



Virginia Housing Commission
Policy Brief
August 2023

Initial Investigation into Other States' Foreclosures Processes Within Common Interest Communities

The laws related to the foreclosure of homes within common interest communities (CICs) vary widely by state. This investigation outlines recent legislation introduced in selected states aimed at minimizing foreclosure impact in CICs and provides a brief overview of some current law in other states. The ability of Common Interest Communities to foreclose serves as an enforcement mechanism because these bodies rely on all members to pay dues and assessments for the community to function. Opposition to reform is usually centered on the fact that when one member doesn't pay, it increases the burden on other members and the association.

Legislation passed in Colorado in 2022 made the most recent significant changes to a state's CIC foreclosure process in a bipartisan effort to reduce foreclosure numbers and provide more rights to homeowners. North Carolina is currently considering legislation during their 2023-2024 session with bi-partisan support that significantly amends the existing processes to benefit homeowners and control CICs. Several other states are considering or have passed reform legislation and while the processes and language vary immensely by state, it is clear there is a bipartisan effort to reduce foreclosure numbers in CICs, and often an effort to significantly limit the power of those governing bodies in the foreclosure process.

Common Interest Community Foreclosures in the Code of Virginia

In Virginia, state laws give CICs the authority to place a lien on a home and foreclose on the lien once perfected (§ 55.1-1833 of the Virginia Property Owners' Association Act and § 55.1-1966 of the Virginia Condominium Act).

Associations in Virginia can use nonjudicial foreclosure to enforce a memorandum of lien, meaning court supervision is not required to foreclose.

The statutes providing the nonjudicial foreclosure remedy also require CICs to file a memorandum of lien in the clerk's office of the county or city circuit court. In homeowner associations (HOAs), this must be filed within 12 months from the time of the first payment while condos (COAs) require a tighter timeline of within 90 days. Before foreclosing, a CIC must give the owner at least 60 days to pay their debts before the association can sell their home. A lien does not exist forever, the CIC must initiate foreclosure proceedings or file a lawsuit to collect the debt within 36 months after filing, or else the lien will expire.

Current Virginia law does not place a limit on the dollar amount of assessments that must be unpaid before a CIC can foreclose on a lien for unpaid assessments. There is also no limit on the amount of attorney’s fees, associated costs, and interest collected, other than that it be reasonable.

Lien Priority

Lien priority determines who gets paid first following a foreclosure sale. Some liens, like property tax liens, have automatic priority over other liens.

In Virginia, once the HOA or COA lien is perfected, that lien is prior to all other liens and encumbrances, except for:

- Real estate tax liens
- Liens and encumbrances recorded prior to the recordation of the declaration, and
- HOA liens - sums unpaid on and owing under any mortgage or deed of trust recorded prior to the perfection of the assessment’s lien, and
- COA liens - sums unpaid on any first mortgage or first deed of trust recorded prior to the perfection of the assessments lien and securing institutional lenders, such as banks. (Va. Code Ann. § 55.1-1833, § 55.1-1966).

For example, in a non-judicial foreclosure, when a condo unit is sold, the proceeds would be put towards paying the first deed of trust, any outstanding real estate taxes, then the condominium lien and the costs of foreclosure.

<u>Virginia Condominium Act</u> <i>Order of Proceeds Distribution:</i>	<u>Property Owners' Association Act</u> <i>Order of Proceeds Distribution:</i>
<ul style="list-style-type: none"> • Reasonable expenses of sale (incl. attorney fees) • First Deed of Trust • Taxes, levies and gov’t assessments – fed., state, local • Association assessment liens (regardless of seniority) • Inferior secured creditor claims of record (may include other deeds of trust and Association judgment liens) • Remaining proceeds to owner 	<ul style="list-style-type: none"> • Reasonable expenses of sale (incl. attorneys’ fees) • First Deed of Trust • All taxes, levies and assessments – federal, state, local • All secured creditor claims of record in order of priority (Association assessment and judgment liens take their place in order of seniority) • Remaining proceeds to owner

(Source: Mercer Trigiani Foreclosure Flowchart)

Lien Priority in Other States

In some states, CIC liens are given a special priority status. These liens are called “super liens.” A commonly cited reason for giving super-lien status to HOA liens is that HOAs help preserve the community's value and neighborhoods may suffer if fees remain unpaid.

Nineteen other states are “super lien” states. In contrast, most other states CICs include language in their contracts that places its lien automatically in second or junior position to the mortgage. This also means a home could be in foreclosure nonjudicially before any missed mortgage payments.

- The following states allow for super liens, or some version of priority liens for community associations: Alabama, Alaska, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, Pennsylvania, Rhode Island, Vermont, Washington, West Virginia

Judicial vs. Non-Judicial CIC Foreclosures in Other States

Most states have the right to launch nonjudicial foreclosure, meaning they can foreclose on properties without a formal court proceeding. The remaining states, less than twenty, require a judicial process before foreclosing.

In a judicial foreclosure, the foreclosure is processed through the court system, providing judicial oversight. Twenty States are judicial foreclosure states, meaning a foreclosure *must* go through the court system. The remaining 30 states, including Virginia, allow lenders to pursue either a non-judicial or judicial foreclosure.

- Judicial foreclosure only states: Connecticut, Delaware, Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, New Jersey, New Mexico, New York, North Dakota, Ohio, Pennsylvania, South Carolina, Vermont, and Wisconsin
- A Colorado based law group representing 50 HOAs said in a court filing that a typical uncontested HOA foreclosure case generates between \$4,000 and \$6,000 in attorneys' fees.

Current CIC Foreclosure Laws and Reform Efforts

States With Recently Introduced/Passed Legislation

Arizona

Arizona passed legislation in 2019 to amend the CIC foreclosure process.

- The original version of this legislation required each homeowner's partial HOA payment be used to reduce attorney's fees, collections, and fines before being applied to the principle of past due assessments.
- The amended version passed reverses that order, so that current law now requires an HOA to apply partial payments to reduce the assessment debt first.
- The 2019 bill also mandates written notice be provided of fee or delinquency to homeowners 30 days prior to forwarding the account to any attorney or collections agency.
- The HOA must provide an accurate, itemized account statement to any homeowner upon request.
- The bill does not limit the amount of attorney's fees or collected costs that can be applied to a delinquent account once it moves to collections.
- Current law allows a CIC to foreclose on a home if the total past-due assessment balance is at least \$1,200, or if the owner has not paid assessments for an entire year.

Colorado

Newly passed legislation in 2022 contains several reform measures aimed at reducing foreclosures in HOAs:

- An association must provide several written notifications to residents about delinquencies and fines.
- An association is required to offer an 18 month a repayment plan prior to foreclosure in amounts greater than \$25 per month, and foreclosure moves ahead if the unit owner declines the offer, or if after accepting the offer, fails to make at least three-monthly payments within 15 days of being due.
- The bill opens small claims court as a venue for disputes, allowing homeowners who can't afford an attorney to defend themselves in a case against their association.
- An association is prohibited from charging a rate of interest on unpaid assessments, fees, or fines in an amount greater than 8% per year.
- Requires an HOA, monthly, to send each unit owner with an outstanding balance owed to the HOA an itemized list of all assessments, fines, fees, and charges owed.

- Fees, charges, late fees, and attorney fees may be subject to a statutory lien but are not subject to foreclosure.
- If an HOA violates any foreclosure laws, the property owner may seek damages in an amount up to \$25,000 plus costs and reasonable attorney fees.

Illinois

The Illinois COA and HOA law changed after the 2023 legislative session. (Section 22.1 of the Illinois Condominium Property Act)

- The law now requires board members to comply with written requests to view records of the Association within ten business days instead of 30 business days.
- In 2022, a change to the law limited direct out-of-pocket fees that an Association may charge to make copies of its records to \$375.00, with annual adjustments tied to the consumer price index. For a "rush" request within 72 hours, an Association may charge an additional \$100.00.

Nevada

Nevada passed 2015 legislation in a reaction to a 2014 Nevada Supreme Court Decision which ruled that HOAs have super-priority lien status to a home mortgage. This means the HOA could foreclose non judicially, so homeowners could be in foreclosure without ever missing a mortgage payment. Additionally, lenders lose a significant amount of investments worth more than the delinquent amount itself.

- The 2015 legislation offers a 60 day right to redemption following an HOA foreclosure sale.
- The bill also forced HOAs to be more transparent in the foreclosure process.

New Jersey

In 2018, New Jersey's foreclosure rate was about 2 ½ times the national rate. In 2019, two bills were passed with the intention of lessening the financial impact of foreclosures on CICs.

- Legislation passed in 2019 granted associations the ability to record liens for nonpayment of association assessments, even if the governing documents do not contain a specific provision authorizing a lien on unpaid assessments.
- After a 2019 bill, associations in New Jersey are entitled to "super-priority" liens covering six (6) months per year of unpaid association bills. This means the association can file papers in a mortgage foreclosure case to get paid back before the mortgage company.

North Carolina

Current law contains the following provisions:

- An assessment that is at least 30 days delinquent constitutes a lien on a homeowner's property after filing a claim of lien within the county where the property is located.
- An association may use the non-judicial process to foreclose a claim of lien on assessments if it has remained unpaid for at least 90 days. If the claim of lien consists solely of unpaid fines, interest on fines, or attorney's fees related to fines, foreclosure must proceed judicially.
- North Carolina allows for reasonable charges in connection with the preparation of statements of unpaid assessment if the charges do not exceed \$200 per non-expedited statement.
- If the unit owner does not contest the obligation to pay or validity of the sum, attorney's fees and trustee's commission cannot exceed \$1,200. This does not include incurred costs or expenses.

North Carolina is considering a bill that would make significant changes. The bill has received bi-partisan support, passed the house, and will be up in the Senate soon. Additionally, a bill to get rid of CIC foreclosures was also introduced during North Carolina's 2023-2024 session but was not heard. The introduced legislation contains the following amendments:

- The bill requires judicial foreclosure for any action to foreclose unpaid assessments, as long as the following conditions are met; (1) The unpaid assessments exceed the lesser of \$2,500 or 12 months of assessments, (2) the debt secured by the lien does not consist solely of fines or related interest or attorneys' fees, (3) the assessment remains unpaid for at least 90 days, and (4) the executive board votes to commence the proceeding against the specific owner's property.
 - The amended version of the bill lowers the threshold to \$1,500 or one year of dues, whichever is lower, to make it more "palatable" to CICs.
- Notice requirements are strengthened by requiring notice not only by certified mail, but also by phone and email to provide multiple avenues of notice.
- The bill prohibits foreclosure to enforce a lien securing debt consisting solely of fines and related fees.
 - For a lien to secure debt consisting solely of fines and related fees, the claim must be filed within 30 days from when the fine was imposed. Proceedings to enforce the lien must be instituted within 180 days after filing. This bill would also limit interest in these cases to 15% of the amount recovered.

South Carolina

In 2018 South Carolina passed the first significant legislation in the state regulating CIC governance.

- Included in the legislation is a provision that allows disputes of up to \$7,500 to be litigated in Magistrates Court, which helps homeowners navigate the process at minimal cost.
- Associations are required to record all their rules and regulations with the county deeds office, those that fail to do so could have legal trouble enforcing rules and powers like foreclosure.
- The act also required the S.C Department of Consumer Affairs to receive HOA-related complaints.

A bill considered in 2020 would prohibit enforcement of any provision in a homeowner's association's governing documents granting the homeowners association the authority to foreclose on the primary residence of an association member. However, a homeowner's association may place a lien on the property for unpaid dues, fines, or other fees. The bill remains in the Judiciary committee.

Relevant CIC Foreclosure laws in Other States

Alaska

- The proceeds of a foreclosure sale must be applied in the following order:
 - (A) the reasonable expenses of sale;
 - (B) the reasonable expenses of securing possession before sale including holding, maintaining, and preparing the unit for sale, payment of taxes and other governmental charges, premiums on hazard and liability insurance;
 - (C) satisfaction of the lien of the association;
 - (D) satisfaction in the order of priority of a subordinate claim of record; and
 - (E) remittance of any excess to the unit owner;

Arizona

- Inclusion of fines or penalties in a lien is prohibited.
- The amount of past due debt must exceed \$1,200 or be 12 months past due before a homeowner's association can pursue a foreclosure to remedy the balance due. ARS Statute 33-1807)
- The proceedings to enforce the lien must be instituted within six years after the full amount of the assessment becomes due.

California

- An association seeking to collect delinquent regular or special assessments of an amount less than \$1,800 is not permitted to collect through either judicial or non-judicial foreclosure. They must seek other remedies, such as small claims court (Cal. Civil Code 5720)
- CICs can charge an interest of up to 12.00% on unpaid fines and prohibits the inclusion of fines or penalties in a lien.
- If a CIC forecloses using a nonjudicial process for delinquent assessments, the foreclosure is subject to a 90-day right of redemption following the sale of the home.
 - In most cases, to redeem the property following the foreclosure sale, the property owner must pay; the total lien amount, interest, and attorney's fees and costs. In California, a homeowner must also pay any repair costs the purchaser paid that were reasonably necessary to preserve the property.

Colorado

- HOAs have a super lien that has priority over a first deed of trust to the extent of six months' worth of common expense assessments that would have become due before a foreclosure. (Colo. Rev. Stat. § 38-33.3-316)
- In non-judicial foreclosures, the balance of assessments and charges must be equal to or exceed six months of common expense assessments to secure a lien.

Connecticut

- An association can't foreclose a lien on a unit unless the unit owner owes a sum equal to at least two months of common expense assessments.

District of Columbia

- Condominium associations are granted super lien status over first mortgage lienholders, which permits up to six months of unpaid assessments upon foreclosure.
- Unpaid assessments constitute liens from the time the assessment is due and payable.
- Nonjudicial foreclosure may require a foreclosure mediation process.
 - Due to this process, lenders have commonly opted to foreclosure in court to avoid mediation.

Florida

- In an HOA, once fines reach over \$1,000 an association has the authority to place a lien on your property. (FL 720.305)
 - Although it cannot exceed \$100, a fine can be levied every day that a violation occurs. Altogether, you can fine residents a max of \$1000 for an ongoing offense. Once a fine has reached \$1000, a lien may be placed against the resident's property.
 - COA fines can't become a lien.
- No minimum amount required to file foreclosure for unpaid dues/assessments.
- Foreclosure must go through the judicial process, meaning the court assigns a foreclosure sale date.
- There is no limit on collection of attorney's fees other than it must be reasonable.
- Unless otherwise provided by bylaws, interest rate on unpaid assessments accrues at 18% annually and late charges for HOA fees are limited to \$25.00 or 5% of the past-due amount.
- Foreclosure cannot occur until 45 days after the homeowner has been provided notice of the association's intent to foreclose.
- COAs must file a foreclosure suit within one year of the filing of the lien, HOAs have five years.

Georgia

- No foreclosure action against a lien shall be permitted unless the amount of the lien is at least \$2,000.00 in assessments, charges, and costs, including reasonable attorneys' fees actually incurred, before an association can foreclose. (Ga. Code Ann. § 44-3-109(c), 44-3-232(c))
- The recording of the CC&Rs or the Declaration of Condominium constitutes record notice of the lien's existence. No further recordation for any claim of lien is required. (Ga. Code Ann. § 44-3-232(a), § 44-3-109(a)).
- The HOA or COA may charge interest on unpaid assessments from the time the assessment became due at a rate not to exceed 10% per year.
- The HOA or COA must initiate an action to enforce the lien within four years after the assessment or installment first became due.

Louisiana

- There is no minimum amount of unpaid assessments due to get a lien. However, past due fines or fees must total at least \$250.00 to be included in a lien.

Maryland

- If the assessment is uncontested, the lien is created non-judicially by filing the Statement of Lien.
- In cases where the assessment is contested in court, the lien is created judicially by the filing of a Statement of Lien in land records, upon the order of a court that a lien be imposed.
- The owner of the affected property must be given notice within two years of nonpayment.
- Maryland is a super lien state, meaning the portion of the homeowners association's liens on the lot have priority over the holder of a first mortgage or deed of trust, not exceeding \$1,200.
- Foreclosure action must be started within 12 years from the date the statement of lien is recorded.

Ohio

- An association is entitled to a lien for unpaid assessments once the amount is ten days late.
- Foreclosure must be initiated within five years after the lien is recorded.

Pennsylvania

- As a judicial foreclosure state, Pennsylvania only allows for foreclosure cases to be resolved within the court system.
- The CIC gets a lien once the homeowner fails to make any required payments, there is no additional requirement that the HOA provide notice of the lien before it is attached.
- CICs may charge interest up to 15% per year.
- A CIC must initiate foreclosure within four years after the assessment becomes payable.
- HOA or COA gets a super lien for the assessments that came due during the six months immediately preceding the foreclosure sale, but only to the extent that the six months' unpaid assessments are paid out of the proceeds of the sale. (68 Pa. Cons. Stat. § 5315(b), § 3315(b))

Nevada

- Nine months of assessments have super-lien status. (Nev. Rev. Stat. § 116.3116).
- Nevada is one of many states that adopted some version of the Uniform Common Interest Ownership Act.

Tennessee

- Condominiums have the power to impose liens and initiate foreclosure, however there is no law in Tennessee governing HOA liens. HOAs can impose liens and initiate foreclosures as provided within their CC&Rs.
 - A COA can only take the non-judicial foreclosure route if its governing documents allow.
 - A COA must begin foreclosure proceedings within 6 years of perfecting the lien.
- For newer condominiums (after 2009), liens automatically attach to the property as soon as the HOA fee becomes due (the lien may be foreclosed by judicial action), then condo boards perfect the lien by filing it within the county recorders office.
- No minimum dollar fine amount for foreclosure

Texas

- HOA can't foreclose a lien that consists solely of fines and attorney's fees associated with those fines.
 - Once the HOA gets a money judgement, it can potentially take money from the homeowner's bank account or garnish the homeowner's wages.