

## Real Estate Title Insurance & *Construction Law*

### The Status of Affordable Housing Units After a Foreclosure and Involuntary Sale

By David J. Byrne

Condominiums and other planned unit developments in New Jersey often contain affordable housing units or “Mt. Laurel” units. These units are deed restricted; that is, they can be owned and/or occupied only by those classified as low- and moderate-income persons. The sale and/or rental of these units is strictly controlled and monitored by the municipality in which they are situated. The background of all of this is New Jersey’s Fair Housing Act. See, N.J.S.A. 52:27D-301 et seq. The enactment of this law constituted the Legislature’s reaction and attempt at managing various court decisions, known as the *Mt. Laurel* decisions. By virtue of the act, the Council on Affordable Housing (“COAH”) was created. COAH exists to facilitate the creation and continuation of housing for low- and moderate-income families. Each municipality must plan for, to the sat-

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isfaction of COAH, and effectuate the creation and continuation of such housing. This is generally memorialized in what are called affordable housing agreements and/or plans, which govern the rights and obligations of all of the players in the creation and continuation of affordable housing: the unit owner, its occupant, the mortgagee, the relevant municipality and the community association in which this unit is located. Municipalities must ensure a certain number of affordable housing units (based on a variety of formulas) exist within its borders.

The recent economic troubles and real estate market downturn have brought this municipal duty to the forefront. Traditionally, the applicable mortgage and affordable housing agreement will contain a provision governing the consequences of any foreclosure. Those provisions will traditionally provide that any affordable housing unit that is acquired by an institutional first mortgage by deed in lieu of foreclosure or by any purchaser at a sheriff’s sale shall be permanently released from any affordability controls and the affordable housing plan governing same.

The provisions traditionally provide also that sheriff’s sales by anyone other than an institutional first mortgage shall not result in the release of the affordable unit from any affordability controls and the affordable housing plan governing same. These affordable housing agreements will generally include provisions noting that they should be interpreted in such a way as to ensure the existence of housing available to low and moderate income persons. Lastly, these agreements typically include provisions compelling that they be interpreted under “the laws of New Jersey.” All of this comports with a portion of COAH’s regulations, which reads, in relevant part, that a “judgment of foreclosure or deed in lieu of foreclosure to a financial institution regulated by State and/or Federal law ... shall extinguish controls on affordable housing units provided there is compliance with N.J.A.C. 5:93-9.14.” N.J.A.C. 5:93-9.13. These regulations provide further that the affordability-related deed restriction and the “mortgage lien shall have priority over all mortgages ... except for a first mortgage placed on the property by the mortgagee prior to the expiration of

resale controls.” N.J.A.C. 5:93-9.3(f).

As of December 2004, however, it appears as if the affordability controls placed upon an affordable housing unit, with respect to a judgment of foreclosure and/or sheriff’s sale, do in fact survive that judgment or sale. Additional COAH regulations were created and codified at N.J.A.C. 5:94, et seq. More specifically, the regulations provide in relevant part that the “provisions of this chapter shall be known as the ‘Substantive Rules of New Jersey Council on Affordable for the Period Beginning on December 20, 2004.’” N.J.A.C. 5:94-1.2. This, together with other portions of the regulations, led to the conclusion that N.J.A.C. 5:94 superseded N.J.A.C. 5:93. For instance, controls “on affordability shall be established and maintained in accordance with the Uniform Housing Affordability Controls set forth in N.J.A.C. 5:80-26.” N.J.A.C. 5:94-7.1. At N.J.A.C. 5:80-26 exists the regulation directly targeted toward the continuation of affordability controls following a foreclosure and/or sheriff’s sale, to which we are directed by N.J.A.C. 5:94-7.1, which provides in relevant part that the “affordability controls set forth in this subchapter .... shall remain in effect despite the entry and enforcement of any judgment of foreclosure with respect to restricted ownership units.” N.J.A.C. 5:80-26.5(e).

It appears that N.J.A.C. 5:80-26.5(e)

and 5:94 et seq. govern the treatment of affordability controls and foreclosures even with respect to mortgages made and/or recorded prior to December 2004. First, the relevant legislative history indicates the N.J.A.C. 5:80-26.5(e) was in effect as early as 2001. See *Wells Fargo Bank, N.A. v. Kelly*, 2005 WL 3098936 (N.J. Super. Ch.). Furthermore, the regulations contain an additional provision which provides in relevant part that unless “expressly stated otherwise herein, this subchapter shall apply to all restricted units described in the foregoing sentence, regardless of the date on which the units were created.” N.J.A.C. 5:80-26.1.

As a result, the foreclosure of an affordable housing unit must proceed and conclude in an atypical fashion. First, because of the recorded and applicable affordable housing plan, and the municipality’s interest in ensuring the preservation of affordable housing units (as contemplated by N.J.A.C. 5:80-26.5(e)), the relevant municipality is a party that maintains a right of intervention. See, R. 4:33-1. For instance, the municipality must “ensure that the restricted units under administration are sold or rented, as applicable, only to low-and moderate-income households.” N.J.A.C. 5:80-26.14. This obviously complicates what should otherwise be a uncomplicated foreclosure, as any additional parties in a foreclosure will ultimately delay what has become

an already frustratingly delayed process. Second, since the affordability controls remain despite any foreclosure, any sheriff’s sale must be regulated such that only a “household” certified as either “low-income” or “moderate-income” can purchase the unit at said sheriff’s sale. The presence of the municipality in the foreclosure will enable the parties to cooperate such that the purchaser of the affordable unit at any sheriff’s sale is certified and/or eligible. A special sheriff’s sale announcement will be necessary, and ordered should the foreclosure’s plaintiff object. Additionally, the relevant municipality is likely empowered to itself purchase the unit, at the regulated price, satisfy the outstanding first mortgage and community association lien, and then thereafter rent or convey it to a pre-certified household. The maximum resale price of the unit “shall be consistent with the regional income limits most recently published by COAH and calculated pursuant to N.J.A.C. 5:94-7.2(b).” N.J.A.C. 5:80-26.6.

So while there can admittedly be confusion given the content of the applicable regulations, and while there is no reported opinion on point, it appears that affordable housing controls remain attached to a unit subsequent to a foreclosure of that unit. In turn, the foreclosure of such a unit, and any resulting sheriff’s sale, must proceed in a fashion slightly different from the standard foreclosure. ■