

Draft
Distressed Property Act
8 April 2002

1. ~~Terms and~~ Definitions

~~a. A “distressed property” is developed real property that is neglected in the case of residential property or vacant or neglected in the case of commercial property.~~

~~a~~b. For the purposes of this Act:

1. “commercial property” is a structure at least 75% of which is used, or approved for use as, non-residential space or facilities;
2. “developed real property” is a parcel of real property containing a completed or partially constructed building or structure;
3. ~~“notification” means notification, in writing, sent to the last known address of the person to be notified;~~
4. “residential property” is developed real property that is not commercial property ~~a structure at least 25% of which is used for residential space or facilities;~~
5. ~~“owner” is the record owner of the property;~~
6. ~~“tenant” is an individual in use or possession of a commercial or residential property, or part of that property, pursuant to an agreement with the owner of the property.~~
7. “residential investment property” is non-owner occupied developed property having more than three housing units for rent and is not commercial property.

~~b~~e. ~~A~~Commercial property is vacant if neither the owner nor ~~any~~ tenant occupies or conducts business on that property, or in any separate parts of the property constituting at least 25% ~~50%~~ or more of the square footage of the property’s floor area, for a period of twelve consecutive months. Residential investment property is vacant if tenants do not occupy at least 25% of the units available for rent.

~~c~~d. A property is neglected if:

1. real estate taxes are in arrears on a commercial property for four or more consecutive quarters, or for a residential property for six or more consecutive quarters;
2. after notice and an opportunity to correct, the property continues to violate an applicable statute or code provision involving a ~~serious~~ health or safety standard;
3. the property has been adjudicated a private or public nuisance and the adjudication remains in effect;

4. the property is the object of a pattern of consistent, ongoing, code violations beyond the owner's control that occur over a period of more than one year even if individual code violations are abated; or
5. the property is a partially constructed building and the building permit has expired and has not been renewed ~~construction has stopped for a period of one year.~~

Source: New

COMMENT

This section defines the terms used in the Act and by result sets the parameters of the statute. The term “developed real property” is used broadly to indicate only that the real property must contain a structure. But the structure does not have to be completed as specified by subsection (c)(5). The Act covers partially completed buildings to provide a remedy for accelerating the development of incomplete property.

Commercial property is defined by actual primary use or status of approved use in subsection (a)(1) to establish a specific standard of identification and to deal with the question of mixed-use property. Residential property is defined in subsection (a)(3) by exclusion, that is, all other property within the definition of developed real property. Residential investment property is defined in subsection (a)(4) as non-owner occupied rental property where the building has more than three rental units.

Subsection (b) defines the term “vacant” for commercial property and residential investment properties. The term “vacant” is defined first in its generally accepted meaning to refer to property that is not occupied or put to use and second to refer to property that is marginally used. Subsection (b) states that commercial property that is used only to the extent of 25% of the square footage of the available floor area is vacant even though partially used or occupied. Examples of marginally used property include commercial property where the ground floor is tenanted but the remainder of the building is empty. That type of commercial property triggers the Act. Likewise, underused residential investment property also triggers the Act.

However, residential property that is vacant but not neglected is not a distressed property. The requirement of “neglect” for residential property avoids deeming a residential property a “distressed property” solely due to an absent owner. Hence, if an owner pays taxes and otherwise complies with the law governing the property, the fact that the property is empty does not result in a designation of “distressed property.”

Subsection (c) specifies the bases for finding that a property is neglected.

2. Identification of distressed properties

a. A distressed property is developed real property that, in the case of commercial or residential investment property, is vacant or neglected, or, in the case of residential property, is neglected.

ba. The code enforcement official of a municipality shall identify distressed properties and maintain an inventory of such properties in the municipality. The identification of each property on the inventory shall include the owner's name, the street address of the property and the basis for finding that it is a distressed property. The code enforcement official shall continuously update the inventory of distressed properties by adding to the municipality's inventory of distressed properties.

cb. A person may report a property to the code enforcement official claiming that it is a distressed property. The code enforcement official shall determine within thirty

days of the report whether the property is a distressed property under this Act and, if so, shall add it to the municipality's inventory of distressed properties.

Source: New

COMMENT

The term "distressed property" covers both developed commercial and residential properties. Subsection (b) obligates the code enforcement official of each municipality to identify real property that is "distressed property" within the meaning of this Act. The code enforcement official's finding must include the owner's name, street address of the property and the basis for the determination. The finding then is followed by notice to the owner under section 3 and is the starting point for creating the municipality's inventory of distressed properties. Private persons may report a real property as a "distressed property." That report requires the code enforcement official to investigate the report and make a determination. Enlisting private persons to inform the municipality of potential properties promotes vigilance in identifying code violations and problem properties.

3. Notice before adding property to inventory

Note: This provision requiring the code enforcement official to notice the owner and lien holders may be counterproductive. First, it imposes a new and onerous obligation on the code enforcement official; second, it imposes a substantial cost upon the municipality since title and judgment searches must be ordered for every property identified to be a distressed property; and third, and most importantly, it not only does not obviate duplicate notice when the municipality or other person files a complaint for an order of sale or appointment of receivership but also may not cut off lien holders' right to repair because the complaint seeks a different remedy from the notice required by this section and the passage of time between the placement of the property on the inventory and the commencement of litigation may induce a court to provide an equitable remedy.

Hence, the purpose of front-loading the notices- avoidance of noticing all parties later and cutting off their rights of repair – may back fire. Realistically, it is unlikely that a lien holder is going to make a substantial investment in a distressed building. In most cases, this action would throw good money after bad. Two versions are therefore presented for the Commission's review.

Version One – Full Notice

a. Before adding a property to the distressed property inventory, the code enforcement official shall notify the owner of the property, and lien holders of the property, that the property has been determined to be distressed property. The notice shall:

1. identify the conditions for finding that the property is a distressed property, including an identification of the deficiencies in the property;
2. state the date the property was determined to be a distressed property;
3. establish a reasonable deadline for eliminating the complained-of conditions; and

4. provide that if the complained-of conditions are not corrected, the property will be listed on the municipality's distressed property inventory, making it subject to sale or receivership.

b. The notice shall also inform the owner and lien holders that each noticed person ~~he~~ has a right to object to the property's being designated a distressed property within thirty days of the date of the notice.

c. If ~~no~~ the person notified under subsection (a) owner of the property does not objects to the claim that the his property is a distressed property and fails to correct the complained-of conditions are not corrected by the deadline established in the notice, the code enforcement official shall place the property on the municipality's inventory of distressed properties.

~~d. If the owner objects to the claim that his property is a distressed property, or the time within which to correct the conditions, the code enforcement official shall provide a hearing.~~

Source: New

Version Two – Limited Notice

a. Before adding a property to the distressed property inventory, the code enforcement official shall notify the owner of the property that the property has been determined to be distressed property. The owner is the legal or natural person named in the current tax record for that property. The notice shall:

1. identify the conditions for finding that the property is a distressed property, including an identification of the deficiencies in the property;

2. state the date the property was determined to be a distressed property;

3. establish a reasonable deadline for eliminating the complained-of conditions;
and;

4. provide that if the complained-of conditions are not corrected, the property will be listed on the municipality's distressed property inventory, making it subject to sale or receivership.

b. The notice shall also inform the owner that he has a right to object to the property's being designated a distressed property within thirty days of the date of the notice.

c. If the owner of the property does not object to the claim that the property is a distressed property or fails to correct the complained-of conditions, the code enforcement official shall place the property on the municipality's inventory of distressed properties.

d. The code enforcement official shall send the written notice to the address of the owner specified in the tax record. The notice is effective whether or not the owner actually receives it.

COMMENT

Note existing comment based on prior draft is not revised pending Commission's decisions.

This section requires the code enforcement official to notify the owner of real property and lien holders, including judgment creditors, that the code enforcement official has determined the property to be a "distressed property."

Subsection (a) specifies the content of the notice. The notice tells the owner and lien holders of the conditions for determining the property to be a "distressed property," gives the "noticed parties" an opportunity to correct the conditions complained of and alerts the noticed parties that if the conditions are unabated, the municipality or any interested person has the authority to ask the court to order a sale of the property. In the case of residential investment property, the municipality or any interested person has the authority to ask the court to appoint a receiver to manage and operate the building. The notice requirement gives both owners and lien holders a pre-litigation remedy to contest the code enforcement official's initial finding.

Should the owner or lien holders fail to object to the finding or fail to correct applicable statutory or code violations, subsection (c) requires that the code enforcement official place the property on the municipality's inventory of distressed properties making that property subject to the remedies of this Act.

4. Municipal hearing

Version One – Full Notice Consequence

a. If the owner, or lien holder, objects to the determination that the property is a distressed property, or to the time period within which to correct the conditions, the code enforcement official shall provide a hearing.

b. An objection is made if, within 21 days of the date the notice was received, the person making the objection files a written notice of objection to the code enforcement official specifying the reason for the objection.

c. The code enforcement official shall conduct a hearing affording the objector the opportunity to submit oral and written evidence that the property is not a distressed property. The objector may be represented by counsel.

d. Within ten calendar days of the hearing date, the code enforcement official shall render a written decision on the matter and provide a copy of that decision to the objector and to all persons noticed under Section 3. If the code enforcement official finds that the property is distressed, the decision shall state the reason for upholding the original finding and shall state the reason for rejecting all objections raised at the hearing or previously submitted in writing.

Source: New

Version Two – Limited Notice Consequence

a. If the owner objects to the determination that his property is a distressed property, or to the time period within which to correct the conditions, the code enforcement official shall provide a hearing.

b. An objection is made if, within 21 days of the date the notice was sent, the owner files a written notice of objection to the code enforcement official specifying the reason for the objection.

c. The code enforcement official shall conduct a hearing affording the owner the opportunity to submit oral and written evidence that the property is not a distressed property. The owner may be represented by counsel.

d. Within ten calendar days of the hearing date, the code enforcement official shall render a written decision on the matter and provide a copy of that decision to the owner. If the code enforcement official finds that the property is distressed, the decision shall state the reason for upholding the original finding and shall state the reason for rejecting all objections raised at the hearing or previously submitted in writing.

COMMENT

Note that existing comment based on prior draft is not revised pending Commission's decisions.

This section outlines the procedure to be followed by the owner and municipality to vindicate the owner's right to be heard and to present evidence in support of his objection. The owner has a right to appeal the decision of the municipality to the Superior Court, Law Division under Rule 4:71 (Appeals from Local Agencies).

5. List of distressed properties; remedy

a. The current inventory of distressed properties shall be available for public review at the office of the municipal clerk or other location as is specified by the municipality, including placement on any Web site published by the municipality and shall be a public record.

b. A municipality or any person may file a summary action with the Superior Court seeking an order to sell a distressed property or appoint a receiver to manage and operate distressed and occupied residential investment real property. The initial filing in the summary action must include a complaint, an appraisal of the property and a copy of the municipal determination that the property is distressed. In actions to appoint a receiver, the initial filing may name a receiver subject to the approval of the Court.

c. The owner, or lien holder, may file a summary action with the Superior Court seeking an order requiring the removal of a property from the municipality's distressed property inventory. The owner or lien holder must demonstrate that the property was improperly placed on the inventory of distressed properties and that the property is no longer vacant or neglected.

Source: New

COMMENT

Note that existing comment based on prior draft is not revised pending Commission's decisions.

This section establishes the inventory of distressed properties. Placing a property on the inventory has legal consequences. Any person or the municipality may bring an action under this Act to force the sale of the property or to have the court appoint a receiver to operate residential investment property. Due process requirements to the owner are satisfied as follows. First, under Section 3, the code enforcement official has given prior notice to the owner that the property is a "distressed property." That notice included

an opportunity to correct and a right to object entitling the owner to a municipal hearing. Second, if the property is placed on the inventory, subsection (c) gives the owner a second opportunity to have that property removed by bringing a summary action before the appropriate court. N.J.S.A. 47:1A-1 et seq.

6. Court Proceeding

a. Except as in subsection (b), the Superior Court shall, after notice and a hearing, enter an order authorizing the sale of the distressed property if the court finds that: (1) the owner and lien holders have been served with the complaint; and (2) the plaintiff has adequate financial ability and plan to rehabilitate the building. If sale is ordered, the Superior Court retains jurisdiction to approve the contract of sale.

b. The Superior Court shall ~~may~~ enter an order appointing a receiver to manage and operate distressed property if the court finds that: (1) the real property is occupied residential investment property, (2) the party submits a plan to remedy defects, (3) the party demonstrates that the rent roll of the building in accordance with the plan approved by the court is sufficient to carry its cost, including mortgages, cost of repair and payment of taxes and (4) the owner is unwilling or unable to repair the property.

c. A lien holder may file, simultaneously with or prior to filing his answer, a motion to remove the distressed property from the municipal inventory if the motion is supported by evidence showing that the lien holder is willing to correct the deficiencies in the property and has the financial ability to complete the repairs. After a hearing, the court may remove the matter from its active calendar if the court finds that the lien holder has provided evidence of financial capacity to correct the deficiencies and a reasonable timetable for completing the repairs. The court shall retain jurisdiction and shall return the matter to its active calendar if the lien holder violates any term of the order holding the action in abeyance.

Source: New

COMMENT

Note that existing comment based on prior draft is not revised pending Commission's decisions.

This section sets the findings the court must make prior to entering an order compelling the sale of the property or appointing a receiver of the property if it is occupied residential investment property. First, the court must find that the plaintiff has served the owner and all parties of record with the complaint as required by New Brunswick Savings Bank v. Markouski, 123 N.J. 402 (1991). Second, the court must find, based on proofs established by the plaintiff, that at the time the complaint was filed, the property was a vacant or neglected property and remains a distressed property. If the court makes these findings, then it may enter an order compelling the sale of the property or appointing a receiver. An action for receivership applies only to residential investment property. The party bringing that action has the burden to prove that the rent roll of the building is sufficient to pay expenses and to rehabilitate the building. The party shall name a receiver to manage the building as provided under subsection (b) of Section 5.

7. Sale

a. The municipality shall sell the property at a public auction subject to commercially reasonable terms where the down payment shall not exceed 10%, conventional financing is acceptable and the closing takes place within the time period agreed to by buyer and seller.

b. Any person, other than the owner of the property at the time it was placed on the inventory of distressed properties, or related parties, is qualified to bid at the auction.

c. The contract of sale of the property shall be subject to approval by the court that has retained jurisdiction over the matter. The court shall approve the contract of sale when the contract is made in good faith, is commercially reasonable and contains a rehabilitation plan.

d. The proceeds of the sale shall be distributed to the lien holders in order of their priority; any surplus shall be distributed to the owner. The buyer shall receive the property free of all liens on the property.

Source: New

COMMENT

Note that existing comment based on prior draft is not revised pending Commission's decisions.

This section governs the mechanism of the court-ordered sale. The term "recognized market" means the market created by real estate brokers and agents through which most property now is sold. The objective is to approximate an ordinary sale of real estate in the recognized market. Subsection (c) requires court approval of the contract of sale if the contract of sale is made in good faith and its terms are commercially reasonable. The term "commercially reasonable" is imported from Revised Article 9-610 of the Uniform Commercial Code.

Importantly, subsection (c) specifies that the order of the court must contain only terms that are commercially reasonable. This provision is meant to prohibit the setting of terms such as the minimum down payment requirement of 20% of the bid required to participate in a sheriff's auction and the short time period in which to pay the full purchase price of the property acquired at auction. E.g., N.J.S.A. 2A:17 et seq. These terms generally limit the market of potential buyers to professional investors. The court therefore is expected to impose financing requirements that open the bidding to the largest number of potential buyers.

Under subsection (d), the proceeds are distributed according to the order of priority established by other law. The owner gets any surplus. The sale washes the title of all liens except where the law provides otherwise such as federal tax liens and the buyer receives clear title to the property. Subsection (e) contains a default rule to cover cases where the sale on the recognized market has not resulted in the submission of any offers after the property has been listed on that market for a period of eight months. The municipality then is required to request that the court order a public sale by the sheriff.

8. Receivership

a. A receiver shall have the authority to preserve, repair and operate the real property until the real property is returned to the owner or sold under Section 7. The authority includes the ability to obtain loans and grants to carry out the objectives of receivership and to place liens upon the property.

b. After appointment, a receiver shall submit periodic progress reports to the court according to court-set reporting requirements.

Source: New

COMMENT

This section identifies the powers of the receiver. The receiver is given broad and general power to carry out the task of correcting defects or rehabilitating the residential investment property.

9. Tax certificates

A municipality may forego the sale of tax certificates on distressed properties selectively by individual properties, or for all distressed properties on the municipality's inventory of distressed properties, provided the municipality makes this determination under N.J.S. 54:5-114.1.

Source: New

COMMENT

This section gives municipalities the option of not selling tax certificates on distressed properties. These sales may be made to professional investors having no interest in or incentive to rehabilitate the property. The result is property encumbered with high interest rate tax certificates. Tax certificate sales exacerbate the problem of distressed properties by increasing their financial risk and by discouraging any person from buying and fixing the problem property.

10. How owner retakes property after appointment of receiver

Prior to the sale of the property, an owner of a residential investment property in receivership may petition the court to obtain the return of his property subject to an order of the court appointing a receiver if the owner:

(1) demonstrates that the owner has the financing and capacity required to rehabilitate and maintain the building;

(2) submits a plan to inspect and repair future defects, which plan includes regular inspections;

(3) pays off any costs incurred by the receiver to correct defects or rehabilitate the real property that were not taken from the rent roll; and

(4) pays, in the discretion of the Court, other costs and fees associated with the property that were incurred by the receiver or any person who filed a summary action seeking the sale of the property or the appointment of the receiver.

Source: New

COMMENT

This section specifies the conditions of return required of an owner of distressed property that is residential investment property subject to receivership.