

REMEDIES FOR RESIDENTIAL MORTGAGE HOLDERS WITH PACE OBLIGATIONS

THE YGRENE PROGRAM

Ygrene Energy Fund operates its “Clean Energy” financing districts in California under the auspices of SB 555, an October 2011 amendment to the Mello-Roos Community Facilities Act of 1982 (Mello-Roos). Its programs conform to all applicable federal and California state laws and regulations.

Multiple provisions of state law, and case law surrounding adjudicated Mello-Roos issues, provide a strong legal foundation for Ygrene programs in California. Property tax liens recorded to secure financing under SB 555 are coequal with ad valorem taxes and senior to mortgages. 555 jurisdictions impose special tax levies on participating property owners through which they repay the financing. There are no recorded assessments, the property owners do not make “loan” payments and property owners technically “vote” to annex their properties into the tax district. In all ways, participating property owners are paying “taxes”.

Responsible underwriting ensures the economic soundness of the financing and offers property owners effective options for maintaining compliance with existing loan covenants.

BACKGROUND ON FHFA’S RESISTANCE

Beginning in 2010, FHFA issued several directives to Fannie Mae and Freddie Mac (GSEs) and the Federal Home Loan Banks related to concerns at the agency over growing national interest in PACE financing. PACE programs offering project funding secured by senior property tax liens were cropping up in a variety of states. The liens had priority over existing mortgages, encouraging FHFA to state that the programs were unsafe and contrary to the objectives of the Housing and Economic Recovery Act of 2008 (HERA).

The directives from FHFA essentially ordered the GSEs to carry out a series of actions to discourage the use of PACE financing. The sanctions included blanket refusals to purchase mortgages with PACE tax liens in place and threats to apply extra stringent underwriting standards throughout communities that sponsored PACE districts.

SB 555 PACE LIEN PRIORITY

In California there are two state laws under which jurisdictions can establish PACE districts. The first is AB 811, a 2008 amendment to the Improvement Bond Act of 1915 that is contained within the California Streets and Highways Code. The second is the previously described SB 555. Both AB 811 assessments and SB 555 special taxes are secured by property tax liens that are senior to existing mortgages.

However, because Mello-Roos special taxes are irrefutably “taxes”, SB 555 makes it easier for homeowners to take advantage of program financing while maintaining compliance with their existing mortgage covenants.

THE UNIFORM CALIFORNIA DEED OF TRUST

The Uniform California Deed of Trust (TD or Uniform Instrument or DOT 305) offers protections to the property owner by (i) prohibiting alteration of the TD document after it has been executed; (ii) explicitly defining property taxes and senior assessment liens as Escrow Items, and (iii) providing a remedy for borrowers in the event a lender identifies a senior lien that it considers violates the loan terms. Each of these protections has relevance for property owners who finance projects through PACE programs.

(i) The law treats the TD as a private contract among the lender, borrower and trustee. This means that lenders cannot violate the document – for instance to not provide for impounding a PACE lien violates the TD and thereby constitutes a breach of the loan requirements – without the consent of the borrower. The original TD is in effect for the life of the loan.

(ii) The TD defines taxes and senior assessments as Escrow Items, the law provides that they can be paid through impound accounts that collect such obligations on a prorated monthly basis. This definition avails property owners of the remedy.

(iii) If a lender determines that a property held as collateral for a loan under the TD is subject to a senior lien, the lender can give the property owner ten days notice to either satisfy the lien or take one or more actions designated in the document. One of the options for the property owner is to establish an impound or escrow account to pay Escrow Items and make monthly instalment payments on the senior obligation. So long as the payments are faithfully made, under California law the issue is considered contractually resolved.

The Uniform Instrument or TD referenced above is the Fannie Mae/Freddie Mac Security Instrument, used when originating single-family residential mortgage loans in all states and U. S. territories. Freddie Mac encourages originators to use the Fannie Mae/Freddie Mac Single-Family Uniform Instruments whenever possible and requires that Freddie Mac Seller/Serviceers use them.