

IREM

**FORECLOSURE SEMINAR:
Lender Obligations**

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**Presented By:
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I. Obligations of Lenders In Relation to Foreclosed Properties

- **Local Ordinance in Boston entitled “*Maintenance of Vacant, Foreclosing Residential Properties.*”**
- Proposed by City Councilor Robert Consalvo
- Requires owners of foreclosed residential properties in Boston to:
 - Register vacant and/or foreclosing residential properties with Commissioner of the Inspectional Services Department.
 - If property is vacant the owner must designate a local individual or management company responsible for the security and maintenance of the property

and

 - Maintain the property in accordance with relevant Sanitary Codes, Building Codes and local regulations
 - Owner must inspect and maintain the property on a monthly basis
 - Owner must place a visible sign containing contact information of owner or designated management company
- Broad definition of “owners” of residential properties, term “owner” includes lending institutions who have initiated foreclosing activity
- Purpose: To protect and preserve public safety, security and quiet enjoyment of occupants, abutters and neighborhoods
- City of Boston may hold lenders responsible for failing to maintain properties
- Similar Ordinances are in place in Attleboro, Cambridge, Chelsea, Everett, Fall River, Gardner, Gloucester, Holyoke, Lawrence, Lowell, Lynn, Malden, Marlborough, Medford, Methuen, New Bedford, North Adams, Pittsfield, Quincy, Randolph, Revere, Somerset, Springfield, Woburn and Worcester.

II. Rights of Tenants Imposed by State and Federal Statute

- Foreclosures are rampant in Massachusetts and New England
- Recent slight trend of decline in foreclosures but too early to tell if it will continue
 - In March, lenders filed 1,048 petitions to foreclose, a 59.4 percent decrease from 2,581 in March 2010, said the Warren Group, a Boston firm that tracks real estate activity.
 - Foreclosure deeds also dropped: there were 552 in March 2011 down 60 percent from 1,391 in March 2010
- Effect of foreclosures widespread:
 - Impact on property values in surrounding community
 - Unpaid common area charges build up, impact entire condominium association
 - Financial strain on property owners
- Lenders can take back property but it remains vacant and unsold

- Do tenants in possession have right to stay?
 - Two types: hold over owners and actual paying tenants
- Foreclosure Act - “Protecting Tenants At Foreclosure Act of 2009 (Statute effective May 20, 2009)
 - Must give ninety day prior written notice that property is being foreclosed upon if it is a tenant at will
 - Must honor longer duration term of written lease if lease
 - expires within ninety days
 - contains fair rent
 - in writing and signed
 - Longer duration, including renewals in federally subsidized (leasing ie section 8)
 - Summary Process – legal process
- Notice (Actual Constable)
- Subject to rights/liabilities of tenancy
 - Security deposit
 - Breach of warranty of habitability
 - Retaliatory evictions
 - Rental flow
 - Summary process, discovery delays, executions, appeals
 - Bankruptcy

III. Collection of Outstanding Condominium Fees

- Baker v. Monga, 32 Mass. Appt Ct. 450 (1992) and Trustees of Prince Condominium Trust v. Prosser 412 Mass 723 (1992) established principle that unit owner’s obligation to pay condo fees is not subject to offset, withholding, counterclaims or defenses for alleged transgressions on behalf of the unit owners’ organization
- Separate action must be brought against unit owners’ association to attempt to recoup fees paid over objection of unit owner
- Recording of Master Deed constitutes record notice and perfection of a condo lien for purposes of notice
- Super lien – takes priority over first mortgagee of record if lender is given notice of 60 days of unpaid common expenses, notice of intent to file foreclosure action and includes up to 6 months of regular common area fees plus collection costs and attorney’s fees
 - Rolling superlien – allows “stacking” of liens for successive 6 month periods
- Failure to notify first mortgagee eliminates priority of lien only with respect to collection costs and attorney fees; six month’s worth of common expenses charges are preserved
- Recording of attested copy of complaint in the registry of deeds perfects the lien
- Virtually no defenses available to a lien enforcement action

IV. Unit Owner Bankruptcy Concerns

- If unit owner declares bankruptcy, condo association must obtain lift of automatic stay from Bankruptcy court before proceeding with collections, foreclosure
- Bankruptcy Code obligates unit owner or bankruptcy trustee to pay post bankruptcy petition condo fees so long as they hold an ownership interest in the property

V. Impact of Defective Mortgage Assignments Under Recent SJC Case

- Recent SJC case – US Bank National Association v. Ibanez (and a consolidated case) (Gants, J.)
- Lenders must prove that the foreclosing entity was the mortgage holder at the time of the notice of sale and foreclosure, or a party authorized to foreclose.
- To do so, a foreclosing entity must provide a complete chain of assignments linking it to the record holder of the mortgage, or a single assignment from the record holder of the mortgage.
- In either case, the foreclosing entity must hold the mortgage at the time of the notice and sale in order to accurately identify itself as the present holder in the notice and in order to have the authority to foreclose under the power of sale (or the foreclosing entity must be one of the parties authorized to foreclose under the law).
- Securitization documents alone are not enough to establish that a lender holds a valid mortgage assignment.