

FORECLOSURE

**FOR
SALE**

MUNICIPAL LAW

Affordable housing: Preserving it from foreclosure

Foreclosures are on the rise; relief bills are pending in the legislature, and our own Chief Justice is mandating mediation in contested foreclosures. Some advice for owners of affordable housing units.

created by 2018. Every time the affordable status of a home is destroyed by the unit being sold free of affordability restrictions, the municipality's stock of affordable housing is reduced. Given the heavy affordable housing obligations facing municipalities — as well as the economic forces rendering foreclosures more frequent and reduced new housing construction — it is imperative local governments preserve their existing affordable stock.

Effective Dec. 20, 2004, the New Jersey Housing and Mortgage Finance Agency (HMFA) promulgated affordable housing rules called the "Uniform Housing Affordability Controls" (UHAC). The mandatory forms of deed restrictions set forth in UHAC assure the affordability status of housing created after 2004, even in the event of foreclosure. N.J.A.C. 5:80-26.5. However, for units created prior to 2004, foreclosures raise the possibility the units will be stripped of their affordability status — especially when a deed restriction was not recorded. Thus, whenever a foreclosure action is instituted, the municipality should act quickly to assert the public interest in

By Donovan Bezer

Owners of affordable housing units are by no means immune from the foreclosure maelstrom. Toms River has announced it will spend affordable housing money to buy down residents' mortgages. This article instructs municipalities how to avoid losing existing affordable units to foreclosure.

The state, through the Council on Affordable Housing (COAH), has set an ambitious goal for the number of affordable housing units that must be

Continued on page 6



Richard Grubb & Associates, Inc.
Cultural Resource Consultants

Services Include:

- Cultural Resource Surveys
- Phase I, II and III Archaeological Investigations
- Archaeological Monitoring
- Historic Architectural Surveys, Assessments and Evaluations
- Historical Research
- National and State Register of Historic Places Nominations
- Historic American Building Survey (HABS)
- Historic American Engineering Record (HAER)
- Historic Preservation Planning
- Historic Structures Reports
- Cultural Resource Management Plans
- Investment Tax Credit Applications
- Public Relations and Educational Programs
- Exhibits, Exhibition Planning and Historic Interpretation
- Educational Brochures and Pamphlets
- Expert Witness Testimony

30 North Main Street • Cranbury • NJ • 08512
609-655-0692 • Fax 609-655-3050 • mail@richardgrubb.com

When you think Title Services, think First Jersey first!

Full Service Agency Providing:

- Mail Forwarding • Court Order Searches • Foreclosure Searches
- City/Zip Searches • Business Searches • Title Commitment Preparation
- Closing Services • Escrow Services • Deeds and File, Notices of Satisfaction
- Recording Services • Email Delivery of Documents

Visit Our Web Site at:
www.firstjerseytitle.com

- Order Title Services On-Line • Mortgage Anticipation Easements
- Ready To-Go Fee Calculators • Download Affidavits and Forms
- Mortgage Recording Fees • Daily News • Credit Funding Alerts

and much more!



First Jersey Title Services, Inc.

1000 Boulevard • Suite 200 • Cranbury, NJ 08512
609-655-3050 • Fax 609-655-3050

Over 25 Years of Statewide Experience in Residential & Commercial Closings
Title Examiners and Closers in All of New Jersey's 21 Counties

Continued from page 5
maintaining the affordable unit's price restrictions.

Steps for municipalities

1. Before a foreclosure suit is filed
Municipalities must seek notice of potential foreclosures of affordable properties, and intervene at the earliest possible juncture. One way of learning about mortgage defaults before a foreclosure action is filed is by monitoring compliance. For example, affordable owners of "two-fer" properties (one rental unit, the other owner occupied) are often required by the municipality to annually certify the continued affordable status of the renter. Sudden compliance failures may indicate contemporaneous mortgage default. Additionally, the UHAC-mandated deed restrictions require affordable owners to serve notice of foreclosure or bankruptcy.

A cooperative relationship needs to exist between the community development office, the offices of the tax collector and business administrator and all applicable utility authorities. Each office should have a list of all affordable properties, so that if a water or sewer bill becomes past due, or property taxes are in arrears, the municipality can segregate that account and prevent liens

from accruing. Municipalities should encourage affordable owners to pay taxes and charges for water and sewer, lest foreclosable municipal liens attach. Arrears that are not promptly corrected can, like compliance failures, indicate a potential mortgage default.

The municipality should purchase all property tax certificates on affordable properties. If it allows tax liens to be acquired by third parties, the certificate holder will institute a tax foreclosure against the affordable property. Also, because municipal tax liens are superior to purchase money mortgage liens (N.J.S.A. 54:5-9), the town's possession of the tax certificates may provide negotiating leverage against the foreclosing mortgagee.

To the extent affordable owners consent, municipalities should obtain and properly record updated deed restrictions for pre-2004 units. Municipalities should also request affordable owners disclose the current holder of their mortgages and execute a limited power of attorney to enable the municipality to act on the owner's behalf with respect to the mortgagee's enforcement of the terms of the mortgage. Under the Fair Foreclosure Act, a mortgagee must give the homeowner 30 days notice of the foreclosure and an opportunity to cure the arrearage. (N.J.S.A.

2A:50-56). Clearly, advance notice of the foreclosure and the chance to pay merely the amounts past due are extraordinarily advantageous to the municipality. Additionally, stepping into the owner's shoes will enable the municipality to redeem the mortgage up to 10 days after a sheriff sale.

(*Hardyston National Bank v. Tartamella*, 56 N.J. 508, 513 (1970)).

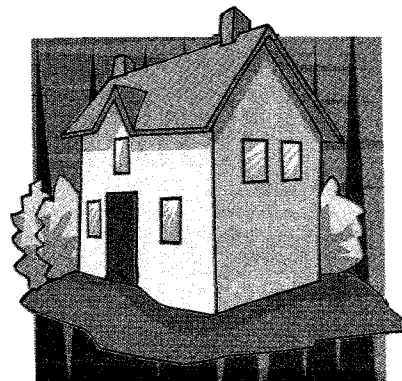
The municipality should inventory its total affordable stock and the affordability controls pertaining to each unit. This is for several reasons.

First, if affordability controls expire prior to 2018, the Third Round Rules (N.J.A.C. 5:97 *et seq*) set tempting incentives to extend controls. Second, affordability controls not properly executed, recorded or indexed should be discovered and corrected. Third, the UHAC-mandated Administrative Agent is either now, or will be, requesting the inventory. Most importantly, the municipality can utilize the inventory to cross check public filings to gain notice of foreclosures.

It is theoretically possible to monitor court filings to become aware of a foreclosure of a property within the town's affordable stock. The municipality would then enter an appearance in the foreclosure action and assert its interest in the preservation of affordability controls. This is ideal because if the town did not learn of the foreclosure by being served a copy of the complaint, it is likely the property's affordability controls are unknown to the mortgagee. Monitoring filed complaints is highly problematic: Foreclosure actions can proceed in either the Chancery Division of the county in which the property is located or before the Superior Court Foreclosure Unit in Trenton when the action is uncontested. The municipality will have to wade through many irrelevant filings.

It will be easier for the municipality to monitor scheduled foreclosure sales. The foreclosure sale is a very late stage at which to assert the municipality's interest in the property, and thus notice of the foreclosure at this late stage is far from ideal. However, monitoring at this level is vastly more feasible, because a municipal employee can simply review the public notices in the newspaper of record each week, and check each property within the town scheduled to be auctioned against a list of the town's COAH properties, and do so from his desk — potentially online. Monitoring the filing of foreclosure complaints requires traveling to the court.

Monitoring foreclosure sales can be used not only to preserve existing affordable units, but to achieve fair share credits as well. For example, the municipality can shop for market rate homes at sheriff sales and purchase



them under the "market to affordable" program. (N.J.A.C. §5:97-6.9). Additionally, the municipality can include, in its fair share plan, the above described approach to preventing foreclosures as an "innovative approach" (N.J.A.C. §5:97-6.15) by which it extends affordability controls (N.J.A.C. §5:97-6.14).

2. After action filed, but prior to final judgment

If a municipality is made a party to the foreclosure action, it should raise the affordability controls in an answer. Additionally, it should contact the foreclosing bank (and any other superior lienholder) to request a payoff figure. The request should include the borrower's name, social security number, the property address, the mortgage identification number (MIN) and, if possible, the borrower's consent to obtain the information. It is advisable to request the bank calculate the payoff amount with several additional days, so as to provide a cushion in the event the town's payment is delayed in reaching the lender. The Home Ownership Security Act (HOSA) requires that residential mortgage lenders provide payoff figures for any household loan secured by mortgage (excluding reverse mortgages) free of charge and within seven business days of a request. N.J.S.A. 46:10B-25(f).

Although the initial mortgagee will be identified in the mortgage, it is possible in today's climate that the name of the party holding the mortgage rights may change many times. The current names of FDIC-insured financial institutions can be searched at: www2.fdic.gov/idasp/main.asp. Additionally, name changes for banks can be searched at: www.fdic.gov/nicpubweb/nicweb/SearchForm.aspx. The Mortgage Electronic Registration System (MERS) is a land records nominee for mortgage lenders and servicers. It maintains a database of the loans for which it possesses authority to foreclose (by virtue of holding electronic Promissory Notes) at: www.mers-servicerid.org/sis. Contact information for the current mortgage servicer can be searched by Mortgage Identification Number (MIN), property address and borrower details.

The lender must duly execute a discharge of mortgage with the county clerk within 30 days of receipt of payoff.

STATE SHORTHAND REPORTING SERVICE, INC.

"THE OFFICE THAT CARES"

Established 1957

Digital Video
DVD/VHS Capability

Court Reporting

Audio Recording

Transcription

VISIT

BOOTH 212

NJSBA

Convention, AC

P.O. Box 227 | Allenhurst | New Jersey 07711
 Phone 732.531.9500 | Fax 732.531.7968 | USA 800.659.6823
www.stateshorthand.com

N.J.S.A. 46:18-11.2. A mortgagee that does not comply is liable to anyone with an interest in the property for legal costs of having the mortgage cancelled of record, but the plaintiff must give the mortgagee 20 days written notice before the complaint is filed. N.J.S.A. 46:18-11.4. A mortgage cancellation can also be effectuated through the Penalty Enforcement Law, N.J.S.A. 2A:51-1 to -5, commenced by verified complaint.

Distinct from issuing a payoff in satisfaction of the mortgage, a municipality may purchase the mortgage's commercial paper. In this case, the municipality should obtain an assignment of mortgage from the bank and/or substitution of attorney, and then proceed with the foreclosure in the bank's name. At the conclusion of foreclosure proceedings, the town can sell the property to an affordable buyer who possesses the financial capability to service a mortgage. That new buyer will use purchase money mortgage funds to pay the town a COAH-compliant price for the unit.

If a bank is unwilling to either sell their mortgage rights, or accept payment from the municipality in lieu of payment from the mortgagor, the bank should be informed of the strong legal arguments with which their judgment of foreclosure can be challenged. Failure to name the municipality in the foreclosure action may constitute a fatal defect. If resale restrictions were properly recorded, there is little doubt that they will be enforced against the mortgagee, for a court will not terminate a deed restriction where there is no public benefit to do so. *Menlo Park Plaza Associates v. Woodbridge*, 316 N.J. Super. 451 (App. Div. 1998). While a mortgagor may argue that N.J.A.C. §5:92-12.17 guarantees that deed restrictions die with the foreclosure, that argument is disfavored. *Wells Fargo Bank, N.A. v.*

Kelly, 2005 WL 3098936 (App. Div. 2005).

In many affordable developments, public subsidies were given in lump sums for multiple units and recorded in a blanket deed. If no instrument whatsoever was recorded with respect to a unit, it should be argued the various public funds invested in the property constitute equitable deed restrictions. Attention should be paid to the sources of the subsidy. There is a greater equitable component to revolving funds (e.g., 95/5) that depend on the recipient repaying the subsidy so as to be available to the next recipient. Also, CDBG and HOME funds carry the policy prerogative of the federal government, which will strengthen an equitable lien argument. Regardless of whether the restriction on the deed is equitable, unrecorded or poorly indexed, the mortgagee's foreclosure should not terminate the restriction. *Bowen v. Smith*, 76 N.J. Eq. 456 (Ch. 1909).

HOSA, which is merely one vestige of public policy protecting homeowners, seeks to prevent an owner being stripped of the equity in his home. However, UHAC, which is another pro-homeowner enactment, prevents a homeowner from avoiding foreclosure by selling his home at market rate. Thus, it would be inequitable to allow a bank to realize hidden equity at a sheriff sale, when the homeowner in default cannot avoid foreclosure by doing so.

The town may possess a power of attorney given by the defaulting owner when he initially purchased the property. If the power of attorney is irrevocable, and conferred a benefit to the defaulting owner (enabled the purchase at a subsidized price), the town can use the power of attorney to exercise the defaulting owner's right of redemption. *HMFA v. Bedminster Hills Housing Corp.*, 285 N.J. Super. 255, 265-73 (App. Div. 1995).

3. After final judgment

Subsequent to entry of final judgment of foreclosure, the municipality should enter an appearance in the Chancery Division foreclosure docket and request the court postpone the sheriff sale. If a non-affordable buyer moves in to the property, ejecting him will be close to impossible. During the adjournment, the town should find a qualified affordable buyer who is ready, willing and able to purchase the property for an amount that is both capable of satisfying liens superior to the town's, and within COAH guidelines. If the bank will sell the municipality an assignment of judgment, further adjournments will not be needed.

If no qualified buyer can be found, the municipality should bid on the property at the sheriff sale. In fact, the municipality should bid aggressively, because it stands a chance of receiving a de facto rebate on the amount it bids in excess of the purchase money mortgage debt, for the following reason: The proceeds from a sheriff sale will be used to satisfy the lien in first position (often, a low-dollar tax lien), and then subordinate liens will be paid in the order of priority. A purchase money mortgage will almost always be in first position or second position after tax liens, and the public entity mortgage representing the affordable housing subsidy will follow.

Assume a property has a fair market value of \$200,000, tax liens of \$10,000, and unsatisfied purchase money mortgage debt of \$90,000. The now-insolvent affordable buyer purchased for \$100,000, and the town received a second mortgage from the owner for the \$95,000 subsidy it gave the developer to enable the reduced purchase price. Purchase money mortgages for affordable properties will usually be satisfied in full when the property is sold at fair market value, because the property is worth more than the affordable purchase price for which the mortgage was

given. This is why it is in a foreclosing mortgagor's interests to avoid the affordability controls and sell the property at market rate. Thus, the property in this hypothetical will easily fetch bidders above the \$90,000 range.

If the town bids \$195,000 for this property worth \$200,000, \$90,000 will be paid to the bank, \$10,000 will be paid to the holder of the town's tax certificate and \$95,000 will be refunded to the town in satisfaction of its \$95,000 second mortgage. See *Bedminster Hills Housing Corp. v. Timberbrooke*, 2008 WL 631299 (App. Div. 2008). The property will have cost the town merely \$100,000. The advisability of bidding aggressively is also supported by the fact that the town can pay the sheriff from its affordable housing trust fund (N.J.A.C. 5:97-8.7(a)6). If the town loses the bidding, land may not be readily available to build a replacement unit, and the subsidy required to construct an affordable unit will likely be much higher than \$95,000.


If the municipality is outbid at the sheriff sale, it should file a motion requesting that the sheriff's sale be set aside, staying any further sale of the property, and permitting the town to exercise the affordable owner's right of redemption. *HMFA v. Bedminster*, 285 N.J. Super. at 262-63.

In summary, municipalities should try to intervene to prevent foreclosure at the earliest possible time, ideally by possessing a power of attorney enabling them to act on behalf of the homeowner. Irrespective of whether the municipality obtains control of the property prior or subsequent to the foreclosure, it should reassert and extend affordability controls. ☉

Donovan Bezer is an associate with Stryker, Tans & Dill in Newark, and a former affordable housing administrator for the City of Jersey City. Reach him at (973) 491-9300.

- Environmental Issues
- Risk Assessment
- Wetlands/Ecological
- Mold
- Environmental Toxicology
- Gasoline & Oil Issues
- Health Issues/Physiology/Chemistry
- Chemical Exposure
- Worker Exposure
- Causation Assessment/Expert Evaluation
- Contamination Issues
- Phase I and II Property Assessments
- Property Damage/Contamination & Remediation

Health Issues & Toxicology



Princeton-Somerset Group, Inc.
 Tel 800-597-8836
 Tel 908-369-6890
 Fax 908-369-6881

Greenbaum Rowe Smith & Davis LLP
COUNSELORS AT LAW

Metro Corporate Campus One
 99 Wood Avenue South
 Iselin, NJ 08830
 732.549.5600

75 Livingston Avenue
 Roseland, NJ 07068
 973.535.1600

Tame Conflict with Experience

Mediation and Arbitration

DOUGLAS K. WOLFSON, ESQ.

Former NJ Superior Court Judge and the
 Assistant Attorney General & Director of Division of Law of NJ

- Employment Law
- Environmental Coverage
- Commercial Disputes
- Catastrophic Injury

ALAN E. DAVIS, ESQ. and STEPHEN H. KNEE, ESQ.

- Business Divorce
- Post M&A Disputes
- Corporate Governance Disputes