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“ . . . more brilliant than we thought we were.”

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On January 23, 2006, Carl Lisman, Esq. was speaking to the Maryland DHCD Task Force on Common Ownership Communities when he made the statement: *“By analogy we looked to municipal taxes in home mortgages and came up with what we thought at the time a very innovative and good solution. We are now convinced that we are more brilliant than we thought we were.”*

Commissioner Lisman served on the Uniform Law Commission (“ULC”) drafting committee for the 1982 Uniform Common Interest Ownership Act (“UCIOA”), which Nevada adopted as NRS Chapter 116 in 1991. Commissioner Lisman was speaking of the UCIOA Superpriority Lien (“Superpriority”) language found at NRS 116.3116(2).

On September 18, 2014, the Nevada Supreme Court determined, in *SFR Investments Pool 1, LLC vs. U.S. Bank*, that a Common-Interest Community (“CIC”) Superpriority can extinguish a First Deed of Trust (“FDOT”). On October 6, 2014, U.S. Bank petitioned the Court for rehearing, and was denied on October 16, 2014.

The *SFR* ruling sent shock waves throughout Nevada and the United States. Critics of the decision, and the Superpriority concept, point to examples of *“pennies on the dollar”* purchases by *“greedy vulture investors,”* and complain that the Borrower/Homeowner will now be stuck with the entire loan amount with no collateral. These comments show a misunderstanding of the brilliance of what the ULC created. The Nevada Supreme Court got it right.

Commissioner Lisman’s analogy of tax liens is helpful to understand the policy behind why a CIC Superpriority is also a superior lien to the FDOT. CICs, like municipalities, manage and maintain infrastructure (Common Elements) that the municipality would otherwise have to maintain through taxes. CIC’s also operate on zero budgets. Therefore, it makes sense that a CIC foreclosure would have the same effect as a municipal tax foreclosure in Nevada; it motivates the Lender to pay the amounts necessary for maintenance of the infrastructure, which preserves property values.

Initially these properties sold for *“pennies”* only because purchasers thought they were purchasing subject to the FDOT. On December 12, 2012, when NRED issued its Advisory Opinion which concluded that the Superpriority would extinguish a FDOT, CIC foreclosure sales were in the 5% of fair market value (“FMV”) range. From then until just before the *SFR* ruling, prices slowly increased to 20% - 30% of FMV, as understanding of the law increased. However, prices remained depressed because of the legal costs purchasers had to expend in battles with

Lenders over the interpretation of the law. The day after the ruling, attendance at the sales, and the prices paid, skyrocketed.

As David Stone, President of Nevada Association Services, Inc. explains: *“Since the Nevada Supreme Court’s Ruling, I have seen properties at HOA foreclosure sales being sold for record amounts of money. In some cases, \$50,000 over the opening bid. This is great for junior lienholders which, according to the Supreme Court, includes the lender. Also, I have seen the number of people buying at the HOA foreclosure sales increase. Usually, our sales will draw 20 people to bid. In our first sale after the Court’s decision, NAS had almost 90 people attend the sale. Truly amazing.”*

Despite what opponents of the law say, the Superpriority is actually good for Lenders and Borrowers. As CIC foreclosure sale prices stabilize at FDOT foreclosure sale price levels, the Borrower’s loan debt, and FDOT’s lien, are satisfied as if a FDOT foreclosure sale had taken place because the Lender is paid from the excess proceeds of the CIC sale. This gives Lenders the flexibility to choose to either pay the Superpriority to preserve a first position on the property, or let the property go to CIC sale and receive a payoff as if they had conducted their own sale, and protects the Borrower from the effect of the loss of collateral.

And, investors were not the only purchasers at these sales who benefitted from the *SFR* ruling; many properties have been taken in reversion by CICs at their own sales. This means many CICs may own property free and clear of the FDOT (and any other subordinate liens), which may, in the future, be sold to benefit all of the Unit Owners in the community. At this early stage title companies are reluctant to issue clear title, and there are other related legal issues that still need to be decided before the dust settles completely. Therefore, Boards should check with legal counsel to assess their options.

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