Community and Economic Development in North Carolina and Beyond Blog: Who is an owner "of record" to be served with complaints and orders under NC minimum housing codes?

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John Spartan serves as the senior housing code official for the town of San Angeles, NC, where he recently presided over his 100th minimum housing hearing. He has overseen the repair or removal of many unfit homes over the years, and he is careful to ensure that his town's minimum housing code keeps up with changes to the authorizing statutes: Minimum Housing Standards, Part 6 of Article 19 of G.S. Chapter 160A . For example, he adjusted his inspection procedures to comply with the 2011 residential inspections law, and he ensured that town council adopted modifications to its minimum housing code to comply with changes to the minimum housing statutes back in 2009. And he carefully follows the procedural flowchart that he found in a School of Government publication on minimum housing codes. But he's never been completely comfortable with one part of the minimum housing process: identification of a property's "owner" and "parties in interest" who are to be notified of any complaints or orders. Properly identifying the "owner" of an unfit dwelling can be tricky on occasion, and it has been the subject of litigation in North Carolina courts over the years. Lenina Huxley, the town attorney, wants to update him on a North Carolina Court of Appeals case, Patterson v. City of Gastonia, that was decided in May 2012. She wants to discuss how the town should identify an owner "of record" following some ambiguous remarks in the case law. Ambiguity is never fun in his line of work, so he reaches for a bottle of aspirin before setting out for her office….

Statutory requirement to serve complaints and orders on the "owner of and parties of interest in" an unfit dwelling

Before describing the holding in the *Patterson* case, it is helpful to review the pertinent statutes. G.S. 160A-443 sets forth the provisions to be included in a local minimum housing code and provides as follows:

> (2) That … whenever it appears to the public officer (on his own motion) that any dwelling is unfit for human habitation, the public officer shall, if his preliminary investigation discloses a basis for such charges, issue and cause to be served upon *the owner of and parties in interest* in such dwellings a complaint stating the charges….
>
> (emphasis added)

G.S. 160A-442 defines "owner" to mean "the holder of the title in fee simple and every mortgagee *of record*," and "parties in interest" means "all individuals … and corporations who have interests *of record*" (emphasis added). The term "of record" is legally significant in this context. *Black's Law Dictionary* (6th Ed. 1990) defines "of record" as "Recorded; entered on the record … *e.g.* a mortgage to be 'of record' must normally be recorded in the county in which it is properly and legally recordable for purpose of constructive notice." In his treatise, *Real Estate Law in North Carolina* (6th Ed. Supp. 2011), Professor Webster explains in Section 17.05, "To be validly recorded, deeds, deeds of trust, mortgages, and

contracts relating to real property must be registered in the office of the Register of Deeds in the county where the land lies…." This recordation requirement is codified at G.S. 47-18.

G.S. 160A-445 provides that minimum housing complaints and orders must be served on owners and parties in interest "either personally or by registered or certified mail." Personal service may be substituted with publication in a local newspaper only when "the identities of any owners or the whereabouts of persons are unknown and cannot be ascertained by the public officer in *the exercise of reasonable diligence*, or, if the owners are known but have refused to accept service by registered or certified mail…." (emphasis added).

The "exercise of reasonable diligence" in identifying the owner and parties in interest

The statutes provide only part of the story. Opinions issued by the North Carolina Court of Appeals further inform the duty of the public officer to identify the owner and parties in interest "of record." The first case is Farmers Bank of Sunbury v. City of Elizabeth City, 54 N.C. App. 110, 282 S.E.2d 580 (1981). In *Farmers Bank*, a bank filed suit against Elizabeth City for demolishing a house on which the bank was mortgagee. The bank had recorded a deed of trust as the security instrument for its mortgage loan, but that deed of trust contained only the name, not the address, of the bank's trustee. The public officer never ascertained the trustee's address, and as a result, the bank's trustee did not receive timely notification of the minimum housing proceedings and subsequent demolition of the house. The city's public officer claimed in an affidavit that he had sought "with reasonable diligence" to ascertain the whereabouts of all interested parties "without success," but he offered no description of the reasonably diligent steps he had taken. That wasn't enough explanation for the reviewing judges. The Court of Appeals sent the case back to the trial court to inquire further about the actions of the public officer—to determine whether he truly exercised "reasonable diligence" in ascertaining the whereabouts of the bank's trustee.

Almost thirty years later, the appeals court once again reviewed an Elizabeth City case involving the reasonableness of a public officer's search for interested parties. In Lawyer v. City of Elizabeth City, 199 N.C. App. 304, 681 S.E.2d 415 (2009), owners of a dwelling had purchased property at a sheriff's sale but failed to record their deed. When the dwelling on the property was found unfit for human habitation, the public officer served the complaint only on the prior owners who, as the court explained, still appeared "as the owners of record in both the Register of Deeds and Tax Department offices." When those prior owners received the complaint, they responded with a letter to the city explaining that the property had been sold at auction and that they were no longer the owners. The public officer, alerted by the letter, then asked the Tax Department and Register of Deeds to confirm that he had the correct owners "of record." He was told once again that the prior owners were the owners "of record," and the dwelling was eventually demolished. The Tax Department continued to consider the prior owners to be "the record owners" until the new owners finally recorded their deed almost a year after the dwelling had been demolished. The new owners then filed suit against the city for demolishing the dwelling and complained that the city had not properly notified them of the minimum housing proceedings.

The Court of Appeals did not have a problem with the fact that the Tax Department considered the prior owners to be the "record owners" up until the moment that the deed from the sheriff's sale was finally recorded by the new owners. Rather, the court merely noted that an attorney could have discovered the unrecorded deed from the sheriff's sale with a proper title search. The court said that reasonable minds could disagree about whether or not the public officer, with a letter in hand telling him that the owners "of record" were no longer the owners of the property, should have conducted a more diligent search (such as a title search) under the circumstances. Since the Court of Appeals was not in a position to make a judgment about reasonableness in this scenario, it sent the case back to the trial court to determine whether or not the public officer should have conducted a more diligent search.

That brings us to the *Patterson* case.

Patterson v. City of Gastonia, 725 S.E.2d 82 (2012)

Billy Patterson and his wife Pearnell Patterson ("Mr. and Mrs. Patterson") were the record owners of 21 mobile homes on a parcel of land that they leased from a doctor. The Pattersons' son, Keith Patterson, also claimed an interest in the mobile homes, but his interest was not recorded. The City of Gastonia commenced minimum housing proceedings against the 21 mobile homes and served the complaints upon Mr. and Mrs. Patterson. No complaints or orders were served on their son Keith. Mr. (Billy) Patterson attended the relevant hearings with the minimum housing public officer and was given an opportunity to repair the homes, but the homes were not repaired within the time allotted by the city. Consequently, six

of the homes were demolished, and Mr. and Mrs. Patterson filed suit against the city.

Among the various claims made by the Pattersons in their suit, this blog post discusses only one: the allegation that the city's failure to notify their son Keith violated the statutory requirement to serve minimum housing complaints on owners and parties in interest, thereby denying him due process. The city responded that Keith Patterson was not a record owner of the mobile homes, so there was no duty to serve complaints on him. The Pattersons did not contend that Keith was a record owner; rather, they argued that the City was required to conduct an investigation to identify even those owners *not* "of record." They cited *Lawyer* and *Farmers Bank* in support of this claim and asserted that the city "knew or should have known that Keith Patterson was a co-owner of the dwellings and would have been privy to that fact through numerous conversations…." *Patterson*, 725 S.E.2d at 88.

The Court of Appeals disagreed with the Pattersons and found for the city. In explaining its decision, the court expounded upon *Lawyer* and *Farmers Bank*:

> [I]n *Lawyer*, there was evidence that the plaintiffs' ownership could have been uncovered through a title search, giving rise to issues of fact regarding whether they were owners of record. In contrast, in *Farmers Bank*, the existence of the deed of trust was a matter *of public record*, but there was a question whether the defendants could have with reasonable diligence located the trustee and the bank based on the recorded deed of trust. *Neither case suggests that a city has a duty to investigate interests not identifiable through a search of the public record.*
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> Here, the Pattersons have presented no evidence that Keith Patterson's interest in the mobile homes appeared *anywhere in the public record*. Instead, they contend that the City should have gone *beyond a public record search* and conducted an investigation to uncover whether there might have been owners other than those appearing of record. Neither the statute nor the case law imposes this duty on a city.

Patterson, 725 S.E.2d at 89-90 (emphasis added).

Did you notice that the court seems to recast the term "of record"—which we know means that the property interest has been recorded with the Register of Deeds—to "in the public record?" The court said that Keith Patterson's interest could not be found "anywhere in the public record" through a "public record search." That sounds terribly broad, as if the public officer would be held responsible for every piece of information that could be considered a public record under the Public Records Act, which would go well beyond property interests that have been properly recorded with the Register of Deeds or listed with the Tax Department. Did the court mean to extend the term "of record" in this way? Surely not—that would be an absurd result in light of the history and specific legal meaning of the term "of record" described earlier in the post. Not to mention that it would be nearly impossible for a public officer to conduct such a public record search. I think the court simply used the terms "in the public record" and "recorded interests" interchangeably. The term "public record" appears nowhere in the minimum housing statutes, nowhere in *Lawyer*, and only once in *Farmers Bank* in an inconsequential recitation of the city's argument. I therefore doubt the Court of Appeals intended to broaden the meaning of the term "of record." So what did the court mean in *Patterson*, and how do we tie these cases together in a way that can inform the actions of housing code officials?

Conclusion: Act reasonably on irregularities

Provided no irregularities have been discovered, a minimum housing public officer should serve complaints and orders only on parties in interest "of record," meaning parties with interests that have been formally recorded with the Register of Deeds or listed with the Tax Department. However, once some type of public record indicates an irregularity in the record, then *Farmers Bank*, *Lawyer*, and *Patterson* suggest that a minimum housing public officer must act reasonably on that information. In *Farmers Bank*, the public officer knew the name—but not the address—of the bank's trustee (from a recorded deed of trust), but the public officer failed to explain how he used "reasonable diligence" to identify the trustee's whereabouts. The Court of Appeals sent the case back to the trial court to determine whether the public officer responded reasonably to the information at hand. In *Lawyer*, the public officer received a letter telling him that the owners "of record" were not the current owners, yet he proceeded with demolition without ascertaining the whereabouts of the new owners. Again, the Court of Appeals sent the case back to the trial court to decide whether this was a reasonable response in light of the public record that had been received. In *Patterson*, however, there was no public record—no letter, no deed of trust—to indicate that Keith Patterson had an interest in the demolished mobile homes. The only evidence was a bare assertion about "numerous conversations." It is here that the Court of Appeals drew a line in the sand. They did not send

this issue back to the trial court to determine whether the public officer acted reasonably in response to these "conversations." No, the court said, as a matter of law, a conversation just isn't enough to require further investigation by the public officer. There must be a public record—information in writing—suggesting that there is some irregularity in the interests "of record." Then courts will examine the reasonableness of a public officer's response to that irregularity.

So what is the lesson? When a public officer is aware of a public record indicating that interests in property may not have been properly recorded—and therefore are not "of record"—then the public officer should "exercise reasonable diligence" to ascertain more information about the unrecorded interest. Unfortunately, the proper exercise of "reasonable diligence" depends entirely on the factual context, so it is difficult to say ahead of time whether a public officer has exercised reasonable diligence in any particular situation. Perhaps that is why many jurisdictions conduct title searches as a matter of course before issuing minimum housing complaints, though it isn't required as a rule. Looks like our intrepid code enforcement official, John Spartan of San Angeles, will need to keep that bottle of aspirin handy.

For further discussion of this and other minimum housing code issues, see the School of Government publication, Housing Codes for Repair and Maintenance.