

To: Amy Peterson, Director, Housing Recovery Operations
From: NYC Sandy Housing Advocacy Group
Date: July 24, 2014
Re: New York City Build it Back *Lis Pendens* Policy

Dear Director Peterson:

Please find attached the memo “The Build it Back Program’s Policy on Homeowners in Foreclosure: Recommendations for Better Meeting Build it Back’s Mission,” which contains recommendations for revising the *lis pendens* bar for Build it Back participants.

This memo is respectfully submitted by the NYC Sandy Housing Advocacy Group, a coalition of legal services providers, advocacy organizations, affordable housing developers, and community based organizations that work together to prioritize sustainability, accountability and community equity in recovery policy decisions. We believe that:

- Environmental sustainability and resilience must be integral components of all rebuilding efforts.
- Communities impacted by Sandy must be active participants in rebuilding, land use, and neighborhood development investment decisions, and that those investments should ensure environmental, economic and social sustainability.

We thank you for your attention to this issue and welcome the opportunity to speak further about the analysis and recommendations made here. Please contact Ismene Speliotis of MHANY Management Inc at (718) 246-8080 x 203 or ispeliotis@mutualhousingny.org, or Elise Brown of MFY Legal Services at (212) 417-3753 or ebrown@mfy.org for further information or to schedule a follow-up meeting or call.

Thank you for your dedication to rebuilding communities affected by Sandy and ensuring that affected New Yorkers are able to rebuild and return to their homes.

Sincerely,

Alliance for a Just Rebuilding
Brooklyn Long Term Recovery Organization
CAMBA
The Legal Aid Society
MFY Legal Services, Inc.
MHANY Management
New Economy Project
New York Mortgage Coalition
Neighborhood Housing Services of East Flatbush
NYLAG
Pratt Center
Project Hospitality
Staten Island Alliance
Staten Island Interfaith and Community Long Term Recovery Organization (SI LTRO)

The Build it Back Program's Policy on Homeowners in Foreclosure:

Recommendations for Better Meeting Build it Back's Mission

NYC Sandy Housing Advocacy Group
July 24, 2014

Current Build it Back *Lis Pendens* Policy

New York City Build it Back is assisting homeowners, landlords and tenants in the five boroughs whose primary homes or residential rental properties were damaged by Hurricane Sandy. Currently, the Build it Back program places a hold on the application of any homeowner whose mortgage lender has filed a *lis pendens* ("notice of pendency" of a foreclosure action) against the property. The filing of a *lis pendens* is the first step of a foreclosure proceeding against a property in New York State. In order for the Build It Back foreclosure hold to be lifted, the homeowner must prove that the foreclosure has been resolved. Otherwise, the homeowner is ineligible to receive Build it Back assistance for home repairs and reconstruction. This policy is overly broad and unfairly penalizes homeowners, particularly low and moderate income homeowners, whose mortgage delinquency was caused or exacerbated by Sandy.

The intention of Build it Back's policy is to avoid expending resources on a house that may be repossessed by the bank. However, the risk that these homes will become bank-owned is very small. A study by New York University's Furman Center demonstrates that **less than 10% of *lis pendens* filings result in bank ownership of the property.**¹ Furthermore, New York State foreclosure proceedings last an average of three years,² during which time a homeowner can save the home. Barring all homeowners with a *lis pendens* filing from receiving Build It Back help jeopardizes both their ability to resolve their mortgage issues as well as to rebuild their homes. This policy will also lead to Build it Back penalizing homeowners who fall into foreclosure because they have exhausted their financial resources while awaiting the assistance they need to return to their homes.

Examples of Build It Back Applicants Trapped in the Foreclosure Hold

Here are some examples of homeowners impacted by the *lis pendens* policy:

1. Applicant W was current on her mortgage prior to Sandy. She is a senior citizen on a fixed income. After the storm, she was forced to vacate her now uninhabitable home and rent an apartment. She was unable to pay both the rent and mortgage with her fixed income, and fell into default on her mortgage. Her income is sufficient to qualify for a loan modification that would bring her current on her mortgage, but she would be required to make three trial modification payments before she could qualify for a permanent modification that would bring her mortgage current. She cannot make these trial payments on top of her rent, and she is falling further into arrears and closer to a foreclosure filing while she awaits repair assistance. Unless Build it Back changes its foreclosure policy, Mrs. W will likely lose her home.
2. Applicant N fell into foreclosure prior to the storm. The bottom floor of her home was completely destroyed by Sandy. The applicant received legal counseling and was assessed

for a loan modification. Prior to the storm, the applicant ran a licensed day care out of her home. With income from her business, the applicant would have been eligible for a loan modification. However, with the current condition of the home, the applicant is unable to operate the daycare. Without that income, she is not financially viable for a modification, and will remain in foreclosure.

3. Applicant R's home was severely damaged by Sandy. Applicant R defaulted on her mortgage and is currently in foreclosure. She has enough income for a viable modification package; however, Build it Back estimates that she will be displaced for more than 6 months during reconstruction. There is not enough household income to pay both rent and mortgage payments, and it may be against her long term interests to enter into a HAMP trial payment period before being temporarily relocated: defaulting on a HAMP trial period may jeopardize her ability to get a permanent modification. Her transfer amount is not sufficient to cover temporary housing costs, and there is currently no philanthropic assistance available for such a need. In this case, it may be best for her to wait to apply for a modification until the temporarily high household expenses (rent and mortgage payments) have ended and proceed through Build it Back with the active *lis pendens*.
4. Applicant B was current on his mortgage prior to the storm, but fell behind after incurring significant post-storm recovery expenses. The storm completely destroyed the property, which is now a vacant lot. The applicant is financially viable for a loan modification, but his mortgage servicer is refusing to process his modification request because the property is "vacant, condemned, or uninhabitable." While Applicant B has not yet received a *lis pendens*, he is currently 18 months behind on his mortgage and expects to receive a notification of *lis pendens* imminently.

The Current Policy is Unfair to Homeowners

Sandy-impacted homeowners who are ineligible for Build it Back repairs due to a *lis pendens* on their property are stuck in a "Catch 22": they are often unable to stop a foreclosure until repairs to their home are complete but unable to receive repairs until the foreclosure is resolved.

Many displaced applicants find themselves in a situation much like Mrs. W's above: they are unable to pay both their mortgage and rent for temporary housing and have fallen behind on their mortgage. They cannot qualify for a loan modification, because they cannot make even a reduced loan payment while they are paying temporary rent. By putting on hold all applications with a *lis pendens*, the Build It Back program is increasing the number of applicants whose homes will revert to bank ownership, homes that otherwise could have been saved through loan modification.

The *lis pendens* hold also creates an unfair burden for homeowners who are not displaced. Most homeowners who are in foreclosure fell behind on their mortgages because of a temporary financial setback, such as loss of employment or reduction in work hours. It often takes time for these homeowners to get back on their feet. It is common for a homeowner to be ineligible for a loan modification when the foreclosure process begins, but to find employment, become eligible, and save the home before the foreclosure is complete. These kinds of changes in circumstances play a significant role in why, as mentioned above, less than 10% of foreclosure filings result in loss of the home becoming bank-owned through a foreclosure auction.

The Build It Back program currently refers homeowners in mortgage default to non-profit legal services or housing counselors to help them negotiate a resolution with the mortgage bank. This is vital help that Build It Back is making available, but it will not produce quick results. While the referral to advocates is critical, securing a loan modification, even with expert assistance, is a long, laborious process. In the experience of New York foreclosure prevention advocates, securing a loan modification takes six months at minimum, and normally much longer, often several years, due to widespread mortgage servicing errors and misfeasance. It is common in foreclosure cases that multiple court appearances over many, many months are required before the mortgage servicer agrees to a resolution.

It is also common for a homeowner to lack sufficient income for a loan modification at the beginning of a foreclosure proceeding, but regain income and save the home before the foreclosure is complete. The following are a few examples of homeowners whose cases demonstrate this point:

1. Ms. N.W., an elderly homeowner, was not eligible for a loan modification in August 2013, when Deutsche Bank began foreclosure proceedings against her. However, her circumstances later changed and by March 2014 she received a permanent loan modification and saved her home.
2. OneWest Bank began foreclosure proceedings against Mr. and Ms. D in 2010. The couple did not have sufficient income to qualify for a loan modification at that time. Thirteen months later, their circumstances changed and they applied for a loan modification. It then took IndyMac (the loan servicer) another year to approve their application and offer them a trial payment plan. Finally, in January 2013, Mr. and Ms. D received a permanent modification and saved their home.
3. Ms. V.B. was not eligible for a home-saving solution in 2007 when U.S. Bank National began foreclosure proceedings against her. She found help from a legal services organization only in 2011, at which point the court had already entered a judgment of foreclosure against her. She was eligible at that time for a loan modification. In 2012, after a year of negotiation with the bank, Ms. V.B. finally received a trial payment plan. However, before she could complete the three-month trial payment plan, she lost her job with the U.S. Postal Service. U.S. Bank delayed moving forward with the foreclosure—a common occurrence—and the case remained in limbo. Then, one year later, Ms. V.B. was rehired by the Postal Service and had sufficient income for a modification. She received a permanent loan modification in July 2014, which brought the long foreclosure to an end.
4. Ms. M.K., an accountant, was laid off in 2009 and fell into mortgage default in December, 2010. By 2013 the small business she had created was doing well, and she became viable for a loan modification. Nevertheless, as of July 2014, Ms. M.K. was still negotiating with Chase with the help of a legal services attorney to secure the modification for which she has qualified for over a year.

These case examples are not extraordinary, they are common. They demonstrate that many homeowners who go into foreclosure may not be viable for a loan modification when the foreclosure begins, but will regain their financial footing and qualify for a loan modification before the foreclosure is completed. This is one reason that only 10% of foreclosure cases result in bank ownership, but current

Build it Back policy shuts the remaining 90% of homeowners out from assistance even though they are very likely to qualify for a loan modification that saves their home.

The Current Policy Will Add to the Blight of Abandoned Properties in Neighborhoods Impacted by Sandy

Build It Back's current foreclosure-hold policy runs counter to the City's mission to help neighborhoods impacted by Sandy become vibrant parts of our city again. Leaving homes with *lis pendens* filings unrepaired—and in many cases uninhabited—will only add to the existing scourge of abandoned properties in neighborhoods impacted by Sandy. As the case examples above illustrate, Build It Back's current policy will cause more homes to become bank-owned. Neighborhoods impacted by Sandy are already scarred by bank-owned, post-foreclosure damaged properties. Neighbors are helpless to do anything about this blight and the health hazards these mold-infested properties present. The major mortgage servicers have taken few if any steps to address these damaged properties to date, other than boarding them up. Many bank-owned properties notoriously sit vacant for years after the bank acquires them post-foreclosure.³ Homeowners in foreclosure want to repair their properties. Helping homeowners repair these houses will help the entire community rebound.

Alternative Solutions

We urge the City to consider adopting an alternative policy that will ensure that Build it Back resources are used effectively while providing services to households in need of assistance. Here are two possible solutions that would meet this balance:

- **Clear the foreclosure hold for those working with a legal or housing counselor:** Working with a trained counselor mitigates the risk of a foreclosure auction by 30%.⁴ Build it Back could allow homeowners with *lis pendens* to move forward in the program if they present an action plan and proof of working with a counselor. This would allow for an individualized approach to addressing *lis pendens* filings.
- **Impose the foreclosure hold only if a judgment of foreclosure has been entered, and remove the hold if a counselor certifies the applicant's viability for a home-saving solution:** Imposing a hold at the start of the foreclosure process shuts out far too many homeowners who will eventually regain their financial footing and qualify for a loan modification. To remedy this overly broad policy, Build it Back should only impose a hold at the judgment of foreclosure stage, which is near the end of the foreclosure process. While homeowners can still save their home after the judgment is entered, home-saving solutions are less likely at this stage. Using the judgment of foreclosure as the measure gives the Build It Back program a clear benchmark for its foreclosure policy without unfairly penalizing hundreds—perhaps thousands—of low and moderate income homeowners who can and will save their homes. Because homeowners who are post-judgment (but pre-auction) are sometimes still able to save their homes, we recommend that post-judgment homeowners be allowed to continue in the Build It Back program if a legal or housing counselor certifies that the homeowner is eligible for a loan modification.⁵ The judgment of foreclosure is the benchmark that the State's New York Rising program uses.

The current Build it Back foreclosure hold policy harms already struggling homeowners and impedes efforts to rebuild more resilient communities in the wake of Sandy. By adopting one of the alternative measures proposed here, the City could balance the need to use resources effectively while better meeting the needs of impacted communities.

¹ *Foreclosed Properties in NYC: A Look at the Last 15 Years*, Furman Center for Real Estate & Urban Policy, New York University, January 2010, p. 4.

² Lisa Prevost, "Paying for Foreclosure Delays." *New York Times*, January 2, 2014. Available at <http://www.nytimes.com/2014/01/05/real-estate/paying-for-foreclosure-delays.html>

³ *Foreclosed Properties in NYC: A Look at the Last 15 Years*, Furman Center for Real Estate & Urban Policy, New York University, January 2010, p. 8-9.

⁴ Been, Vicki, et. al. "Determinants of the Incidence of Loan Modifications" *New York University: Furman Center for Real Estate & Urban Policy*, 2011. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1941915

⁵ A homeowner's eligibility for a loan modification is easy to determine. The eligibility criteria for loan modification vary depending on the type of mortgage loan, who the servicer is, and who the investor is. However, trained legal and housing counselors are familiar with all the modification options, and the eligibility for each. Once the counselor has certain basic information about the loan and the homeowner's income, that counselor can determine whether the homeowner is eligible for a home-saving modification.