

COLORADO FORECLOSURE LAWS

INCLUDING:

- **COLORADO OWNER ASSOCIATION ASSESSMENT LIENS AND FIRST LIEN AND SECOND MORTGAGE FORECLOSURES**
- **SUMMARY OF THE PUBLIC TRUSTEE FORECLOSURE PROCESS IN COLORADO—THE PROCESS USED BY MOST LENDERS**
- **FAQs ON COLORADO PUBLIC TRUSTEE FORECLOSURE LAWS**
- **OWNER ASSOCIATION JUDICIAL LIEN FORECLOSURE—A VALUABLE COLLECTION TOOL**

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COLORADO FORECLOSURE LAWS

COLORADO OWNER ASSOCIATION ASSESSMENT LIENS AND FIRST LIEN AND SECOND MORTGAGE FORECLOSURES

1. Lien Priorities in Colorado.

- a. Real Estate taxes and assessments - **first lien** (with priority over all other liens)
- b. First Mortgage or first Deed of Trust - referred to commonly as first liens, but actually a **second lien**, behind real estate taxes and assessments, and also, in Common Interest Communities where the Community is subject to the Colorado Common Interest Ownership Act, CCIOA), these lenders are also junior the owner association's 6 month super or limited priority lien
- c. Owner Association liens for assessments and other charges (if the Community is subject to CCIOA) - a **third lien**, yet, consistent with the common practice of referring to the senior loan as a first mortgage, owner association assessments liens, in Communities subject to CCIOA, are typically described as second liens
- d. So-called Second Mortgages - **fourth lien** (if the Community is subject to CCIOA)
- e. So-called Third, Fourth, etc. Mortgages - **fifth lien** for the third mortgage (if the Community is subject to CCIOA), **sixth lien** for the fourth mortgage, etc. Transcript of Judgments or other encumbrances against the property fall into this category as well.

2. Owner Association assessment liens as “second priority” liens/Subordination of owner association assessment liens in the declaration.

In the case of owners assessment liens, normally a first deed of trust encumbering the subject property, which deed of trust secures a promissory note evidencing the loan, will be senior to a owners association assessment lien regardless of when the lien was recorded. The reason for this is that most owners association declarations set forth that any lien in favor of the owners association resulting from the failure of the property owner to pay assessments to the association is subordinate to the lien created by a purchase money mortgage. This provision is a requirement for approval of FHA, VA, FNMA and FHLMC financing on properties which involve an owners association.

3. The super lien, or limited priority lien, allowed to owner associations under CCIOA.

A priority lien is created pursuant to a part of CCIOA -- CRS 38-33.3-316(2)(b)(1).

CCIOA which gives associations a lien over the first deed of trust for an amount equal to the common expense assessments which would have come due during the six months immediately preceding the institution of a foreclosure by either the association or the holder of a lien senior to the association.

4. **When a lender becomes an owner they are obligated to pay assessments.**

In a Common Interest Community subject to CCIOA, once a lender (whether they had a first or second or other junior lien) has acquired title to the property through foreclosure, the lender will become the property owner and will be required to pay the owners association assessments which accrue from and after the date of acquisition of title. In Colorado public trustee foreclosures, title is deemed to be acquired at the time all redemption periods have expired. Therefore, this is the point in time in which the mortgage lender must begin to pay the owners association assessments which accrue subsequent to that date.

***SUMMARY OF THE PUBLIC TRUSTEE FORECLOSURE PROCESS IN COLORADO
—THE PROCESS USED BY MOST LENDERS***

The following points/paragraphs summarize the Public Trustee foreclosure process used by most lenders. The process is one of “due process” or procedure, requiring notice to persons with interests in the property to be foreclosed.

1. Notices required prior to the start of foreclosure. Prior to an attorney for a lender initiating a foreclosure, the deed of trust or mortgage being foreclosed upon must be reviewed by the lenders attorneys, to ensure that any notice requirements have been complied with. This is especially true with the 30-day notice requirement provided for in the FNMA/FHLMC uniform instrument deed of trust and the 20 days notice requirement under Colorado Law for all consumer loans such as second deeds of trust on personal residences.
2. Lender attorney orders title work. Once any notice requirements are complied with, a foreclosure certificate or foreclosure guarantee is obtained from a title company in order to determine the parties who have a record interest in the property. Those parties are entitled to receive notice of the foreclosure. The foreclosure certificate contains copies of all recorded instruments since the recording of the deed of trust which is to be foreclosed, and now, also the notice, if any, recorded by an owners association.
3. Lender choice on how to foreclose: through the public trustee (administratively) or through the courts (judicially). A deed of trust granted to a Colorado public trustee may be foreclosed through a power of sale public trustee foreclosure proceeding. A mortgage or a deed of trust to a private trustee must be foreclosed through a judicial foreclosure (considerably longer and more expensive and the same as the process used by associations to foreclose their liens).

4. The Public Trustee process begins with an NED. The public trustee foreclosure begins with the filing of a Notice of Election and Demand for Sale with the public trustee in the county in which the property is situated. At the time of filing of the Notice of Election and Demand, all of the required notices to interested parties along with pre-addressed stamped envelopes for the mailings must also be delivered to the Public Trustee.
5. Foreclosure sale date set and advertised. The public trustee must set the foreclosure sale no less than 45 days and no more than 60 days from the date of recording of the Notice of Election and Demand. During that period of time, the property is advertised for sale in a newspaper of general circulation for four consecutive weeks.
6. Notice of cure rights to be mailed. The public trustee must mail a notice to the grantor of the deed of trust and to the owner of the property informing them of their statutory right to cure the default and reinstate the loan (if the default involves only the failure to pay money). These notices, the necessary mailing list and stamped envelopes are prepared and delivered to the public trustee by the attorney for the lender, and it is the lender's attorney not the public trustee who is responsible for the accuracy of the listed parties entitled to receive notice of the foreclosure.
7. Notice of Sale to be mailed. The public trustee must mail a copy of the Notice of Sale, as it appeared in the newspaper, to the grantor of the deed of trust at the address given in the deed of trust, and must mail a like notice to each person who appears to have acquired a record interest in the subject property subsequent to the recording of the deed of trust and prior to the recording of the Notice of Election and Demand for Sale. Again, the attorney for the lender must provide the necessary envelopes and mailing list to the public trustee.
8. Notice of Redemption Rights. Additionally, the public trustee must mail a notice to the grantor of the deed of trust, any subsequent owner of record and to other persons having a right to redeem informing them of their statutory rights of redemption after the sale.
9. Order Authorizing a Public Trustee Sale. During the period between the recording of the Notice of Election and Demand and the sale date, the holder of the deed of trust being foreclosed must file a separate limited court action in a Colorado District Court to procure an order authorizing sale. This action is commonly referred to as a "Rule 120 proceeding," because the matter is heard pursuant to Rule 120 of the Colorado Rules of Civil Procedure. The purpose of this procedure is to provide the owner of the property with a forum in which they may contest the issue of whether a default exists under the note and deed of trust. Rule 120 also has a procedure for compliance with the Soldiers and Sailors Civil Relief Act of 1940.
10. Court Mailing of Notice of Rule 120 Hearing. The Clerk of the Court must mail a notice prior to the hearing date notifying all interested parties of the date of the hearing.



11. Court action approving and authorizing the foreclosure sale, if no objections are filed. If no response is timely filed prior the hearing date, the court will enter the order authorizing sale without a hearing. If a response is filed, a court hearing is set for a later time, and the initially scheduled foreclosure sale will be continued until the order authorizing sale is procured.
12. Bid to be submitted by the lender's attorney, after the order authorizing sale has been entered. After the order authorizing sale has been entered, the attorney must submit a written bid to the public trustee along with a conformed copy of the order authorizing sale prior to the sale date. The bid letter must contain a complete accounting of the indebtedness and be in the form required by state statutes. If the owner of the property does not timely cure the default before the foreclosure sale, the public trustee will conduct the sale and bid in the amount specified by the holder of the note in its written bid, or in an oral bid made at the sale itself.
13. Deficiency Bids. A lender can bid an amount less than its total indebtedness at the foreclosure sale and thereby establish a claim for a deficiency. If this is done it is essential that the lender have an appraisal of the property conducted prior to the foreclosure sale in order to support the deficiency claim.
14. Owner cure rights and withdrawal of the foreclosure upon cure. If owner chooses to cure the default by exercising his statutory right to cure, he must pay the necessary funds directly to the public trustee. After the owner files an intent to cure, the lender, through the attorney for the lender, must submit to the public trustee a written statement which contains a complete breakdown of the funds necessary to cure. Upon payment of the cure proceeds, the public trustee will inform the lender's attorney's office of the cure. Upon receipt of the funds and upon filing with public trustee of a "withdrawal" of the foreclosure prepared by the attorney, the public trustee will issue a check to the lender for the cure amount and return the funds along with original note and deed of trust to the attorney. Upon receipt of the cure proceeds and original documents from the public trustee, the attorney will forward them on to the lender.
15. Effect of the foreclosure sale, if it occurs/Certificates of Purchase. If the foreclosure sale is held and the holder of the note is the successful bidder at the foreclosure sale, the public trustee will cancel the note (or if a deficiency bid is made, will reflect the amount of the deficiency on the note) and issue a "Certificate of Purchase" to the holder of the deed of trust as the successful bidder. If a third party is the successful bidder, the holder of the deed of trust foreclosed will be paid the amount of the holder's bid from the proceeds of the sale.
16. Junior Lienor Redemption Rights. Junior lien holders may redeem if they timely file a notice of intent to redeem within 8 business days from the date of the sale. The Public Trustee must provide redemption figures within 14 days after the sale, and the lien holder must then redeem 15-20 days after sale. The junior lienor having the most senior lien

according to the public records has the first rights to redeem. Each subsequent lienor in succession is allowed an additional five-day period to redeem according to the priority of his lien. It should also be noted that if a Federal Tax Lien exists on the property, the IRS under Federal law has in its favor 120 day redemption period.

17. Deed issued by the Public Trustee, after expiration of redemption periods without any redemption occurring. If no redemption is made, the public trustee, upon being presented with the original Certificate of Purchase, will issue a public trustee's deed to the holder of the Certificate of Purchase. The holder of the Certificate of Purchase must make a timely demand upon the public trustee to issue the public trustee's deed. The public trustee's deed cannot be executed and recorded less than 15 days after the date of the sale.
18. Possession of the Property. After the public trustee's deed is issued, it may be necessary for the lender, who has now become the owner, to file an "Unlawful Detainer" or "Eviction" lawsuit to evict any occupant in the property, if they refuse to relinquish possession.
19. Conveyance of the Property by the Lender (now owner) to HUD or VA. Subsequent to issuance of the public trustee's deed, the lender's attorney should proceed with the necessary title acquisition procedures on HUD and VA loans so that title is timely delivered to the Veterans Administration or to HUD.
20. Notes on the above "Summary." Although the foregoing summary does not cover all of the details of a public trustee's foreclosure in Colorado, nevertheless, we hope it is helpful to you to understand the process more clearly.

FAQs ON COLORADO PUBLIC TRUSTEE FORECLOSURE LAWS

1. **What are the changes to the foreclosure law beginning January 1, 2008 that may affect HOA's? Can you briefly describe those changes?**
 - a. House Bill 2007-1157, effective January 1, 2008, contains numerous revisions to Colorado's foreclosure law (C.R.S. § 38-38-101, *et seq.*). The overall intent of the revisions to the law is to modernize and simplify the foreclosure process in Colorado while providing owners with a better opportunity to retain ownership of their property. The most significant changes relating to owners and homeowners are:
 - i. Expansion of time in which an owner may cure the default prior to the foreclosure sale; and
 - ii. Elimination of the owner's right to redeem their property following a foreclosure sale.

2. How long does a homeowner have to pay or ‘cure’ a lender's public trustee foreclosure before sale?

The "cure period" or the timeframe in which a homeowner may "cure" delinquencies is up to the date of a public trustee's sale. This period was increased as of January 1, 2008.

3. What notice is required to be provided to the HOA in the event that a first lien lender is commencing foreclosure proceedings? What rights does the HOA have in the event the lender is foreclosing?

Unless a proper address is recorded with the County Clerk as described herein, the association will receive no notice of the impending foreclosure and the association's interest in the property may be extinguished, perhaps forever. However, in the event proper notice of address is recorded in the public records at the appropriate County Clerk and Recorder's office, notice will be provided of the foreclosure. The HOA has the right to cure the default or the right to redeem the property should it go to foreclosure sale.

4. In general, does the HOA have any rights to recover assessments owing the HOA in the event of foreclosure on a property in the common interest community?

Yes, the Colorado Common Interest Ownership Act (CCIOA) provides an association a lien right on a unit or lot in the event of unpaid assessments (regular or special). In the event of a foreclosure, under the law, the HOA has the right to recover six months of assessments. This is known as the ‘super lien’ and was established for the protection of owners who are members of HOA's.

5. What sort of "address notice" should the HOA maintain on file with the appropriate County authorities so that other creditors notify the association of foreclosure action?

- a. In order to ensure your community association receives notices of foreclosures on homes located in your association, the association should take the following steps:
 - i. Seek the assistance of qualified legal counsel.
 - ii. A notice of address should be recorded in the public records at the County Clerk and Recorder's Office of the County where your association is located that provides notice of the address where your association will receive notices of foreclosure per the Declarations.

- iii. Your association should determine where the association would like to receive notices of foreclosure. (Associations may prefer the community manager and/or legal counsel to receive such notices.)
- iv. Upon the first indication of an owner's problem in paying assessments on a timely basis, and consistent with the association's collection policy, a Notice of Assessment Lien that includes the association's address should be recorded.
- v. Liens in your association records for past due assessments should include the address or addresses where your association would like to receive notices of foreclosure. You may also want to include your attorney's address, even if the lien also references your community manager's address.

6. Has the period of time it takes a lender to foreclose been shorter?

No, the time it takes, from start to finish is still approximately 4-1/2 months.

7. May the HOA itself commence foreclosure proceedings for dues or assessments due to the HOA?

Yes, the owners association itself may commence foreclosure proceedings, if funds are due the association. Foreclosure proceedings should not be commenced lightly and should always be done with the assistance of a qualified attorney.

8. How does an HOA initiate foreclosure proceedings for assessments owing it? When should the HOA take action?

An owners association contemplating initiating foreclosure proceedings should retain the services of a qualified attorney to assist the association. As with the management of all assessments or dues receivable due to the HOA, it is important that consistency and uniformity be practiced and policies in this area should be reduced to writing, for all owners to access, consistent with state statutes that require a collection policy.

9. Are associations always junior to lender public trustee foreclosures?

No, only the first lien holder is superior to the association, and the first lien lender is also subject to the super lien.

OWNER ASSOCIATION JUDICIAL LIEN FORECLOSURE – A VALUABLE COLLECTION TOOL

1. Introduction to Owner Association Lien Foreclosures.
 - a. Collection Duties. Board members have a duty to collect assessments due an owner association.
 - b. Typical Owner Association Collection Tools. Most owner associations use the following collection tools:
 - i. A Collection Policy (required under Senate Bill 05-100);
 - ii. Late Charges;
 - iii. Interest charges;
 - iv. Other fees (if allowed under the governing documents);
 - v. Letters from the manager and/or association to the delinquent owner;
 - vi. Additional notice of lien filing/recording; and
 - vii. County Court lawsuit (for breach of the owner’s agreement to pay assessments).
 - c. Additional Collection Tools. In addition to these remedies, the following are sometimes used:
 - i. Suspension of voting rights (notice and hearing may be required);
 - ii. Suspension of rights to use recreational amenities or common elements (notice and hearing may be required); and
 - iii. Utility shut offs (notice and hearing may be required and consultation with the owner association’s legal counsel is recommended). [Note: some municipalities preclude utility shut offs as a collection remedy.]
 - d. The other additional collection tool that owner associations should consider: HOA foreclosures. An additional collection remedy that owner associations should consider is judicial foreclosure of the assessment lien. This option should be evaluated regularly and used aggressively. However, in order to properly evaluate the foreclosure option, owner associations and their boards and managers must understand the judicial foreclosure process.
2. The Basics of the Judicial Foreclosure Process. Most declarations grant the owners association a lien against an owner's unit for unpaid assessments. In addition, the Colorado Common Interest Ownership Act (CCIOA) also grants owner associations a statutory lien for all unpaid assessments coming due after July 1, 1992. An owner association's lien can be foreclosed through a judicial foreclosure (a District Court lawsuit). A judicial foreclosure process is required to be followed versus the public trustee foreclosure process used by lenders to foreclose on deeds of trust.

3. When Should An Owner Association Foreclose? An owner association should consider foreclosing its lien if all or some of the following apply:
 - a. The property is not already involved in foreclosure by the first lien lender;
 - b. The owner is chronically delinquent in paying assessments;
 - c. Delinquent assessments cannot be collected through a County Court collection lawsuit (e.g., the owner cannot be located for service, or the owner is judgment-proof);
 - d. There is equity (market value vs. balance of first mortgage) in the property in excess of approximately \$20,000;
 - e. The owner association has a high delinquency ratio compared to owners that are paying;
 - f. If there is no equity and a change of ownership is desired; or
 - g. If your owner association has a high delinquency ratio compared to owners that are paying repeat delinquent owners or otherwise uncollectible delinquent accounts, the association should consider a judicial lien foreclosure.

4. The Judicial Foreclosure Lawsuit – Court Order Sought to Allow a Sheriff’s Sale of the Property.
 - a. Lawsuit filed. To start a judicial foreclosure, an owner association files a lawsuit in the district court of the county where the property is located. The suit is brought against the owner and all persons who have an interest in the property as defendants. Further, a Lis Pendens is recorded against the property to give notice to any interested parties that there is pending litigation against said property.
 - b. Service of process obtained. The lawsuit is served on all defendants.
 - c. Response periods expired. Following service of the lawsuit, the defendants are allowed a short period of time to file an answer with the court. If the defendants do not answer the lawsuit, an order for foreclosure can be obtained by "default." This is sometimes referred to as a “default judgment.”
 - d. Trial is scheduled, if a response to the lawsuit is filed. If the owner files an answer, the case is set for trial in the same manner as other lawsuits.

5. Common or typical result of HOA foreclosure lawsuit. An order for foreclosure can frequently be obtained by a summary judgment motion without having to go to trial, or

the defendants default and do not answer.

6. Court Ordered Foreclosure by the Sheriff. The key steps in the Sheriff sale process (similar to the Public Trustee process) are as follows:
 - a. After a foreclosure order is issued by the court, either by default, summary judgment or trial, that order is sent to the County Sheriff by the owner association's attorneys.
 - b. The Sheriff schedules a sale date. The initial scheduled sale date must be no less than 110 calendar days after the date of the recording of the Lis Pendens.
 - c. Once the sale dates is set, the Sherriff publishes notice of the sale in a local newspaper. The Sherriff also sends notices to all persons who have an interest in the property.
 - d. The owner association submits a bid to the Sheriff before the sale. The bid is typically the amount of money that the owner owes the association (including assessment late fees, interest, fines, attorney fees and costs incurred in the foreclosure), and not additional sums or cash. As such, the owner association bids its debt (a sort of paper bid only) without any cash paid or bid at the sale. The bid is generally for the total debt owed to the owner association.
 - e. A sale (held by the Sheriff in an auction format) occurs at the Sheriffs office.
 - f. The highest bidder at the sale receives a "certificate of purchase" not a "deed."
 - g. The owners association is not always the successful bidder. If the owners association is not the highest bidder, it will receive the full amount of its bid (typically within two week's time) through the court and the owner association will be removed from the foreclosure process it started. The successful bidder takes the owner association's place in the foreclosure.
 - h. If the owners association is the highest bidder, it receives the "certificate of purchase."
 - i. There is no owner redemption period in a judicial foreclosure.
 - j. After the Sheriff's sale, other lienholders (i.e., second mortgage, judgment creditor, etc.) have short periods of time to redeem the property. An intent to redeem must be filed with the Sheriff's Office within 10 days after the Sheriff's sale takes place.
 - k. If nobody redeems the property, the Sheriff will issue a confirmation deed for the property to the holder of the certificate of purchase (e.g., the owner association or the successful bidder). When the deed is issued, it removes (forecloses) the owner, who is then no longer the owner, and also removes any other encumbrances against the

property (except the first mortgage and any tax liens).

7. What can an owner association do once it has a deed? Once it is the owner, an owners association can then evict the former owner or occupants. After eviction, the owner association can lease, sell the property or leave it vacant. If the owner association sells the property, the owner association is entitled to keep the net proceeds following payment of the first mortgage and closing costs.
8. What about the first mortgage? Usually, the property will remain subject to the first mortgage following the sale and issuance of a deed. (Most Declarations contain a provision which specifically makes the assessment lien subordinate to the first mortgage.)
 - a. If the property remains subject to a first mortgage, the owner association must make the mortgage payments, if it wants to keep the property.
 - b. If, at any time, the owner is not making mortgage payments, the lender may foreclose its lien and become the owner. Accordingly, when the property is subject to a mortgage, it is very important for the owners association to communicate its intent to the lender and try to work with the lender to make payments on or assume the mortgage to allow time to sell the property without the lender foreclosing.
9. General Recommendations on HOA Foreclosures. Judicial foreclosure of owner association liens is an effective collection tool.
 - It serves as an additional option or remedy to get the owner to pay.
 - It “reminds” the owner that the repercussions of choosing not to pay assessments are both serious and expensive and could potentially lead to the loss of their property.
 - A component of the effective use of assessment lien foreclosure is the board's commitment to not accept marginal payment plans and not accept payment plans, once a sale date is scheduled.