

Date of Hearing: May 3, 2010

ASSEMBLY COMMITTEE ON BANKING AND FINANCE

Mike Eng, Chair

AB 2347 (Feuer) – As Amended: April 20, 2010

SUBJECT: Mortgage defaults: secondary public financing

SUMMARY: Provides that if a property contains two or more dwelling units and a public entity holds a deed of trust or is a party to a recorded rent regulatory agreement on the property, the public entity may, by written notice to the trustee, postpone the sale date by no more than 60 days.

EXISTING LAW

- 1) Regulates the non-judicial foreclosure process pursuant to the power of sale contained within a mortgage contract, and provides that in order to commence the process, a trustee, mortgagee, or beneficiary must record a notice of default (NOD) and allow three months to lapse before setting a date for sale of the property. [Civil Code Section 2924, all further references are to the Civil Code].
- 2) Provides that the mortgagee, trustee or other person authorized to make the sale must give notice of sale, and requires notice of sale to be made, as specified, at least 20 days prior to the date of sale. [Section 2924f].

FISCAL EFFECT: Unknown

COMMENTS:

According to the author, this bill is intended to mitigate the impacts of the foreclosure crisis on the availability of affordable housing in California. When public agencies provided financial assistance to multifamily properties in exchange for securing some percentage of affordable housing units, the author states, those agencies should have an opportunity to intervene by either purchasing the property or finding a purchaser for the property that will preserve the affordable units before the trustee concludes foreclosure proceedings.

The author states that AB 2347 would help local governments protect their investments in affordable rental housing, threatened by foreclosure, by providing 60 additional days before an agency-assisted affordable development can be sold through foreclosure.

Supporters note that public agencies, typically city or county housing departments, frequently provide financial assistance to multifamily properties. Deeds of trust and/or regulatory agreements secure the loans and ensure that the properties remain affordable to eligible families. These affordability agreements are usually subordinated to mortgages or similar interests held by private lenders. If the owner defaults on the private loan and a foreclosure ensues, the public agency's investment and affordability conditions are wiped out. According to supporters, in the last three years in the City of Los Angeles alone, 22 separate loans for multifamily developments in the City's portfolio were threatened with foreclosure. If all these loans were wiped out, the

City of Los Angeles would lose approximately \$23 million, and the affordability restrictions on many affordable rental units.

The author observes that a receiver is typically appointed to evaluate and report on the property's operations and financial condition in a foreclosure on a multifamily residence. A public agency with a subordinated interest in the property uses the receiver's report to conduct an economic analysis. This analysis is the basis for a locality's action plan for the property. The local legislative body must review and approve the best fiduciary course of action regardless of its threatened investment and loss of housing.

The problem, supporters state, is that too often the report arrives too late for the local government to utilize it for this analysis. The foreclosure process requires that a foreclosed multi-family property be sold at a public auction. In the current process, government agencies that are the secondary loan holder are not given ample time to approve the funds, make a bid, cure a default or buy a distressed property to ensure that it remains affordable.

In order to allow public agencies an appropriate opportunity to obtain a meaningful receiver's report, determine a course of action, and take steps to protect public investments, this bill would allow public agencies to send a written notice to the trustee to temporarily postpone a foreclosure sale for up to 60 days. The postponement could only be exercised if: (1) the public agency holds a trust deed or rent regulatory agreement on the property; and (2) the property contains two or more units.

AB 2347 would, supporters contend, ensure that local governments have a fair opportunity to obtain the receiver's reports and other assessments of the property – not just days before the sale is scheduled, but in time to evaluate the information, and decide whether to commit scarce financial resources to salvage the long-term affordability of these valuable, rent-restricted apartments.

ARGUMENTS IN OPPOSITION: While the committee did not receive any opposition letters on this bill, the Assembly Judiciary Committee analysis noted the following opposition from the California Land Title Association, contending as follows:

If a public entity has a trust deed or rent regulatory agreement on property they do not have the legal authority to instruct the holder of a trust deed to postpone a foreclosure sale. This is because they do not have privity of contract with the trustee and also are not a party to the trust deed being foreclosed. If a "public entity" has a junior lien they can protect their interest like any other junior by paying off the senior or bidding at the foreclosure sale and are already being notified by the trustee through the process established under existing law.

Under existing law, a "public entity" that has a regulatory agreement in a second deed of trust (or subsequent deed of trust) unfortunately gets wiped out when a senior lien forecloses. If they want to protect their agreement they can pay off the senior being foreclosed. It is our understanding that foreclosures are typically taking several months which would seem to provide AMPLE time for a public entity to become aware of a foreclosure that is pending and to make a calculated decision on whether or not to intervene. If notification from a receiver is not being done, then that process needs to be

improved at the local level or addressed through additional obligations place upon receivers.

As currently drafted, several terms are undefined and create huge potential problems for consumers, title companies, lenders, real estate professionals, and other interested parties. Specifically, from this one section alone, the following terms are undefined: What is a “public entity” under this bill and how would that be ascertained and by whom? Could a “public entity” notify an escrow holder or title company at any time and still postpone the sale even if the sale is just hours away? What happens to a consumer/bona fide purchaser who happens to purchase a multi-family unit and is unaware that notification to a “public entity” has not taken place? Can the sale be set aside and the postponement subsequently granted? In other words, what is the effect if the notification does not take place and the public entity has not asked for a postponement?

If a consumer/investor isn't using a title company to conduct a title search or facilitate a transfer of this type of property, they are even more at risk and may not have an underlying title insurance policy to protect them if their sale is set aside, postponed, or delayed.

A 60-day delay outlined in this bill may put at risk other contingent financing or other transactions hinging on such a sale, and may result in a total failure of a transaction because of the timing of related contingencies. In short, a consumer purchasing this type of property may suffer unintended monetary losses because they did not anticipate such a delay. This is even if they exercise due diligence and conduct a thorough title search of recorded county records.

As indicated above, these new requirements would increase the risk for buyer/consumers who would be wary of investing in multifamily housing if such an investment has a higher risk associated with it. If the goal is to increase available affordable housing of this kind, does it make sense to increase the risk associated with such an investment? Shouldn't the legislation target requiring receivers to provide more timely notice to local agencies?

#### Amendments:

Committee staff is aware that the author's office has conducted several meetings with interested parties to further narrow and clarify this bill. In the mean-time the committee may wish to consider the following amendments.

1) Provide a definition of "public entity." Committee staff recommends the following:

**"Public entity" includes a county, city, city and county, redevelopment agency or any other political subdivision thereof.**

2) Clarify that a foreclosure stay may be requested only once by one and that that the application is further limited to properties with five or more dwelling units. On Page 6, starting with line 8, make the following changes.

(d) If a property contains ~~two or more dwelling~~ **five or more multifamily** units and a

*public entity holds a deed of trust or is a party to a recorded rent regulatory agreement on the property, the public entity may, by written notice to the trustee, postpone the sale date by no more than 60 days.*

***(i) if multiple public entities hold deeds of trust, or are parties to a recorded rent regulatory agreement on the property pursuant to this subsection, only one entity may postpone the sale date.***

***(ii) The power under this subsection to postpone the sale date may be exercised only once.***

REGISTERED SUPPORT / OPPOSITION:

Support

None on file.

Opposition

None on file.

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