

Private foreclosure sale blocked

Petra Pasternak

A Santa Clara County court ruling last week added some much needed clarity to a controversial area of commercial property foreclosures.

Siding with the developers of Sunnyvale Town Center, Superior Court Judge Peter Kirwan ruled from the bench June 6 that Wachovia bank could not force the sale of the property through receivership.

Secured lenders can sell properties in default in two primary ways, said one of the prevailing lawyers, Wendel, Rosen, Black & Dean attorney Charles Hansen. One path is through a trustee sale, which is outside of court, and the other is a court-supervised judicial foreclosure. The key is that both involve an open and public bidding process, said Hansen, who represents developer Sand Hill Property.

That process is important to the borrower for a variety of reasons, including the possibility of being on the hook for any loss in property value.

Hansen said that, by contrast, Wachovia had made a deal with a bidder behind closed doors and asked for the court's approval of the sale. Sand Hill didn't like the arrangement because it wasn't open to public participation and essentially cut them out of the process. "We don't understand a lot of what happened because we've not been allowed in the tent," Hansen said. "They said they talked to many bidders," he added, and worked through a broker that was an affiliate of Wachovia, which is now owned by Wells Fargo. "From our perspective it was all a little bit cozy."

Wachovia's attorney, Jones Day partner Robert Trodella, didn't respond to a request for comment.

Shartsis Friese partner [Joel Zeldin](#), who has represented both property owners and banks in foreclosures, said there's been a good amount of confusion about the power of receivers. "The judge's ruling was very helpful in making order out of a chaotic area of law," said Zeldin, who's not involved in the case.

He said he's never seen anyone try to do a private foreclosure sale, but said that over the past three years, questions over whether a lender properly followed statutory rules for foreclosure have come up more frequently.

"We've seen them over and over," Zeldin said. "The statutes are very technical. People hire lawyers to read them very carefully to make sure the lender complies."

A borrower might demand compliance in order to delay a foreclosure, to participate with new investors in buying the property back, or to gain negotiating leverage for a reason from liability, among other reasons, Zeldin said.

Wendel, Rosen's Hansen said lenders, frustrated by the legal limits on how they deal with borrowers in default, have been looking for new ways to dispose of properties for decades.

But receivers typically have limited purposes, including the signing of leases or eviction of tenants.

Hansen noted that receivership sales may still go forward when creditors and borrowers agree on the process.