

CHAPTER 30 – MORTGAGE, FORECLOSURE AND LIEN PRIORITY

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CHAPTER 30 – MORTGAGE, FORECLOSURE AND LIEN PRIORITY

30.1 SECTION 1: AUTHORITY

30.1.1 This ordinance is adopted pursuant to Red Cliff Constitution, Article VI, § 1(p).

30.2 SECTION 2: EFFECTIVE DATE

30.2.1 This ordinance shall take effect upon a majority vote of the Red Cliff Tribal Council.

30.3 SECTION 3: ABROGATION AND GREATER RESTRICTIONS

30.3.1 Where this ordinance imposes greater restrictions than those contained in other ordinances, the provisions of this ordinance shall govern.

30.4 SECTION 4: INTERPRETATION

30.5.1 In their interpretation and application, the provisions of this ordinance shall be held to be minimum requirements and shall be liberally construed in favor of the Tribe and shall not be deemed a limitation or repeal of any other Tribal power or authority. The Tribe's sovereign immunity is not waived or affected hereby.

30.5 SECTION 5: LIEN PRIORITY

30.5.1 All mortgage loans recorded in accordance with the recording procedures set forth in this Code, including Leasehold Mortgages, and including loans made, guaranteed, insured or held by a governmental agency, shall have priority over any lien not perfected at the time of such recording and any subsequent lien or claim excepting a lien or claim arising from a tribal leasehold tax assessed after the recording of the mortgage. (In those cases where the government direct, guaranteed or insured mortgage is created as a second mortgage, the loan shall assume that position.).

30.6 SECTION 6: RECORDING OF MORTGAGE LOAN DOCUMENTS

30.6.1 The Tribal Recording Clerk shall maintain in the Tribal Real Estate program a system for the recording of mortgage loans and such other documents as the Tribe

may designate by laws or resolution.

30.6.2 The Tribal Recording Clerk shall endorse upon any mortgage loan or other document received for recording:

(a) The date and time of receipt of the mortgage or other document;

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- (b) The filing number, to be assigned by the Tribal Recording Clerk, which shall be a unique number for each mortgage or other document received, and;
- (c) The name of the Tribal Recording Clerk or designee receiving the mortgage or document.

30.6.3 Upon completion of the above-cited endorsements, the Tribal Recording Clerk shall make a true and correct copy of the mortgage or other document and shall certify the copy as follows:

Red Cliff Band of Lake Superior Tribe of Chippewa Indians)
Red Cliff Reservation, Wisconsin) ss.

I certify that this is a true and correct copy of a document received for recording this date.

Given under my hand and seal this ____ day of _____.

(Signature)

(Date)

30.6.4 The Tribal Recording Clerk shall maintain the copy in the records of the recording system and shall return the original of the mortgage loan or other document to the person or entity that presented the same for recording.

30.6.5 The Tribal Recording Clerk shall also maintain a log of each mortgage loan or other document in which there shall be entered:

- (a) The name(s) of the Borrower/Mortgagor of each mortgage loan, identified as such;
- (b) The name (s) of the Lender/Mortgagee of each mortgage loan, identified as such;

- (c) The name(s) of the grantor(s), grantee(s) or other designation of each party named in any other documents filed or recorded;
- (d) The date and time of receipt;
- (e) The filing number assigned by the Tribal Recording Clerk; and
- (f) The name of the Tribal Recording Clerk or designee receiving the mortgage or document.

30.6.6 The certified copies of the mortgage loan and other documents and the log maintained by the Tribal Recording Clerk shall be made available for public inspection and copying. Rules for copying shall be established and disseminated by the Tribal Recording Clerk.

30.6.7 All mortgages will be recorded with the BIA in addition to any Tribal recording provisions.

30.7 SECTION 7: FORECLOSURE PROCEDURES

30.7.1 A Borrower/Mortgagor shall be considered to be in default when he or she is thirty (30) days past due on his or her mortgage payment(s) or is in violation of any covenant under the mortgage for more than 30 days to the Lender/Mortgagee (i.e., the 31st day from the payment due date).

30.7.2 When a Borrower/Mortgagor is thirty days past due on his or her mortgage and before a foreclosure action or activity is initiated, the Lender/Mortgagee shall complete the following:

- (a) Make a reasonable effort to arrange a face-to-face interview with the Borrower/Mortgagor. This shall include at least one trip to meet with the Borrower/Mortgagor at the mortgaged property.
- (b) Lender/Mortgagee shall document that it has made at least one phone call to the Borrower/Mortgagor (or the nearest phone as designated by the Borrower/Mortgagor, able to receive and relay message to the Borrower/Mortgagor) for the purpose of trying to arrange a face-to-face interview.

30.7.3 Lender/Mortgagee may appoint an agent to perform the services of arranging and conducting the face-to-face interview specified in this action.

30.7.4 When the Borrower/Mortgagor is past due on three installment payments and at least ten (10) days before initiating a foreclosure action in Tribal Court, the

Lender shall advise the Borrower/Mortgagor in writing by mail or by posting prominently on the unit, with a copy provided to the Tribe, as follows:

- (a) Advise the Borrower/Mortgagor that information regarding the loan and default/delinquency will be given to credit bureaus.
- (b) Advise the Borrower/Mortgagor of homeownership counseling opportunities/programs available through the Lender or otherwise.
- (c) Advise the Borrower/Mortgagor of other available assistance regarding the mortgage/default.
- (d) In addition to the preceding notification requirements, the Lender/Mortgagee shall complete the following additional notice requirements:
 - (i) notify the Borrower/Mortgagor that if the Leasehold Mortgage remains past due on three installment payments, the Lender/Mortgagee may ask the applicable governmental agency to accept assignment of the Leasehold Mortgage if this is an option of the governmental program;
 - (ii) notify the Borrower/Mortgagor of the qualifications for forbearance relief from the Lender/Mortgagee, if any, and that forbearance relief may be available from the government; and
 - (iii) provide the Borrower/Mortgagor with names and addresses of government officials to whom further communications may be addressed, if any.

30.7.5 If a Borrower/Mortgagor is past due on three or more installment payments and the Lender/Mortgagee has complied with the procedures set forth in the first part of this Section, the Lender/Mortgagee may commence a foreclosure proceeding in the Tribal Court by filing a verified complaint as set forth in Section 8 of this Chapter.

30.8 SECTION 8: FORECLOSURE COMPLAINT AND SUMMONS

30.8.1 The verified complaint in a mortgage foreclosure proceeding shall contain the following:

- (a) The name of the Borrower/Mortgagor and each person or entity claiming through the Borrower/Mortgagor subsequent to the recording of the

mortgage loan, including each Subordinate Lienholder (except the Tribe with respect to a claim for a tribal leasehold), as a defendant;

- (b) A description of the property subject to the mortgage loan;
- (c) A concise statement of the facts concerning the execution of the mortgage loan and in the case of a Leasehold Mortgage the lease; the facts concerning the recording of the mortgage loan or the Leasehold Mortgage; the facts concerning the alleged default(s) of the Borrower/Mortgagor; and such other facts as may be necessary to constitute a cause of action;
- (d) True and correct copies of each promissory note, mortgage, deed of trust or other recorded real property security interest (each a “security instrument”) and any other documents relating to the property and if a Leasehold Mortgage, a copy of the lease and any assignment of any of these documents; and
- (e) Any applicable allegations concerning relevant requirements and conditions prescribed in: (i) federal statutes and regulations; (ii) tribal codes, ordinances and regulations; and/or (iii) provisions of the promissory note, security instrument and if a Leasehold Mortgage, the lease.

30.8.2 The complaint shall be verified by the Tribal Court Clerk along with a Summons specifying a date and time for appearance for the Defendant(s).

30.9 SECTION 9: SERVICE OF PROCESS AND PROCEDURES

30.9 Notwithstanding any requirements or procedures set forth in Chapter 4 of this Code, any foreclosure complaint must be in writing, and must be delivered to the Borrower/Mortgagor in the following manner:

30.9.1 Delivery must be made by an adult person and is effective when it is:

- (a) Personally delivered to a Borrower/Mortgagor with a copy sent by mail, or
- (b) Personally delivered to an adult living in the property with a copy sent by mail, or
- (c) Personally delivered to an adult agent or employee of the Borrower/Mortgagor with a copy sent by mail.

30.9.2 If the notice cannot be given by means of personal delivery, or the Borrower/Mortgagor cannot be found, the notice may be delivered by means of:

- (a) Certified mail, return receipt requested, at the last known address of the Borrower/Mortgagor, or
- (b) Securely taping a copy of the notice to the main entry door of the property in such a manner that it is not likely to blow away, and by posting a copy of the notice in some public place near the premises, including a tribal office, public store, or other commonly-frequented place and by sending a copy first class mail, postage prepaid, addressed to the Borrower/Mortgagor at the premises.

30.9.3 The person giving notice must keep a copy of the notice and proof of service in accordance with this section, by affidavit or other manner recognized by law.

30.10 SECTION 10: CURE OF DEFAULT

30.10.1 Prior to the entry of a judgment of foreclosure, and Borrower/Mortgagor or an Subordinate Lienholder may cure the default(s) under the Mortgage by making a full payment of the delinquency to the Lender/Mortgagee and all reasonable legal and court costs incurred in foreclosing on the property. Any subordinate Lienholder who has cured a default shall thereafter have included in its lien the amount of all payments made by such Subordinate Lienholder to cure the defaults(s), plus interest on such amounts at the rate stated in the note for the mortgage. There shall be no right of redemption in any Leasehold Mortgage Foreclosure proceeding.

30.11 SECTION 11: JUDGMENT AND REMEDY

30.11.1 This matter shall be heard and decided by the Tribal Court in a prompt and reasonable time period not to exceed sixty (60) days from the date of service of the complaint on the Borrower/Mortgagor. If the alleged default has not been cured at the time of trial and the Tribal Court finds for the Lender/Mortgagee, the Tribal Court shall enter judgment:

- (a) Foreclosing the interest of the Borrower/Mortgagor and each other defendant, including Subordinate Lienholder, in the mortgaged property and
- (b) Granting title to the property to the Lender/Mortgagee or the Lender's Designated Assignee; in the case of a Leasehold Mortgage, the Lease and the Leasehold Estate will be assigned to the Lender/Mortgagee or the Lender's Designated Assignee, subject to the following provisions:
 - (1) The lender shall give the Tribe the right of first refusal on any acceptable offer to purchase the Lease and the Lessee's leasehold

interest in the property described in the lease which is subsequently obtained by the Lender or Lender's Designated Assignee.

- (2) The Lender or Lender's Designated Assignee may only transfer, sell or assign the Lease and Lessee's leasehold interest in the property described in the Lease to a Tribal member, the Tribe, or the Tribal Housing Authority;
 - (3) The mortgagee has the right to convey the leasehold interest to the Secretary of HUD without providing the right of first refusal to the Tribe for Section 248 mortgages.
- (c) Ordering a public sale and advertising the terms of such sale in a newspaper or other communication distributed by the Tribe to its members (if such exists), posting the notice on the Leased Premises and in the Tribal offices;
 - (d) Providing for the distribution of any funds in excess of the amounts due to the Mortgagee to the Subordinate Lienholders, if any, in order of lien priority, and then to the Mortgagor;
 - (e) Providing that the Leased Premises may be rented prior to a sale, with preference being given to financially qualified Members, the Tribe, and the Tribal Housing Authority; and
 - (f) Providing that if no financially qualified Members, the Tribe, or the Tribal Housing Authority rents the Leased Premises within sixty (60) days of its being offered for rental, then the receiver may rent to a non-Member, for initial and renewal periods not exceeding one (1) year, with preference to re-rent the Leased Premises being granted to financially qualified Members, the Tribe, or the Tribal Housing Authority upon the expiration of each renewal period. (8-23/05G)

30.12 SECTION 12: ASSIGNMENT OF LEASEHOLD INTERESTS IN LIEU OF FORECLOSURE AND RECEIVERSHIP

30.12.1 Assignment of Leasehold Interest in Lieu of Foreclosure. At any time after a default, the Mortgagor may enter into a written Assignment of Leasehold Interest in lieu of foreclosure, subject to the following provisions:

- (a) Thirty (30) days shall have expired after the Mortgagee has given the Tribe written notice of the "Lessor's Option" and the Tribe, as Lessor, has not exercised the same;
- (b) The assignment shall contain (i) the Mortgagor's warranty that the Mortgagor, in good faith, believes that the value of the Leasehold interest is equal to or less than the amount currently due, or to become due after a

foreclosure, under the Mortgage and (ii) the Mortgagee shall release the Mortgagor from the obligation to repay the Note;

- (c) The Mortgagee may petition the Tribal Court to appoint a receiver, who shall be the Tribe unless otherwise agreed to by the Mortgagee and the Tribe, to receive title to the Leasehold Interest and to liquidate it in accordance with the provisions of this Ordinance;
- (d) Such petition shall include a copy of the assignment and shall be served on the Mortgagor and the Tribe.

30.12.2 Receiver: Appointment, Duties, and Responsibilities

- (a) In addition to appointing a receiver upon petition of the Mortgagee in connection with an assignment of Leasehold Interest in lieu of foreclosure, the Tribal Court shall appoint a receiver upon commencement of a foreclosure action and shall have the authority to prevent waste from occurring on the Lease Premises during the pendency of the proceeding.
- (b) Except as otherwise agreed by the Tribe pursuant to a memorandum of understanding or other agreement with a Mortgagee, the receiver shall be the Tribe. The receiver shall have the authority to hire such professionals as directed by the Mortgagee to manage and secure the Leased Premises.
- (c) The receiver shall be an officer of the Tribal Court and shall be immune from all liability except that arising from its own negligence or willful acts. All contracts for services entered into by the receiver shall be satisfied solely from the proceeds from the sale or rental of the Leased premises or shall be advanced by the Mortgagee.
- (d) The Tribal Court shall discharge the receiver when the Leased Premises are sold and the proceeds are distributed according to this Ordinance.
(8/23/05G)

30.13 SECTION 13: FORECLOSURE EVICTIONS

Foreclosure evictions shall be handled according to the general eviction process set forth below.

30.13.1 Jurisdiction. The provisions of this section 12. shall apply to all persons and property subject to the governing authority of the Tribe as established by the Tribal Constitution, Tribal code, or applicable federal law.

30.13.2 Unlawful Detainer. A Lessee, Sublessee, or other occupant of a Leasehold Estate subject to a Leasehold Mortgage shall be guilty of unlawful detainer if such person shall continue in occupancy of Leasehold Estate without the requirement of any notice by the Lessor, after such person's Leasehold Estate has been foreclosed in a Leasehold Mortgage foreclosure proceeding in the Tribal Court.

30.13.3 Complaint and Summons. The lender or Federal Agency (which made, guaranteed or insured the mortgage loan) as appropriate, shall commence an action for unlawful detainer by filing with the Tribal Court, in writing, the following documents:

- (a) A complaint, signed by the lender or Federal Agency, or an agent or attorney on their behalf:
 - (1) Citing facts alleging jurisdiction of the Tribal Court;
 - (2) Naming as defendants the mortgagors and any other record owner (including Sublessees and subordinate lienholders), of which the complainant has record notice (except the Tribe with respect to a claim for a Tribal tax on the Leasehold Estate subject to the Leasehold Mortgage);
 - (3) Describing the Leasehold Estate subject to the Leasehold Mortgage;
 - (4) Stating the facts concerning (i) the execution of the lease and the Leasehold Mortgage; (ii) the recording of the Leasehold Mortgage; and (iii) the facts upon which he or she seeks to recover;
 - (5) Stating any claim for damages or compensation due from the persons to be evicted; and
 - (6) Otherwise satisfying the requirements of the Tribal Court.

30.13.4 A copy of the summons, issued in accordance with established Tribal Court rules and procedures, requiring the defendants to file a response to the complaint by the date specified in the summons. The deadline specified in the summons for filing a response shall be no less than six (6) nor more than thirty (30) days from the date of service of the summons and complaint. The summons shall notify the defendants that judgment will be taken against them in accordance with the terms of the complaint unless they file a response with the court by the date specified in the summons.

30.13.5 Service of Summons and Complaint. A copy of the summons and complaint shall be served upon the defendants in the manner provided by the Tribal court rules for service of process in civil matters. In the absence of such Tribal Court rules, the summons and complaint shall be served by one of the following two methods:

- (a) delivering a copy personally to the Borrower/Mortgagor or to any other occupant under color of law, or to any adult residing on the leasehold Estate and, if applicable, to any Sublessee; or

- (b) posting said notice in a conspicuous place near the entrance to said Leasehold Estate, and sending an additional copy to the Lessee or to any other occupant under color of law, and, if applicable, to the Sublessee, by certified mail, return receipt requested, property addressed, postage paid.

Proof of service may be made by affidavit of any adult person stating that he has complied with the requirements of one of the above methods of service.

30.13.6 Powers of the Tribal Court. The Tribal Court shall enter of Order of Repossession if:

- (a) Notice of suit is given by service of summons and complaint in accordance with the procedures provided herein; and
- (b) The Tribal court shall find during pre-trial proceedings or at trial that the lessee, Sublessee, or other occupant under color of law of the Leasehold Estate subject to the Leasehold Mortgage is guilty of an act of unlawful detainer.

Upon issuance of an Order of Repossession, the Tribal Court shall have the authority to enter a judgment against the defendants for the following, as appropriate: (1) back rent, unpaid utilities, and any charges due the Tribe, Tribal Housing Authority, other public Housing Authority, or Sublessor under any sublease or other written agreement (except for a Leasehold Mortgage); (2) any and all amounts secured by the Leasehold Mortgage that are due the lender (or Federal Agency); and (3) damages to the property caused by the defendants, other than ordinary wear and tear. The Tribal Court shall have the authority to award to the prevailing party its costs and reasonable attorney's fees in bringing suit.

30.13.7 Enforcement. Upon issuance of an Order of Repossession by the Tribal Court, Tribal law enforcement officers shall help plaintiffs enforce same by evicting the defendants and their property from the unlawfully occupied Leasehold Estate. In all cases involving the lender or a Federal Agency, the Order of Repossession shall be enforced no later than forty five (45) days after a pre-trial proceeding or trial in which the Tribal Court finds against defendants, subject to Section 30.12.8 below, and provided, that no party exercised the right to cure a default or right of first refusal as described in Sections 10 and 11 above.

30.13.8 Continuances in Cases Involving the Lender or Federal Agency (which originally made, insured or guaranteed the mortgage loan). Except by agreement of all parties, there shall be no continuances in cases involving the lender or Federal Agency that will interfere with the requirement that the Order of Repossession be enforced not later than 45 days after a pre-trial proceeding or trial in which the Tribal Court finds against defendants, subject to the sound discretion of the Court.

30.14 SECTION 14: NO MERGER OF ESTATES

30.14.1 There shall be no merger of estates by reason of the execution of a Lease or a Leasehold Mortgage or the assignment or assumption of the same, including an assignment adjudged by the Tribal Court, or by operation of law, except as such merger may arise upon satisfaction of the Leasehold Mortgage.

30.15 SECTION 15: CERTIFIED MAILING TO TRIBE

30.15.1 In any foreclosure proceedings on a Leasehold Mortgage where the Tribe is not named as a defendant, a copy of the summons and complaint shall be mailed to the Tribe by certified mail, return receipt requested, within five (5) days after the issuance of the summons. If the lessor is not the Tribe, this notice will also be mailed to the lessor at the same time the notice is mailed to the Tribe. If the location of the lessor cannot be ascertained after reasonable inquiry, a copy of the summons and complaint shall be mailed to the lessor in care of the Superintendent of the applicable agency of the Bureau of Indian Affairs.

30.16 SECTION 16: INTERVENTION

30.16.1 The Tribe or any Lessor may petition the Tribal Court to intervene in any Lease or Leasehold Mortgage foreclosure proceeding under this Code. Neither the filing of a petition for intervention by the Tribe, nor the granting of such petition by the Tribal Court shall operate as a waiver of the sovereign immunity of the Tribe, except as may be expressly authorized by the Tribe.

30.17 SECTION 17: RIGHTS OF THE MORTGAGE

30.17.1 Subject to this Ordinance and the terms of the Mortgage, a Mortgagee has the following rights in connection with an assignment of Leasehold Interest in lieu of foreclosure or a foreclosure judgment:

- (a) The receiver shall follow the directions of the Mortgagee in setting the terms of, and conducting, a public or private sale and the acceptance of any offer to by the Property, subject to the following:
 - (1) All assignments shall be in form and substance satisfactory to the Mortgagee;
 - (2) All assignees shall be bound by the terms of the lease; and
 - (3) The receiver shall obtain the consent of the Secretary if such consent is required by law and has not been given.
- (b) The Mortgagee need not accept any offer at the public sale other than a bona fide cash offer, to be paid within forty-five (45) days of the public sale, in an amount equal to or greater than the amount due on the judgment, plus all accrued interest and expenses to date of sale;

- (c) If no offer is accepted at the public sale, the receiver may sell the Leasehold Interest at private sale; the Mortgagor shall have no interest in the proceeds and all proceeds, including any proceeds in excess of the amount due under the judgment, shall be paid to the Mortgagee; and
- (d) The receiver shall follow the directions of the Mortgagee in renting the Leased Premises, subject to the following:
 - (1) All rental agreements shall be in a form and substance satisfactory to the Mortgagee;
 - (2) All renters shall be provided with a copy of the Lease and shall agree in writing to be bound by the terms thereof;
 - (3) All rental proceeds shall be paid to the Mortgagee and shall be applied to the amount outstanding under the Note or judgment;
 - (4) The receiver shall obtain the consent of the Secretary if such consent is required by law and has not been given. **(8-23-05G)**

30.18 **SECTION 18: APPEALS**

30.18.1 Appeals under this code shall be addressed in accordance with RCCL, Chapter 31.