

**Department of Legislative Services**  
Maryland General Assembly  
2013 Session

**FISCAL AND POLICY NOTE**  
**Revised**

House Bill 811

(Delegate Niemann)

Environmental Matters

Judicial Proceedings

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**Residential Property - Foreclosure of Liens by Common Ownership Communities**

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This bill establishes a procedure that the governing body of a condominium or homeowners association (HOA) must follow to foreclose on a lien on residential property. The bill authorizes the Commissioner of Financial Regulation to adopt regulations to carry out the bill's requirements.

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**Fiscal Summary**

**State Effect:** Minimal decrease in special fund revenues for the Department of Housing and Community Development (DHCD) in FY 2014 and subsequent years due to a decrease in the number of prefile and postfile mediation fees received from unit owners or lot owners facing foreclosure. No effect on expenditures.

**Local Effect:** The bill does not directly affect local governmental operations or finances.

**Small Business Effect:** Minimal.

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**Analysis**

**Bill Summary:** The bill requires a governing body of a condominium or HOA to send a written notice of intent to foreclose (NOI) to a debtor and, if the property is not occupied by the debtor, the occupant of the property. The NOI must be sent at least 45 days before the filing of an action to foreclose a lien. The governing body must send the NOI by certified mail, postage prepaid, return receipt requested, bearing a postmark from the U.S. Postal Service, and by first-class mail.

The bill requires that an order to docket (OTD) or a complaint to foreclose a lien must include an affidavit stating the default date and the nature of the default as well as state that a NOI was properly sent to the debtor and the date it was sent. The OTD or complaint to foreclose must be accompanied by (1) the original or a copy of the recorded declaration or the contract by which the lien is created; (2) a statement of the debt remaining due and payable; (3) a copy of the lien; (4) an affidavit that complies with the federal Servicemembers Civil Relief Act, if any defendant is an individual; and (5) a copy of the NOI.

The bill requires that a copy of the OTD or complaint to foreclose and all other papers filed with the OTD or complaint be served on the debtor by personal delivery of the papers in accordance with the Maryland Rules. A foreclosure sale may not occur until at least 45 days after this service is made. The bill also requires that a notice of the time, place, and terms of a foreclosure must be published in a newspaper of general circulation in the county of the pending action at least once a week for three successive weeks. The first publication may not be less than 15 days before the sale, and the last publication may not be more than a week before the sale.

The bill grants the debtor the right to cure the default by paying the amount of the lien plus costs incurred in the foreclosure action at any time up to one business day before the foreclosure sale. The governing body, or its agent, must provide the debtor, or the debtor's attorney, the amount needed to cure the default and payment instructions within a reasonable timeframe.

The statute of limitations for failure to comply with the provisions of the bill is three years after the date of the order ratifying the sale.

### **Current Law:**

*Condominiums:* A unit owner is liable for all assessments or installments of assessments coming due while owning the unit. The Maryland Condominium Act (MCA) authorizes the governing body of a condominium to charge up to 18% interest on any delinquent assessment or installment not paid when due. A condominium may charge a late fee of the greater of \$15 or 10% of the total amount of any delinquent assessment or installment if the delinquency has continued for at least 15 calendar days. The late charge may not be imposed more than once for the same delinquent payment.

A council of unit owners may impose a lien on a unit in accordance with MCA and the Maryland Contract Lien Act (MCLA) to recover unpaid assessments, interest on unpaid assessments, late charges, collection costs, and reasonable attorney's fees. A deficiency lawsuit following a foreclosure along with a lawsuit to recover a money judgment for

unpaid assessments may be maintained in the same proceeding without waiving the right to impose such a lien.

*HOAs:* As set forth in the declaration, a lot owner is liable for all HOA assessments and charges that come due while the lot owner owns the lot. An HOA's declaration or bylaws may also provide for a late charge of the greater of \$15 or 10% of the total amount of any delinquent assessment or installment if the delinquency has continued for at least 15 calendar days. The late charge may not be imposed more than once for the same delinquent payment.

Under the Maryland Homeowners Association Act, in addition to any other available remedies, the governing body of an HOA can also enforce the payment of unpaid association assessments and charges provided in the declaration by imposing a lien on a lot in accordance with MCLA procedures.

*MCLA:* Under MCLA, a person seeking to create a lien as a result of a breach of contract must give written notice, within two years of the breach, to the person whose property is subject to the lien. Within 30 days after service of the notice, the person served may file a complaint in circuit court to determine whether probable cause exists to establish a lien. If the court orders a lien or the property owner fails to file a complaint, the person seeking to create a lien may file a statement of lien in the land records.

A lien may be enforced and foreclosed by the lien holder in the same manner, and subject to the same requirements, as the foreclosure of mortgages or deeds of trust on property containing a power of sale or an assent to a decree. An action to foreclose a lien must be brought within 12 years following recordation of the lien statement.

Chapter 387 of 2011 (HB 1246) enabled a portion of a condominium's or HOA's lien to have priority over a holder of a first mortgage or deed of trust in the event of a foreclosure of a mortgage or deed of trust on a unit or lot. The portion of the contract lien that takes precedence over the claim of the holder of a first mortgage or deed of trust is limited to an amount of up to four months, or the equivalent of four months, of unpaid regular assessments for common expenses up to \$1,200. The governing body of the condominium or HOA must provide specified information to the holder of the first mortgage or deed of trust upon request in order to have priority.

*Foreclosure Process:* Except under specified circumstances, to foreclose on residential property in Maryland the secured party must first send a NOI then file and serve an OTD or complaint to foreclose.

Prefile mediation occurs prior to the filing of an OTD or complaint to foreclose. A secured party is not required to offer prefile mediation and may only offer it if the

property is owner-occupied; however, the secured party must include specified information with the NOI if it does offer the option. If a mortgagor or grantor elects to participate in prefile mediation, the mortgagor or grantor must notify the secured party by submitting an application within 25 days after the secured party mails the NOI. Once the secured party receives the application, the secured party must notify the Office of Administrative Hearings (OAH) within five business days. OAH must (1) schedule a prefile mediation session within 60 days after the day on which it receives the notice from the secured party; (2) notify the parties and their attorneys, if any, of the date of the prefile mediation session; and (3) issue a report describing the result of the mediation upon its completion.

An OTD or complaint to foreclose is an action to foreclose a mortgage or deed of trust; it cannot be filed until either 90 days after a default on a condition on which the mortgage or deed of trust states that a sale may be made or 45 days after an NOI and accompanying loss mitigation application are sent. An OTD or complaint to foreclose must be filed with the circuit court and a copy must be served on the mortgagor or grantor.

Postfile mediation occurs subsequent to the filing of an OTD or complaint to foreclose. A grantor or mortgagor may file with the court a completed request for foreclosure mediation within 15 days after the service or mailing of the final loss mitigation affidavit. The secured party may then file a motion to strike, accompanied by an affidavit setting forth the reasons why foreclosure mediation is not appropriate. If the secured party files a motion to strike, it must mail a copy of the motion and affidavit to the grantor or mortgagor. The grantor or mortgagor has 15 days to file a response.

The court must transmit the request to OAH within five days of receiving the mediation request. OAH must conduct the mediation hearing within 60 days of this transmittal, unless the time is extended for good cause. Upon scheduling the mediation hearing, OAH must send notice to the parties detailing the production of specified documents by a specified date. If no agreement is reached at the foreclosure mediation, the foreclosure attorney may schedule the foreclosure sale, and the grantor or mortgagor may file a motion to stay the sale if filed by a specified date.

**Background:** For more information on Common Ownership Communities (COCs), including the collection of assessments, see the **Appendix – Common Ownership Communities**.

**State Fiscal Effect:** Minimal decrease in special fund revenues for DHCD in fiscal 2014 and subsequent years due to a decrease in the number of prefile and postfile mediation fees received from unit owners or lot owners facing foreclosure.

As noted above, a lien may be enforced and foreclosed by the lien holder in the same manner, and subject to the same requirements, as the foreclosure of mortgages or deeds of trust on property containing a power of sale or an assent to a decree. Thus, a lot owner or unit owner subject to a lien foreclosed by a lien holder is able to request either a prefile or postfile mediation. Under the bill, an action to foreclose a lien on residential property that is brought by a COC governing body is exempted from the requirements relating to foreclosure mediation.

The total fees for prefile mediation and postfile mediation are \$350 and \$50, respectively. Each fee is paid to the Housing Counseling and Foreclosure Mediation Fund. While the number of lot owners or unit owners with a home subject to a lien foreclosed by a COC governing body is unknown, according to DHCD, there were 3,136 requests for foreclosure mediation in calendar 2012. To the extent that any of these requests were made by lot owners or unit owners applicable to the bill, special fund revenues decrease minimally in fiscal 2014 and subsequent years.

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### **Additional Information**

**Prior Introductions:** None.

**Cross File:** None.

**Information Source(s):** State Board of Contract Appeals; Office of the Attorney General (Consumer Protection Division); Department of Housing and Community Development; Judiciary (Administrative Office of the Courts); Department of Labor, Licensing, and Regulation; Secretary of State; Department of Legislative Services

**Fiscal Note History:** First Reader - February 20, 2013  
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## Appendix – Common Ownership Communities

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When a person purchases a house, condominium, or an interest in a cooperative housing arrangement, he or she may also be required to join an association of owners which is intended to act in the common interests of the homeowners, condominium owners, or co-op owners in the community. These associations assess dues to property owners to achieve their goals and address community problems. Collectively, these associations are often referred to as common ownership communities (COCs). The Secretary of State reports that there were over 2,500 condominiums in the State of Maryland registered with the office in 2012. It is unclear how many homeowners associations (HOAs) and cooperatives are currently operating in the State, but the number is substantial.

With a growing number of Marylanders residing in COCs, and evidence that some COCs had issues with governance, dispute resolution, and financial stability, the General Assembly authorized the Task Force on Common Ownership Communities in June 2005 (Chapter 469 of 2005, SB 229). The issues addressed by the task force included the education and training needs of COC boards and prospective buyers, availability of alternative dispute resolution services, special considerations of aging COCs, collection of assessments, and resale of homes within COCs. The task force met 10 times, held 5 public hearings, and submitted its final report in December 2006. The report's findings and recommendations have served, in subsequent years, as the basis for numerous pieces of legislation, intended to improve the operation of COCs. This legislation, enacted from 2007 through 2011:

- authorized a group of three or more unit or lot owners in a condominium or HOA to petition a circuit court to appoint a receiver in specified situations frequently found in aging communities (Chapter 321 of 2007, SB 287);
- gave the Consumer Protection Division within the Office of the Attorney General increased authority over violations of the Maryland Homeowners Association Act (Chapter 593 of 2007, HB 183);
- eased restrictions on the ability of a COC to amend its governing documents by allowing an amendment at least once every five years (Chapters 144 and 145 of 2008, SB 101/HB 1129);
- strengthened the transition process from developer to COC governing body by allowing the governing body to terminate specified contracts and requiring the

developer to provide specified documents (Chapters 95 and 96 of 2009, SB 742/HB 667);

- required the governing body of a COC to purchase fidelity insurance or a fidelity bond covering various acts of malfeasance by COC officers, directors, and other specified employees and agents (Chapters 77 and 78 of 2009, SB 541/HB 687 and Chapter 615 of 2010, HB 702); and
- granted a condominium or HOA priority over a specified portion of a lien in the event of a foreclosure of a mortgage or deed of trust on a unit or lot (Chapter 387 of 2011, HB 1246).

The task force's report also featured findings and recommendations relating to alternative dispute resolutions and the creation of an ombudsman in local governments. Montgomery County's Commission on Common Ownership Communities was referenced as an alternative dispute resolution model for future local offices. Since the report's release, Prince George's County created its Common Ownership Communities Program in 2007 with the stated purpose of assisting governing bodies as well as owners and residents of homeowners' residential condominiums and cooperative housing corporations with education, training, and alternative dispute resolution. Charles County also has an office dedicated to COCs which predates the task force.

Finally, findings and recommendations of the report which have not been codified in statute concern reserves of COCs, an insurance deductible cap for unit owners, the suspension of privileges of delinquent unit owners, uniformity of disclosure requirements and packages, and uniformity of COC depository requirements.