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# STATE OF MAINE

Inter-Departmental Memorandum Date November 4, 1976

To Genevieve K. Gelder, Director Dept. Maine State Housing Authority  
From Joseph E. Brennan, Attorney General Dept. Attorney General  
Subject First Lien Status of Mortgages acquired by the Maine State Housing Authority pursuant to 30 M.R.S.A. §4756

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You have asked, by memorandum of November 2, 1976, a number of questions relating to whether, under the particular fact situations set forth in your memorandum, certain mortgages may qualify as first liens so as to meet the requirements, set forth in 30 M.R.S.A. §4756, for purchase of such mortgages by the Maine State Housing Authority (the "Authority"). In rendering this opinion, we specifically assume, in addition to the facts and assumptions set forth in your memorandum, that, with respect to the mortgage applications under consideration by the Authority, all other applicable statutory requirements are met and that the only question to be considered relates to whether first lien status of a mortgage is impaired by the existence of those present or potential claims specified in your memorandum, so as to constitute a legal impediment to the Authority's purchase of such mortgage. Before specifically addressing the questions posed, it is appropriate to discuss generally the issues and the law that is here involved.

By virtue of 30 M.R.S.A. §4601-A et seq, the Authority was created and vested with the powers and duties therein delineated. Among such powers, 30 M.R.S.A. §4756 provides, in pertinent part, the following:

"The state authority shall have the power to purchase or to make commitments to purchase from . . . financial institutions. . . , the interest bearing obligations secured by mortgages and notes which are a first lien on land and improvements in Maine . . . ." (Emphasis added).

Although there is little guidance found in current Maine case law, the issue of whether a particular mortgage constitutes a "first lien" on property would appear to require inquiries, first, into whether there are any other liens to which such mortgage is subject or subordinate, and, second, into the quality of the underlying title of the mortgagor.

With respect to the first of these inquiries, the question is answered simply by a review of the land records and other information of which the mortgagee has notice in order to determine whether there is in existence at the time the mortgage is made and recorded any other lien on the property. See In Re Estate of Lalla, 281 Ill. App. 124 (1935); 30 U.S. Atty. Gen. Op. 606 (1918). The crucial determination here is that of ascertaining what types of existing encumbrances upon the property constitute "liens" so as to render the mortgage ineligible for acquisition by the Authority under 30 M.R.S.A. §4756. Although the concept of a "lien" is variously defined, and sometimes misused, such concept invariably involves a financial charge on property as security for a debt, duty or other obligation. Hurley v. Boston R. Holding Co.,

315 Mass. 591, 54 N. W. 2d 183 (1944); A. C. Paradis Co. v. H. W. Maxim Co., 148 Me. 218, 91 A 2d 485 (1952); Hamilton v. Buck, 36 Me. 536 (1853); 53 CJS, Liens §1; Patton on Titles, §567, Footnote 29. A lien may be distinguished from a mere claim or demand to property in the sense that a lien is a security interest in property whereas a claim or demand involves merely the legally unperfected assertion of a right in or to such property. "The right to enforce a lien by sale of the property to which it attaches is its essential characteristic." McClintic-Marshall Co. v. Ford Motor Co., 254 Mich. 305, 236 N.W. 792, 797 (1931).

Thus, examples of "liens" on real property may be seen in the following: mortgages, unpaid real estate taxes and assessments (to the extent provided by law), attachments and mechanics' liens. Notably, a litigant's filing of a certificate, in the nature of a lis pendens, in the land records pursuant to 14 M.R.S.A. §4455(2) would appear not to fit within this concept of "lien". The purpose of a lis pendens is to give record notice to subsequent purchasers (including mortgagees) of the existence of litigation in which interests in the property are disputed, with the result that the right of any purchaser, taking title after the recording of such notice, will be subject to the resolution of such litigation as if such purchaser had actual notice of the existence of such claim. The recording of a lis pendens does not, however, confer new rights or interests on the party to the litigation. 54 CJS, Lis Pendens §§3 and 38. A "lis pendens does not create a lien - it only gives notice of the claims made in the suit." Onyx Refining Co. v. Evans Production Corp., 182 F. Supp. 253, 256 (N.D. Tex. 1959); Accord, Simon v. Vanderveer, 155 N.Y. 377, 49 N.E. 1043 (1898); Schechter v. Rosen, 168 N.Y.S. 2d 825 (1957). Of course, this is not to say that the existence of a lis pendens or other notice of an adverse claim to the property to be mortgaged may be prudently ignored by a prospective mortgagee, since it is clear that his rights will be subject to those which are successfully asserted by such adverse litigants, but only that such notice does not in itself constitute a lien. Consequently, the existence of a lis pendens, as with other evidence of a potential claim, although not fatal to the eligibility of the mortgage as a first lien, should be weighed by the Authority in accordance with the principles set forth in the next paragraphs.

Since the existence of a valid first lien mortgage on property implies the existence of title to such property in the mortgagor, the second component to a determination of whether a mortgage constitutes a first lien involves an assessment of the quality of the underlying title of the mortgagor to the mortgaged property. In this regard, 30 M.R.S.A. §4757 requires that the interim mortgagee, from whom the mortgage is to be purchased, certify to the Authority that "in the [former's] judgment the loan would in all respects be a prudent investment for its own account." However, since the Authority's laws do not otherwise provide standards by which the Authority may make such assessments as to underlying title, the Authority must be seen to possess discretion to

make good faith decisions, consistent with the exercise of prudent business judgment, as to the acceptability of the quality of such title as well as to all other aspects of the soundness and desirability of a proposed mortgage investment. 1/ Thus, 30 M.R.S.A. §4602(2)(B), in pertinent part, vests in the Commissioners of the Authority the power and duty to establish policies with respect to:

"(2) Purchase, sale, or commitment to purchase mortgages and notes;

\* \* \* \*

(4) Setting and establishing selection and evaluation standards, criteria and procedures under which it will purchase, sell, or agree to purchase loans, notes or obligations, having regard among other things to property values, local economic conditions and expectancy, credit and employment, and to local housing conditions and needs and the availability of credit resources to meet the same relative to similar or competing conditions and needs in other localities in the State." 2/

In establishing such policies and making such assessments of the underlying title and of other aspects of the soundness of a proposed mortgage investment, the Authority should, of course, remain mindful of the express purposes of the Legislature in creating the Authority to, inter alia, recognize the immediate need for rehabilitated and new housing, particularly for lower income families, to encourage private investments in such housing projects, and to adopt such action and practices as will promote a concerted effort to upgrade housing conditions and standards within the State. 30 M.R.S.A. §4553.

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1/ In regard to determining the nature of the title assessment which the Authority must make, it is noteworthy that the laws providing for federal mortgage insurance define "first mortgages" as meaning "classes of first liens as are commonly given to secure advances on . . . real estate, under the laws of the State, in which the real estate is located. . . ." 12 U.S.C.A. §1707(a). To some degree, this definition provides guidance similar to 30 M.R.S.A. §4757, which requires a certification from the interim lender that the investment is sound.

2/ The relatively broad discretion given to the Authority was upheld against constitutional attack in Maine State Housing Authority v. Depositor's Trust Co., 278 A. 2d 699 (1971).

In sum, as to the second component of determining whether a mortgage constitutes a "first lien", the Authority must consider and weigh, in accordance with the policies and standards established by the Commissioners of the Authority and within the above statutory framework, the effect upon the soundness of the proposed mortgage investment of any existing, claimed or other potential defects in or encumbrances upon the title of the mortgagor. In exercising such business judgment, the Authority may wish to rely, as to questions of title, upon a title opinion of counsel or a title insurance policy (although the Authority's laws do not specifically so require). Where such opinion or insurance excludes any representation or protection with respect to certain existing or potential adverse claims, the Authority may, to the extent consistent with its statutory policies and procedures and the standards of prudent business judgment, elect to acquire the mortgage notwithstanding the existence of such claims provided that the same do not constitute prior "liens" as above described. By the same token, it clearly lies within the discretion of the Authority to refuse to acquire any mortgage where a potential defect in the mortgagor's title is alleged. See 30 M.R.S.A. §4758.

Having generally discussed the law regarding the "first lien" requirements of mortgages acquired by the Authority, we will now proceed to address each of the questions posed in your memorandum:

1. Would a mortgage offered to the Authority be a first lien on land and improvements pursuant to 30 M.R.S.A. §4756 given the litigation in U. S. v. Maine as it is presently constituted, in which the sole defendant is the State of Maine and the only remedy claimed is money damages and no other Indian claims have been asserted in the litigation?

Looking to the first above described component to a determination of whether a state of facts adversely affects the first lien status of a mortgage, it is clear, of course, that the currently asserted claims set forth in U. S. v. Maine do not have any impact on the primacy of a mortgage as a first lien. Not only do such claims not contemplate a demand for return of any property, but, as explained above, even if amended to demand such return, mere claims, in themselves, cannot constitute a first or prior lien as such.

Looking to the second above described component, it is our view that the claims currently asserted in U. S. v. Maine, even coupled with the potentiality that they may be expanded to include claims for the land itself, do not rise to a level that as a matter of law so impairs the underlying title of the mortgagor as to prevent a mortgage from being deemed a first lien within the meaning of 30 M.R.S.A. §4756. We believe that the determination here is one for the prudent business judgment of the Authority as to the soundness of a particular mortgage investment proposal.

2. Would the answer to Question 1 change if the complaint in U. S. v. Maine is amended to request return of all lands held by the State?

No, for the reasons given in the answer to Question 1.

3. Would the answer to Question 1 change if the complaint in U. S. v. Maine is amended to join all private landowners in the affected areas?

No, for the reasons given in the answer to Question 1.

4. Would the answer to Question 1 change if the complaint in U. S. v. Maine is amended to call for return of all land (a) as described in the current complaint, or (b) described with greater specificity?

No. If the complaint is so amended, of course, what was considered to be a potentiality in answering Question 1 becomes a reality. However, applying the principles set forth at the beginning of this Opinion and for the reasons set forth in Question 1, we would not find that the mere existence of the claims, as so amended, would constitute a first or prior lien as such, nor would we find that as a matter of law such claims would so impair the underlying title of the mortgagor as to render the mortgage ineligible for consideration by the Authority. Again, in such case, questions as to the acceptability of the quality of such title would appear to be within the prudently exercised discretion of the Authority.

5. Would the answers to Questions 1 and 4 change if the plaintiff in U. S. v. Maine makes and records an attachment on land other than land to be mortgaged to the Authority?

No. Although a properly obtained attachment upon land which is to be subject to a mortgage to the Authority will constitute a lien and, if prior to the lien of such mortgage, will prevent such mortgage from being a first lien upon such land, yet the existence of attachments upon other unrelated lands would not affect our answer to Questions 1 and 4.

6. Would the answers to Questions 1 and 4 change if the plaintiff in U. S. v. Maine makes and files a certificate pursuant to 14 M.R.S.A. §4455(2), in the nature of a lis pendens, covering land to be mortgaged to the Authority?

No. As discussed above, the existence of a lis pendens, although providing constructive notice to prospective purchasers of the existence of an adverse claim involving the land, does not in itself constitute a lien upon such land. Moreover, since the filing of a lis pendens does not improve or alter the rights the adverse litigant may have against the property itself, we do not find that such filing would, automatically and as a matter of law, render the mortgagor's underlying title an unacceptable foundation for the creation of a first lien.

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Notwithstanding the filing of a lis pendens against the mortgaged property and the recognition that its rights as mortgagee will be subject to any successfully asserted rights to the land in U. S. v. Maine, the Authority nevertheless possesses the discretion, consistent with the exercise of good business judgment, to decide whether or not the proposed mortgage constitutes a suitably sound investment.

Because of the foregoing answer to part (b) of your Question 6, it is unnecessary to answer part (a) of that Question.


7. (Question II in your memorandum). Would the existence of a lawyer's certification of good and merchantable title underlying the mortgage materially change the answers to the foregoing questions?

No. However, consistent with the exercise of prudent business judgment, the Authority may reasonably rely, as to matters of title, on the existence of such title certificate in determining whether there may be impediments to the first lien status of the mortgage. Ultimately, however, unless there exists in fact a lien prior to that of the mortgage, the decision of whether the mortgage constitutes a suitable investment is within the reasonable discretion of the Authority provided it acts consistently with the policies and procedures of its laws.

8. (Question III in your memorandum). Would the existence of a title insurance policy which provides coverage without exception for claims arising out of U. S. v. Maine materially change the answers to the foregoing questions?

No, for the reasons given in the answer to Question 7.

We hope that the foregoing will provide the Authority with the guidance it requires as to interpretation of the "first lien" requirement in 30 M.R.S.A. §4756.

  
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JOSEPH E. BRENNAN  
Attorney General

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