

Merrimack Valley

housingreport

An e-publication of UMass Lowell and the Middlesex North Registry of Deeds



University of
Massachusetts
Lowell

MIDDLESEX NORTH
REGISTRY OF DEEDS

Volume 3, Issue 10 October 2010

Rising Doubts About Foreclosures.....	1
Chapter 40B is on the Ballot in November.....	2

Rising Doubts About Foreclosures

By Richard P. Howe Jr.

During the past few weeks, national lenders such as GMAC and Bank of America announced that they would suspend all foreclosure activity in the face of rising questions about the validity of past and current foreclosures. Politically, there are demands from members of both parties for a national moratorium on foreclosures. The centuries-old process of foreclosing a mortgage, a fundamental and unquestioned precept of our law of real property, is suddenly fraught with doubt.

To understand why this is so requires a brief explanation of mortgage law. Every mortgage is both a contract and a conveyance of real estate. In the contract, the borrower agrees to repay the lender an amount of money with interest in a designated period of time. This contract is memorialized in the promissory note

which is signed by the borrower. In the second part of the transaction, the borrower signs a document called a mortgage which conveys an interest in the property to the lender. This conveyance is a contingent one: If the borrower fails to pay back the loan in accordance with the terms of the promissory note, or fails to pay the real estate taxes or keep the property insured or in good repair, the mortgage grants the lender the right to take possession of the property and to sell it at auction. The proceeds of this auction are then applied against the amount due on the promissory note. If the auction yields more than is owed, the overage would be refunded to the homeowner. If the auction fails to cover the amount owed (which is usually the case), the lender may bring a lawsuit against the borrower for the amount of the deficiency.

Con't on pg 3

Deeds, Mortgages, Foreclosures and Orders of Notice Recorded

September 2009 and September 2010 compared

	Haverhill		Lawrence		Lowell		Methuen	
	Sept-09	Sept-10	Sept-09	Sept-10	Sept-09	Sept-10	Sept-09	Sept-10
Deeds	88	88	87	87	179	98	84	90
Mortgages	135	212	97	122	202	23-	165	196
Foreclosure Deeds	11	14	11	18	21	29	7	7
Orders of Notice	29	43	47	62	48	75	33	35

Chapter 40B is on the Ballot in November

By Emily Vidrine

Chapter 40B, the state's affordable housing zoning law, is on the ballot this year, and Massachusetts residents will have to choose whether to vote to repeal it. For many, Chapter 40B has been an important vehicle for affordable housing development since its enactment in 1969. The law enables housing developments that include 20-25% affordable housing units to gain approval from local Zoning Boards of Appeals (ZBAs) in communities that have not yet met the 10% standard of affordable housing inventory. In practical terms, the law allows affordable housing developments the right of appeal in communities where zoning boards reject the project or approve with conditions that are not economically feasible to the development. The developments still must meet state regulations. This has been a key tool for helping communities in Massachusetts overcome zoning hurdles and come closer to meeting the 10% standard.

So far, according to CHAPA's 40B factsheet, 40B has had a significant impact in the state's affordable housing stock. About 29,000 affordable homes have been added to the housing stock across the state since its inception, and the majority of new affordable housing production in communities who have not yet reached the 10% standard are a direct result of 40B.

There has been some media attention on the issue of 40B lately that emphasizes communities' opposition to the law because it allows developments to override local zoning ordinances, resulting in unfavorable developments that don't match the communities they are set in. The Harvard Kennedy School Rappaport Institute, however, put out a study in late 2008 that shows that about 81% of 40B project applications are approved by local ZBAs and developers do not appeal conditions for 83% of ZBA-approved applications. This indicates that the great majority of communities tend to be in agreement with 40B developments. In addition, the 40B law has been revised and improved

since 2001, to make it easier on communities by lowering the number of subsidized housing units that must be created each year and providing more flexibility so long as communities demonstrate that they are actively approaching the 10% goal.

There is a common perception that affordable housing developments are high-density poorly constructed buildings that are filled with unemployed individuals who take advantage of state programs. The truth is that chapter 40B developments contain both market-rate units that serve middle-income households and affordable units that serve seniors and families that make less than 80% of the area's median income. Typical occupations of occupants are health care workers, educators, retail employees, construction tradespeople, office management and administrative staff, financial service workers, human services workers, and retirees, according to CHAPA's factsheet. Furthermore, concerns about property value declining around 40B developments have not been realized. In a field project report from Tufts University's Urban and Environmental Policy and Planning department that studied community concerns related to 40B developments, findings indicate no change in property values occurred after completion of 40B developments, and most other community concerns were a result of fear due to loss of zoning control.

It is well understood that Massachusetts is one of the most expensive states to live in, and with the current state of the economy and the housing market, the need for affordable housing is greater than ever. The Massachusetts Low Income Housing Tax Credit 2010 Qualified Action Plan reports that there is a shortage of affordable rental units in most communities. If 40B is repealed in November, without a promising alternative policy to promote affordable housing in Massachusetts, the gap between affordable housing needs and supply will worsen. █

Rising Doubts About Foreclosures Con't from page 1

Years ago, the home lending business was locally based. A bank would loan money to a homeowner and monitor the repayment over time. But the promissory note need not stay with the bank that made the loan in the first place. Over time, more and more banks began “selling” these notes to investors who sought a steady stream of fixed income over time (the interest on the note). In return, the bank had more cash to lend to new borrowers. Since the bank made much of its revenue from transactional fees at the inception of the loan, the more loans made, the more income to the bank.

A fundamental rule of property law is that “the mortgage follows the note” so anytime the initial lender “sold” a note to an investor (usually a bigger bank or investment company), the initial lender would execute and record at the registry of deeds an “assignment of mortgage.” The assignment would convey the interest in the property created by the mortgage and held by the initial lender to the new holder of the note. Once the assignment was recorded, the new holder of the note would possess all the foreclosure rights granted to the initial lender by the mortgage.

During the housing bubble of the past decade, the practice of local banks making and holding mortgages long-term faded into obscurity. Instead, an army of mortgage originators descended on our neighborhoods and churned out loans of questionable terms and security at an incredible rate. Before the ink on the documents was even dry, they would be bundled up and shipped off to Wall Street to be repackaged as investment bonds. Because the originators, the

investment bankers, and everyone else involved (except for the ultimate investor) were paid based on the speed and size of each transaction, volume and speed became paramount.

In this rush to Wall Street, the quaint old custom of recording mortgage assignments was neglected, ignored or deferred. The assignment of mortgage was a loose end that no one worried about very much.

When the bottom dropped out of the real estate market and the rate of foreclosures soared, many investors who held notes proceeded directly to foreclosure notwithstanding the fact that the companion mortgage had never been assigned by the initial lender. Without the assignment already in place, the subsequent foreclosure and any sale of the property to a third party that followed would be rendered void.

Enough Massachusetts foreclosures fall into this scenario that many lenders are freezing foreclosures here until they can ensure that any necessary assignment are recorded prior to the commencement of any foreclosure activity. Because the property law of every state is different, other defects in the foreclosure process have arisen in other jurisdictions. The one thing all of these problems have in common is that they were born of the same corner-cutting mentality among lenders that allowed so many questionable loans to be made in the first place. Whatever the case, delays in the foreclosure process will further slow any possible recovery of the real estate market both in Massachusetts and nationwide. █

The Merrimack Valley Housing Report thanks its major sponsors for 2010:

**Merrimack Valley Regional Network to End Homelessness
&
Community Teamwork Inc.**

The *Merrimack Valley Housing Report* is published by UMass Lowell and the Middlesex North Registry of Deeds

Richard P. Howe Jr., Editor
Richard.Howe@sec.state.ma.us

David Turcotte, Editor
David_Turcotte@uml.edu

Emily Vidrine, Research Assistant /Writer
Emily_Vidrine@student.uml.edu

Joann Vaillette, Publication Assistant/Writer
Joann_Vaillette@student.uml.edu

Center for Family, Work, and Community
University of Massachusetts Lowell
600 Suffolk Street, First Floor South
Lowell, MA 01854
Tel. (978) 934-4682
www.uml.edu/mvhousing

This project is funded in part by the Office of the Chancellor and the Office of Outreach. UMASS LOWELL

Subscribe to the Merrimack Valley Housing Report

To begin receiving this monthly e-publications, please e-mail David Turcotte at David_Turcotte@uml.edu