



**THE FORECLOSURE PROCESS AS IT RELATES TO  
MUNICIPAL CODE ENFORCEMENT (MML CONVENTION, JUNE 28, 2010)**

**I. Background.**

Waves of foreclosures have flooded the State of Maryland since “the bubble burst” on the housing market a few years ago. Municipalities have struggled with the issue of unmaintained and vacant properties often due to foreclosure. These properties invite crime, nuisances and depressed home values. Numerous code violations are often allowed to linger too long because some municipal officials are unable to identify the parties responsible for maintaining the properties, and take appropriate corrective action.

**II. Issues.**

The purpose of this handout is to advise city and town officials of the foreclosure process in Maryland with guidance as to whom they need to serve with municipal infractions at critical stages of the foreclosure process. In addition to knowing whom to properly serve the citation, the municipal staff also needs to have some understanding of the foreclosure process in regards to when the title owner is no longer responsible for the property’s maintenance and whether a municipal infraction issued to the owner has any effect on the purchaser in foreclosure. Finally, if the purchaser or mortgagee is a bank, it is helpful to know how to get the bank’s immediate attention to possibly take responsibility for property maintenance.

**III. Law.**

A mortgage (or deed of trust) is a security document that allows landowners to pledge their parcels as security for a debt. *See Simard v White*, 383 Md. 257 (2004). There are two basic types of security documents or lien instruments typically used in Maryland: 1.) the mortgage, and 2.) the deed of trust.<sup>1</sup>

A mortgage (or deed of trust) typically gives the lender the right to foreclose on the property if the borrower defaults on the loan. The foreclosure process is governed by the lien instrument, Title 7 of the Real Property Article of the Maryland Annotated Code and Title 14, Chapter 200 of the Maryland Rules.

There are three basic types of mortgages (and deeds of trust) and thus three types of foreclosures typically found in Maryland. *Id.* at 290. The three types of mortgages (or deeds of trust) and foreclosures are: 1.) mortgages and foreclosures by common law, 2.) mortgages and foreclosures with a “power of

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<sup>1</sup> The distinction between a mortgage and a deed of trust involves the parties involved and the rights of the parties. Conveyances of property by a debtor (grantor) to a third person in trust (trustee) for the creditor (cestui que trust) are accomplished by a deed of trust; whereas, a mortgage simply pledges or conveys the land from the debtor (mortgagor) directly to the creditor (mortgagee). Where the number of creditors to be secured is a significant number, and the bonds, promissory notes or debts secured are held by different persons, the deed of trust is the preferred type of security instrument. *Simard*, 383 Md. at 288.



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sale”, and 3.) mortgages and foreclosures with “assent to decrees.” Common-law mortgages contain no “power of sale” or “assent to decree” provisions and are often referred to as judicial foreclosures.

A “power of sale” means a provision in a lien instrument pre-authorizing a person to sell the property upon a specified default. Md. Rule 14-201(b)(6). An “assent to decree” means a provision in a lien instrument declaring consent to the entry of an order in court for the sale of the property subject to the lien upon a specified default. *Simard*, 383 Md. at 287. Both types of mortgage provisions are governed by the Maryland Rules as authorized by Section 7-105 of the Real Property Article. For the three basic types of mortgages described, each involves varying degrees of court supervision of the foreclosure process including the requirement for a formal hearing or not.

Unless otherwise stated in the loan document or ordered by a court, foreclosure proceedings generally involve the following steps: 1.) the lender waits ninety (90) days from date of default, 2.) the lender sends a notice of intent to foreclosure 45 days before filing the foreclosure case, 3.) the lender files the foreclosure in the Circuit Court with several documents, 4.) the lender personally serves the papers on the property owner (if the lender is unable to perfect service after two (2) attempts, the lender may file an affidavit and alternatively serve the owner by certified and regular mail and by posting the property) 5.) lender waits 45 days to publish a notice of sale in a newspaper of general circulation once a week for three (3) successive weeks, 6.) after the aforementioned 45 days, a notice of sale is sent by the lender to the mortgagor (owner) by certified and by registered mail no later than ten (10) days prior to the sale, 7.) a sale is conducted by an authorized person at the courthouse door or at the property, 8.) a report of the sale within thirty (30) days is filed with court, 9.) a notice to show cause (to not ratify the sale) is published at least once a week for three (3) successive weeks during the thirty (30) day period, 10.) should the sale amount fail to satisfy the debt, lenders have three (3) years to file for a deficiency judgment limited to the balance of the loan in default after the foreclosure sale proceeds have been applied. *See* RP Art., §7-105.1 *et seq.*

In addition to any other foreclosure requirements required under the law, after commencing a foreclosure in court, the person authorized to make the sale is required to notify the county or municipal corporation where the property is located not less than 15 days prior to the sale. RP Art., §14-126(a). Within 10 days of receiving notice, the county or municipality must inform the person of any outstanding taxes or fees against the property. Furthermore, the municipality or county may enact a local law requiring notice of the sale within five (5) days of filing the foreclosure action. RP Art., §14-126(b).

Under a recent foreclosure law that became effective on April 4, 2008, the lender is required to accept funds to cure the default up to one business day before the sale. RP Art., §7-105.1(h)(1). Often, if the lender and the owner are unable to work out a solution, the owner will file a Chapter 7 or 13 bankruptcy in federal court to stop or stay the sale. Generally, a Chapter 7 filing will provide a three-month opportunity to cure the default and a Chapter 13 filing will give the owner up to five (5) years to bring the mortgage current. *Foreclosure Proceedings in Maryland* (MSBA Rev. June 2008). One must



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take care not to interfere with property in the bankruptcy estate (e.g., impounding autos) that would otherwise violate the automatic motion to stay.

Unless the mortgage or deed of trust specifically states otherwise or the lender subsequently purchases the property at sale, throughout the foreclosure process the lender or mortgagee has no right to evict the mortgagor (owner/debtor) or otherwise take possession of the property. The Court of Appeals of Maryland has held that “generally, where a purchase of property at a foreclosure sale is ratified by a Circuit Court, complete equitable title vests in the purchaser and the purchaser may then be entitled to possession of the property.” *Empire Properties v. Hardy*, 386 Md. 628, 633 (2005). When the person in actual possession of the property fails or refuses to peacefully deliver possession to the purchaser after a proper foreclosure, the aggrieved purchaser must then resort to Maryland Rule 14-102 (Judgment Awarding Possession) to acquire actual possession often with the assistance of the sheriff.

Municipal infractions often become an issue for properties undergoing foreclosure either because the properties are neglected by the occupant or are left vacant and neglected. Citations for municipal infractions are generally issued by a code enforcement officer to those persons whom they observe to be committing a municipal infraction.

Typically under a municipal code, written notice of a violation must be given to the owner. The “owner” is often defined as the owner of the premises or some other possessory interest like a leasehold. The municipal infraction citation must be served in accordance with Maryland Rule 3-121 which may be made by delivering to the person to be served a copy of the required papers (i.e., citation form), by leaving the papers with an adult at the dwelling, or by mailing to the person served the required papers by certified mail requesting restricted delivery. If proof is made by affidavit that good faith efforts to serve have been made but not succeeded, the court may order an alternative form of service such as mailing the papers to the last known address, posting the property and the person’s business, if applicable.

#### **IV. Analysis**

*A. To whom should the Code Enforcement Officer serve with a municipal infraction at various stages of the foreclosure?*

The municipal infraction citation for a property maintenance violation must be served on any person whom is believed to be committing or has committed a municipal infraction which is usually the owner or tenant having control of the premises. In addition to actual possession, an owner may have constructive possession and control of a vacant property if the person is legally entitled to occupy the property.

If the premises are undergoing a foreclosure proceeding, the new owner (i.e., purchaser) typically does not legally obtain possession and control of the property until after the sale has been



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ratified by the Circuit Court. *Empire Properties*, 386 Md. at 628. Furthermore, unless the mortgage instrument states otherwise, the mortgagee (i.e., the bank or creditor) typically does not have a right to actually possess and control the property prior to sale and ratification. *See id.* For this reason it is important for the code enforcement official to verify whether the mortgagee has taken possession and control before issuing the citation. For assistance in ascertaining whether the mortgagee or its agent has taken possession and control or otherwise has a right to maintain the property, see section IV.C. below.

*B. Whether a municipal infraction issued to the owner has any effect on the purchaser in foreclosure?*

A municipal infraction cannot properly be issued to the purchaser in foreclosure until after the court ratifies the sale and the deed is conveyed to the new owner. *Empire Properties*, 386 Md. at 633. Furthermore, a municipal infraction issued to the owner of real property typically has no effect on the purchaser unless and until a judgment is awarded by the court in favor of the municipality thereby assessing a fine against the property which by law (i.e., charter or ordinance) may additionally constitute a lien collectable in the same manner as taxes. *See Tax Property Art.*, §14-804. Said lien may be placed on the real property tax bill of the property subject to the assessment and collected as an ordinary tax by the municipality. Once the lien attaches to the property, a subsequent purchaser could later become responsible for the debt whether or not the subsequent owner had prior actual notice of the lien.<sup>2</sup> *See TP Art.*, §14-804.

From the date property tax on real property is due, liability for the tax and a 1st lien attaches to the real property in the amount of the property tax due on the real property. RP Art., § 14-805. Moreover, transfer or conveyance of the property is prohibited until the tax or fee is paid. *McBriety v. Commissioners of Cambridge*, 127 Md. App. 59 (1999) (citing RP Art., §3-104(b)).

Depending on the mortgage instrument, it is possible that the mortgagee could take possession before the foreclosure sale and even prior to the vesting of full title in the purchaser. Some city codes include a “mortgagee in possession” within the definition of an owner. *Black’s Law Dictionary* defines a “mortgagee in possession” as “[a] mortgagee of real property who is in possession of it with the agreement or assent of the mortgagor, express or implied, and in recognition of his mortgage and because of it, and under such circumstances as to make the satisfaction of his lien an equitable prerequisite to his being dispossessed.” In other words, the mortgage could include an express provision that would allow the mortgagee to take actual possession prior to the foreclosure sale, or before the audit is ratified by the court followed by delivery of the deed. *Empire Properties*, 386 Md. at 650.

If the property is vacant and it is unknown which party to the mortgage is in actual or constructive possession of the premises, a municipal official could attempt to find the responsible party

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<sup>2</sup> It is good practice to ensure that the notice of the debt has been recorded and indexed among the judgment records in the office of the clerk of the circuit court in the county where the land lies, and/or is recorded and indexed on the tax rolls of the local government.



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by contacting the owner of record at the address listed on the SDAT record, by verifying the registered person authorized to make foreclosure sale in the county's records; or, by contacting the loan servicing company and/or "property preservation contact" as described below.

*C. If the purchaser or mortgagee is a bank, how does the municipality get the bank's attention to take responsibility?*

For some mortgages, the mortgagor has an express duty to maintain the property and, if not, the mortgagee (or an assignee/financial institution) or loan servicing company may be entitled to take certain measures to preserve the property. There exists an on-line database that is available and used to track mortgage loans as they move through the mortgage banking system. The system is called MERS (Mortgage Electronic Registration System) and can be used to find the "property preservation contact" for most vacant or distressed properties.

This website service allows the user to input the property address or borrower's name to identify the servicer for a particular loan, provided that the mortgage company has indeed registered the loan on the MERS system. However, because mortgage companies are not required to use the MERS system, not all mortgages will be identifiable through this website.

Because of the wave of foreclosures that recently swept across communities in the United States, municipalities are grappling with the issue of unmaintained vacant properties in their areas. To assist them in locating the parties responsible for maintaining these types of properties, MERS has enabled its members to enter property preservation contacts with each loan on the MERS System. A ten-minute video on how to use MERS with a link to locate property preservation contacts is available at <http://www.mersinc.org/ppc/index.aspx>.

Furthermore, one can locate where the deed is located in the land records by book (liber) and page (folio) number for any Maryland property by conducting a search on the State Department of Assessments and Taxation website (<http://www.dat.state.md.us>). Once the deed liber/folio and owners are ascertained, a search may be made to locate the deed of conveyance in the land records as well as the recorded mortgage instrument or deed of trust. Deeds and mortgage instruments are available at <http://www.mdlandrec.net>. Often the MERS representative or mortgage servicer is also listed in the mortgage document (i.e., lien instrument or deed of trust) found in the land records and would be an alternative to searching the MERS database.

With the information found at the above described websites, one can also monitor the foreclosure case filed in the Circuit Court of a given county as it moves through the foreclosure process. The Maryland Judiciary maintains a case search database available from [www.courts.state.md.us](http://www.courts.state.md.us). Once the foreclosure case is located for the specific property, one can check to see whether the foreclosure sale has been ratified thereby conveying equitable title to the purchaser and letting the code enforcement official know when to properly issue a municipal infraction to the correct party.



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Finally, Prince George's County has recently enacted an ordinance on June 23, 2009 entitled "Vacant Residential Property Registration and Maintenance" that is codified in Section 13-1101 *et seq.* of the Prince George's County Code. This ordinance's recital states that "many of these homes are vacated at the demand or request of the financial institution, at times prior to the conclusion of foreclosure proceedings, and sit empty for months or years creating a blight on the neighborhood...and constituting a violation of the County's Housing Code." (emphasis added.) In cooperation with the County Department of Environmental Services, a Prince George's County municipal code enforcement official could also use the County's "residential-property-subject-to-foreclosure" database to contact the person authorized to make the foreclosure sale and the property preservation agent.

**V. Conclusion**

The code enforcement official should practice due diligence and persistence in attempting to ascertain the proper party to serve notice of a code violation. MERS and some county and municipal governments have databases to assist in contacting the appropriate person authorized to sell and/or maintain the property prior to ratification of the foreclosure sale and recordation of the deed. Once the proper owner is served and a judgment awarded, a lien running with the land and attributable to the purchaser (i.e., successor in interest) may be placed upon the property and may be collected in the same manner as the property tax.