



Foreclosures and Zoning

**Georgia Association of Zoning Administrators
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Common Problems

- **CODE ENFORCEMENT:**
- Who owns the property?
- Who is responsible for the property?
- How to get results?

Common Problems

➤ New Developers

- Do they have vested rights ...
 - Building permits?
 - Approved Site plans?
 - Special Use Permits

Foreclosure

- The property is vacant, or...
- It is being occupied by a person who claims to no longer own the property.

➤ Who owns the property?

➤ How does the CEO track the owner down?

The Foreclosure Process

- Property owner gives a security deed to secure a debt (often, but not always, the purchase money for the property).
- Property owner defaults: fails to make payments.
- The security deed grants the lender the right to sell the property on the courthouse steps on the first Tuesday of the month.

The Foreclosure Process, cont'd

- There is only a modest amount of notice required (newspaper advertisement).
- At the foreclosure sale, the lender, as the agent for the property owner, sells the property to the highest bidder.
- Highest bidder may be a new property owner, but it is often the bank itself.
- “Deed under power of sale”

What is a short sale?

- A short sale is simply one where the lender allows property to sell for less than the amount due, and releases the debt.
- If the sale is to a third party, then it is really no different from any other sale.
- If the sale is back to the bank, then it is usually accomplished by a deed in lieu of foreclosure.
- Either way, it should not affect the CEO's enforcement procedure.

Foreclosure and Confirmation

- Lender may either get a judgment on the promissory note first, or may first foreclose. It's lender's election.
- This is the result of laws adopted as a result of the Great Depression, but it has been interpreted by the Courts in a way that seems very unjust.

If Lender Does Not Get a Judgment First....

- If a lender forecloses first, it can only go after the balance due if the foreclosure is confirmed in a judicial proceeding.
- Confirmed = brought fair market value.
- Debtor has a right to challenge the foreclosure for not bringing fair market value.

HARDBALL

If the lender gets a judgment first, then it can foreclose and keep going after the debt still owed. Even if the foreclosure brings little proceeds, the lender does not need to confirm the sale.

It is difficult for the debtor to challenge the foreclosure in this posture.

The Foreclosure is Final...

- As soon as the deed under power of sale is signed and delivered.
- Usually within a few days of the foreclosure sale.
- Before that, the original owner still owns it.

After the Foreclosure

- The original property owner
 - may leave willingly, or...
 - may continue to stay in the house as a holdover tenant.
- Unless the new owner chooses to have the old owner dispossessed, a Landlord-Tenant relationship is created.

Who is responsible?

- Before the property is actually sold on the courthouse steps, the original property owner is still responsible.
- After the foreclosure, the new property owner (whether the bank or someone else) is responsible.
- If old owner holds over, then they would be responsible as a tenant.

How do you determine and verify?

- Look at the deed records.
- Either in the deed room, or on the Superior Court Clerk's Authority website: www.gsccca.org
- Form PT-61
- Tax assessor's office
- Secretary of State's office

New Law: O.C.G.A. § 44-14-14

- Allows local governments to adopt a limited and uniform registration requirement for vacant property.
- Preempts other local registration requirements

Vacant Real Property

- Real property that is intended for habitation, but has not been inhabited for 60 days, has no evidence of utility usage, and is not actively being marketed for sale or rent, or
- Partially constructed without a valid building permit, or
- Is held as a result of foreclosure.
- Excludes multi-family structures where any one unit is being inhabited.

Registration

- Grantee of the foreclosure deed or deed in lieu of foreclosure and next subsequent transferee must give local government the following information:
 - owner's name, address, phone, fax, e-mail
 - agent's name, address, phone, fax, e-mail
 - vacant property's address
 - transfer date
 - recording info (deed book and page #)

Registration, cont'd

- Owner has at least 60 days to file.
- If they notify the County and provide the recorded deed and information within 60 days, no fee.
- Otherwise, fee of no more than \$100.
- Penalties of no more than \$500 per month.

O.C.G.A. § 44-14-14 is Not Self-Effectuating

- The local government is required to adopt an ordinance complying with the statute in order to enforce a vacant property registration requirement.
- Requires administrative procedures.

Effect of Enforcement Actions on Foreclosure

- An enforcement action will not necessarily stop a foreclosure, but should give a lender or prospective buyer pause, and may delay foreclosure.
- A lis pendens is appropriate when a civil action has been filed – will give the bank incentive to get the matter resolved.

Effect of Foreclosure on Enforcement Actions

- Where a code enforcement action has resulted in a lien on the property, a foreclosure will wipe out the lien except where it predates the recording of the security deed.
- CEO may have to refile or get the new owner named as a party.

What if you know something that prospective buyers might not?

- Situations arise where a property is unfit, and during the foreclosure process, the CEO discovers it.
- Does the CEO have a duty to warn prospective buyers?

Dealing with the New Developer

- What rights “run with the land”?
- Zoning designations. See Stendahl v Cobb County, 284 Ga. 525 (2008)
- Special Use Permit, probably.
- Conditional use, probably.

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- Rights to continue non-confirming uses run with land. See BBC Land & Dev. Co. v. Butts County, 281 Ga. 472 (2007)
 - That case says that development approvals do not run with the land (i.e. are not transferrable), BUT...

The Legislative Response: O.C.G.A. § 44-5-40

- Vested interests in property stemming from the approval of land disturbance, building construction, or other development plans, permits, or entitlements in accordance with a schedule or time frame approved or adopted by the local government shall be descendible, devisable, and alienable in the same manner as estates in possession.

➤ What if the permit or plat has expired?

Other considerations.

- Should a bond be required for roads and utilities?
- Has the old one expired?
- Should this apply to a new developer or new builders?

Bankruptcy

- A debtor seeks the aid of the federal courts to discharge or modify his debts, and for protection from creditors.

Chapter 7

- The most common form – liquidation.
- Trustee is appointed.
- Everything owned by debtor other than secured and exempt assets are sold to pay off unsecured debts.

Chapter 11

- Reorganization – preferred by corporations
- Delta bankruptcy
- Debtor in possession
- Court oversight

Chapter 13

- Repayment plan over a period of several years
- Trustee appointed to review debtor's repayment plan

Effect of Successful Bankruptcy

- Confirmed plans
- Discharge of debts

Secured v. Unsecured Debts

- Secured debts are those debts where the creditor has a protected interest in property of the debtor which “secures” the debt if debtor can’t pay.
- Security deed for home loan versus credit card.
- UCC for personal property or equipment.

Bottom line: the secured debt gets protected.

Priority

- This relates to the sequence in which secured interests are created.
- First in time = senior priority.
- If the senior priority debt is greater than the value of the asset, then the junior priority debt gets “wiped out”.
- First mortgage versus lien.

What happens to the house?

- If the debtor has a mortgage secured by the home, then the bank's interest in the home will be protected, and ultimately the bank will be able to get the debt paid or the home through foreclosure.
- The debtor will often recognize the mortgage debt, keep paying it, and seek to discharge other non-secured debts.

Temporary Effects

- Automatic stay of foreclosure or collection actions
- Contempt of court

Automatic Stay and Enforcement

- Exemption for police power actions
- Pecuniary interest test
 - tall grass / appearance of property / health
vs.
 - occupational tax

In re Douglas S. Nease and Brenda M. Nease

- Tall grass citation
- Chapter 13 bankruptcy – house surrendered to mortgage company, but no action
- Cease and desist letter / contempt action
- The Court said – “police power”

Effect of Code Enforcement Actions

- Fines may be discharged
- Liens may be erased by superior secured interests