judgment of foreclosure any amounts (other than the amount of attorneys’ fees awarded by chancery) *not* part of a recorded lien.

A foreclosing association need not address this by delaying the pending foreclosure and having the complaint amended to contemplate each subsequently recorded lien. Instead, the association need only motion directly to the OF, asking that the final foreclosure judgment include these ‘additional sums.’ The application should be entitled “motion for additional sums,” and be supported by an association officer’s certification that breaks down the additional sums and attaches the subsequently recorded lien(s) as an exhibit.

An association can take account of subsequently recorded liens after its final judgment of foreclosure has been entered.<sup>15</sup> The OF will enter an amended final judgment of foreclosure so long as

it receives a motion in that regard within 20 days of the association's receipt of the final judgment of foreclosure with respect to which an amendment is sought. This motion must be on notice to chancery of the vicinage in which the particular unit or home is situated.

### Lien Foreclosure Final Judgment

The OF coordinates and manages the entry of all foreclosure judgments by the superior court.<sup>16</sup> So long as the association's foreclosure judgment application/motion is filed not more than six months after default was formally entered, it need not be on notice to the owners/defendants. After the passage of six months, the application/motion must be on notice to the owners/defendants.

Such application/motion is complete, and likely to result in the entry of final judgment, so long as it includes: 1) notice of motion; 2) proof of service; 3) certification of non-military service regarding all defendants; 4) certification of search fees and costs; 5) proof of all relevant master deed, declaration and/or bylaws provisions; 6) certification of amount due executed by an association officer; 7) entered order directing the OF to include in the final judgment a sum certain as attorneys' fees (if any); 8) copy of each recorded lien contemplated by the foreclosure; 9) proposed form final judgment; and, 10) proposed form writ of execution.

The requisite certification of amount due must not include a component for attorneys' fees. It must set forth separately, and with authority provided, each aspect of the alleged amount due (*i.e.*, late fees, interest, fines, special assessments, the accelerated portion of any unpaid common expenses, membership and/or capital contributions).

### Common Lien Foreclosure Judgment Application Deficiencies

The OF has identified several com-

mon mistakes made by counsel seeking the entry of a lien foreclosure final judgment. First, the OF will reject any application that includes a right of possession in the proposed form of order. Second, the OF enforces a strict set of guidelines concerning deceased owners. Running afoul of this will result in the application's rejection. Third, a proposed form of final judgment that identifies the Division of Taxation as a party will be rejected. Fourth, a proposed form of final judgment that includes the amount of attorneys' fees that have not first been awarded by superior court order will be rejected. Lastly, a proposed form of final judgment that includes amounts in excess of the amounts set forth and contemplated by the relevant recorded liens will be rejected.

### Post-Sheriff's Sale Possession

As intimated above, and in contrast to a residential mortgage foreclosure, a lien foreclosure final judgment does not carry with it a right of possession to be enjoyed by the eventual sheriff's sale purchaser. In turn, the lien foreclosure judgment will not provide for automatic possession of the foreclosed unit or home. Instead, the sheriff's sale purchaser must obtain formal possession (assuming the owner has not already vacated the property) via court order. That court order can be procured via formal, 16-day, motion made to the chancery judge presiding in the county in which the particular unit or home is situated.

### Conclusion

As a result of statute, court rule and OF policies and procedures, the foreclosure of a lien is different, in substance and procedure, from the foreclosure of a residential mortgage. Counsel's experience with the prosecution of a residential mortgage foreclosure will be merely helpful, not determinative, to his or her prosecution of a lien foreclosure. ☞

**David Byrne** is a partner in, and chair of, Ansell Grimm & Aaron's community association practice group, representing condominiums, cooperatives and homeowners associations in New Jersey, Pennsylvania and New York. He currently holds officer positions with the Big Apple Chapter and the Hudson Valley Chapter of Community Associations Institute (CAI).

### ENDNOTES

1. N.J.S.A. 46:8B-1 *et seq.*
2. See, *e.g.*, 11 U.S.C. sec 1322(b).
3. N.J.S.A. 46:8B-21f.
4. A superior court judge will address any contest first, and when it becomes uncontested, refer it to the OF.
5. See, *e.g.*, R. 1:34-6; R. 4:61-1; R. 4:64-7.
6. N.J.S.A. 46:8B-21.
7. N.J.S.A. 46:8B-21a.
8. *Id.*
9. See, N.J.S.A. 2A:50-53 *et seq.*
10. *Id.*
11. N.J.S.A. 2A:50-56.
12. See, N.J.S.A. 2A:50-53 *et seq.*
13. N.J.S.A. 46:8B-21f.
14. See, N.J.S.A. 46:8B-17.
15. See, R. 4:49-2.
16. R. 1:34-6.