

TITLE 42. COMMERCIAL FORECLOSURE

CHAPTER 1. FINDINGS AND GENERAL PROVISIONS

42 M.P.T.L. ch. 1 § 1

§ 1. Findings

The Tribal Council hereby finds that:

a. Adequate and clear recording of Leasehold Interests and liens, commercial foreclosure, and eviction procedures are a necessity for the financing of businesses operating on the Mashantucket Pequot (Western) Tribal Nation Reservation.

b. Commercial foreclosure procedures are necessary to ensure a remedy for Commercial Lenders in the event of a default. Commercial Eviction procedures are necessary to assure the orderly utilization of available Commercial Space located on trust lands, to provide for the orderly enforcement of rights and obligations of Occupants and to provide for an orderly means of removing Occupants following a foreclosure and sale.

c. A single uniform commercial foreclosure and eviction code would enhance the operations of the Tribal Government and provides a remedy for Commercial Lenders.

42 M.P.T.L. ch. 1 § 2

§ 2. Scope

The provisions of this Law shall apply only to the following matters relative to Commercial Spaces:

a. The recording of a Mortgage or security interest in a Leasehold Interest with the Tribal Clerk's Office.

b. The enforcement of the foreclosure rights of Commercial Lenders holding a Mortgage where a Lease serves as collateral.

c. The manner by which the rights of Occupants in and to Commercial Spaces are terminated and the eviction of such Occupants.

d. The manner by which eviction and ejection of Occupants from Commercial Spaces following a foreclosure and sale is to be effected.

42 M.P.T.L. ch. 1 § 3

§ 3. Exclusion

a. Nothing in this title shall be construed to divest the Tribe of its ownership and control of Tribal land, pursuant to its trust relationship with the United States.

b. The provisions of this shall not apply to any Residential Housing.

CHAPTER 2. DEFINITIONS

42 M.P.T.L. ch. 2 § 1

§ 1. Definitions

Capitalized terms, wherever appearing in this law, shall have the meaning as set forth in this section.

a. "Assignment of Leases and Rents" means an assignment from a Borrower to a Commercial Lender of Borrower's rights, as lessor, in any leases, licenses, subleases and any other use or occupancy agreement including, if applicable, the right to receive rent thereunder as collateral for the Loan.

b. "Borrower" means a Person and his assigns or successors in interest to whom a thing or money is lent at such Person's request.

c. "Commercial Lender" means a Person and his assigns or successors in interest who hold any interest in a security interest in a Lease for non-residential property operated for a profit on the Reservation. This definition includes any subsequent holder, whether by assignment, succession or otherwise, of the original lender's right, title or interest in, and to, the Mortgage.

d. "Commercial Space" means any non-residential property used for commercial profit-making purposes. Commercial Space includes, without limitation, stores, malls, food outlets, office buildings, and industrial parks.

e. "Court" shall mean the Mashantucket Pequot (Western) Tribal Court.

f. "Days" means business days.

g. "Foreclosure Proceeding" means a proceeding brought by a Commercial Lender in the Mashantucket Pequot Tribal Court to foreclose on a Mortgage.

h. "Improvements" means structures, buildings, and other development intended as permanent enhancements to the value, beauty, or unit of real property.

i. "Lease" means the lease or other agreement for use of Tribal land as to which a Mortgage has or will be given.

j. "Leasehold Interest" means an interest established pursuant to a lease or sublease between the Lessee/Sublessee and Lessor/Sublessor.

k. "Lessee" means the Person who leases or lets property from another; a tenant.

l. "Lessor" means the Person who leases or lets property to another; a landlord.

m. "Mortgage" means an Occupant's pledge of its Leasehold Interest as security for a debt to a Commercial Lender or other mortgagee, whether denominated as a mortgage or deed of trust, and all documents evidencing the debt secured by the Mortgage or other documents or agreements related to the Mortgage, including without limitation, any Assignment of Leases and Rents, consents or estoppels, or any agreements of the Tribe or Landlord related to the Lease or Mortgage (the "Related Mortgage Documents").

n. "Occupant" means a Person who has certain legal rights to or control over the premises occupied; a tenant or owner.

o. "Person" means any individual, association of individuals; partnership; private, public, tribal, or municipal corporation; lending entity; tribal enterprise; company; business enterprise; or tribal governmental entity.

p. "Reservation" means land, or any interest therein, held by the United States in trust for, or for the use and benefit of the Tribe, and includes land held by the Tribe that is subject to federal restrictions against alienation.

q. "Sublessee" means a Lessee who leases or lets property to a Sublessor.

r. "Sublessor" means the Person who leases or lets property from a Sublessee.

s. "Subordinate Lienholder" means the holder of any lien, including a Mortgage, perfected subsequent to the recording of a Mortgage under this title.

t. "Tribe" means the Mashantucket Pequot (Western) Tribal Nation.

u. "Tribal Clerk's Office" means the Office where the Mashantucket Pequot Tribal Clerk maintains records of real estate transactions on the Reservation which office is currently located at the Community Center, 2 Matt's Path, Mashantucket, Connecticut.

CHAPTER 3. PRIORITY AND RECORDING

42 M.P.T.L. ch. 3 § 1

§ 1. Priority

Mortgages recorded in accordance with this chapter, including, without limitation, those evidencing a loan made, guaranteed, insured or held by the Tribe or a federal government agency, have priority over any lien not perfected at the time of recording and any subsequent lien or claim.

42 M.P.T.L. ch. 3 § 2

§ 2. Recording

a. A Commercial Lender holding a Mortgage or Assignment of Leases and Rents for Commercial Space on the Reservation shall record the Mortgage and/or Assignment of Leases and Rents in the Tribal Clerk's Office within thirty (30) days of closing on the Mortgage; provided, however that the Commercial Lender need not record the Related Mortgage Documents.

b. The Tribal Clerk's Office shall provide file-stamped copies of the date and time of the filing of the Mortgage and Assignment of Leases and Rents to the Commercial Lender evidencing such submittal to and recording with the Tribal Clerk's Office. Additionally, if the Mortgage or Assignment of Leases and Rents relates to a Lease for Commercial Space on the Reservation and no Notice of Lease has been recorded with the Tribal Clerk's Office for such Lease, upon request, the Tribal Clerk's Office shall also record and provide file-stamped copies of the date and time of filing such Notice of Lease evidencing such submittal and recording with the Tribal Clerk's Office of such Lease.

c. Upon satisfaction of a Mortgage, the holder thereof shall record in the Tribal Clerk's Office in addition to the recording office of any other governmental authority an instrument evidencing satisfaction of the debt and release of the security interest. The satisfaction and release shall be filed with the Tribal Clerk's Office within thirty (30) days of actual receipt of full payment under the Mortgage.

CHAPTER 4. FORECLOSURE

42 M.P.T.L. ch. 4 § 1

§ 1. Foreclosure Remedy

The remedy of foreclosure described in this chapter is available and may be exercised only pursuant to and in accordance with security instruments providing for such action.

42 M.P.T.L. ch. 4 § 2

§ 2. Jurisdiction

The Mashantucket Pequot Tribal Court has jurisdiction over foreclosure and eviction (i) where so provided and in conformity with the consent to jurisdiction provisions of a Mortgage; or (ii) where a state or federal court has in a final order declined jurisdiction over such foreclosure proceeding; or (iii) where a Borrower and a Commercial Lender have expressly agreed in writing to such jurisdiction for a foreclosure proceeding.

42 M.P.T.L. ch. 4 § 3

§ 3. Tribe May Intervene

The Tribe may petition the Mashantucket Pequot Tribal Court to intervene at any time in any Mortgage Foreclosure Proceeding. In all cases, the Court shall grant such a petition. Neither the filing of a petition to intervene by the Tribe, nor the granting of the petition by the Mashantucket Pequot Tribal Court, shall operate as a waiver of the sovereign immunity of the Tribe, except where the Tribe has expressly waived its sovereign immunity or as the Tribe may expressly authorize.

42 M.P.T.L. ch. 4 § 4

§ 4. Notice of Foreclosure Proceeding

a. Upon default (as defined in a respective Mortgage) and failure to cure after notice of default, if and as applicable under the Mortgage, a Commercial Lender holding a Mortgage may file a foreclosure action with the Mashantucket Pequot Tribal Court. A foreclosure action shall be commenced upon (i) the filing of a summons and complaint and lis pendens with the Mashantucket Pequot Tribal Court; and (ii) the filing of a lis pendens in the Tribal Clerk's office.

b. After filing with the Court, the Commercial Lender or its agent shall serve the summons and complaint upon each party entitled to notice under this title. Each party served with notice shall have twenty (20) days after service to file a responsive pleading. Once all response deadlines have expired or all responses to the complaint have been received by the Commercial Lender, the Commercial Lender may file a motion for a default judgment or summary judgment with the Court. The notice of the motion shall be served and proof of service shall be made in any manner provided by the Mashantucket Pequot Rules of Civil Procedure. The Court shall hold a hearing on the motion for default judgment or motion for summary judgment. If the Court denies the motion, the parties must complete discovery and an evidentiary hearing must be held to resolve all issues within thirty (30) days after the hearing on the motion for default or summary judgment.

c. If any party is not served or is not timely served before any motion or evidentiary hearing date, the Court shall order the hearing continued to a date and time certain, not less than ten (10) days from the date scheduled for the original hearing. All notices already timely served remain effective. The Commercial Lender shall satisfy the notice requirement of this section with respect to those parties not served or not timely served with respect to the original hearing. Any party timely served, who has not received actual notice of the date to which the hearing has been continued, shall be sent the order of continuance by first-class mail at his last known address unless he has filed an appearance in which case notice shall be provided in accordance with the Rules of Court.

d. The summons and complaint shall be served on the following:

1. Any Borrower, Lessee, Sublessee or Sublessor of the Leasehold Interest;
2. All Persons to whom the security instrument itself directs notice to be sent in case of default;
3. All properly recorded lienholders of the Leasehold Interest with liens properly recorded prior to the recording of a lis pendens in the Tribal Clerk's Office; and
4. The General Counsel of the Tribe and the Tribal Clerk.

e. A complaint shall be in writing and shall clearly identify the following:

1. The particular property interest being foreclosed, with such a description as is necessary to identify the property, including the date, original amount, original holder, and the date and time of recordation of the security instrument with the Tribal Clerk's Office.
2. The name and address of the holder of the security instrument at the time that the notice of hearing is filed.
3. The nature of the default claimed.

4. The fact, if appropriate, that the secured creditor has accelerated the maturity of the debt.
5. Any right of the Borrower to pay the indebtedness or cure the default, if such is permitted under the Mortgage.
6. That if the foreclosure sale is consummated, the purchaser will be entitled to possession of the Commercial Space as of the date of the assignment of the Lease to purchaser, and that the Occupant, if still in possession of the Commercial Space, can then be evicted.
7. The name, address, and telephone number of Borrower.
8. That the hearing may be held on a date later than that stated in the notice and that the party will be notified of any change in the hearing date.

42 M.P.T.L. ch.4 § 5

§ 5. Foreclosure Hearing

a. At any motion or evidentiary hearing, the Court shall consider the evidence of the parties and may consider, in addition to other forms of evidence required or permitted by law, affidavits and certified copies of documents. An order of foreclosure shall be issued if the Person presiding finds the existence of the following:

1. An unpaid debt in which the party seeking to foreclose is the holder;
2. Default (as defined in a respective Mortgage);
3. Right to foreclose under the instrument;
4. The fair market value of the Leasehold Interest based on appraisals or other proof acceptable to the Court in its sole discretion; and
5. Service of the complaint on those entitled to notice under Chapter 4 § 4(d). If the Court issues an order of foreclosure, the Court shall authorize the Commercial Lender to proceed under the instrument, and the Commercial Lender shall give notice of and conduct a sale pursuant to the provisions of this title. Such order shall specify the date, time and place of the sale and deposit requirements and may include direction as to advertising and other matters relating to the sale.

Any party named as a party in the Complaint or has intervened as a party in the foreclosure action shall be permitted at any motion or evidentiary hearing to present evidence to challenge the right of the Commercial Lender to foreclosure.

b. A copy of the foreclosure order issued by the Court after a motion or evidentiary hearing shall be filed in the Tribal Clerk's Office before the Commercial Lender may proceed to advertise and sell.

c. A Commercial Lender shall not be required to provide a deposit in order to bid at sale and may bid its indebtedness at the sale. A Commercial Lender who is the successful bidder may apply all or part of the indebtedness as a credit in purchasing the property auctioned provided sufficient funds are paid into the Court to cover all costs.

d. A Commercial Lender may conduct the auction sale through counsel or an auctioneer retained and paid for by the Commercial Lender with such costs

to be added to the indebtedness due under the Mortgage and related loan or lease documents.

42 M.P.T.L. ch.4 § 6

§ 6. Appeal

Within ten (10) days of the Court's final order of foreclosure or finding for the defendant may be appealed to the Mashantucket Pequot Appellate Court. Appeals shall be limited to the trial court record in addition to briefs and oral argument presented by the parties. If an appeal is taken, the trial court may require the appealing party to post a bond with sufficient surety as the Court deems adequate to protect the opposing party from any probable loss by reason of appeal; and upon posting of the bond, if one was required by the Court, the Court shall stay the foreclosure pending appeal.

CHAPTER 5. Sale

42 M.P.T.L. ch.5 § 1

§ 1. Notice of Sale

The notice of sale in a foreclosure action brought pursuant to this chapter shall include the following:

1. A description of the instrument pursuant to which the sale is held, identifying the original mortgagors and recording data. If the record owner of the Leasehold Interest is different from the original Borrower, the notice shall also list the Borrower, as reflected on the records maintained by the Tribal Clerk's Office, not more than ten (10) days prior to publishing the notice. The notice may also reflect the owner not reflected on the records if known. The notice must specify that the sale is not subject to any contingencies including without limitation contingencies for financing or inspection;
2. The date, hour and place of sale consistent with the provisions of the instrument and this chapter;
3. A description of the property interest to be sold in such a manner as is reasonably calculated to inform the public as to what is being sold, which description may be in general terms and may incorporate the description as used in the instrument containing the power of sale by reference thereto. Any property interest described in the Mortgage or Related Mortgage Documents which is not being offered for sale should also be described in such a manner as to enable prospective purchasers to determine what is and what is not being offered for sale;
4. The terms of the sale provided for by the instrument pursuant to which the sale is held, including the amount of the cash or bank check deposit, if any, to be made by the highest bidder at the sale;
5. Any other provisions required by the instrument or the Court to be included therein;
6. Whether the property interest is being sold subject to, together with or free and clear of any subordinate rights or interests provided those rights and interests are sufficiently identified;
7. Whether the property interest is subject to limitations regarding possession and transfer under federal and Tribal law; and

8. The successful bidder shall be required to enter into a purchase and sale agreement with the Person conducting the sale subject only to Court approval of the sale.

42 M.P.T.L. ch.5 § 2

§ 2. Mailing and Publishing of Notice

a. In addition to complying with the provisions for mailing or publishing notice of sale as are expressed in the security instrument, the Court in its discretion may direct such advertisement as in the opinion of the Court will serve the interest of the parties, and permit the charges for such advertisement to be taxed as a part of the costs of the foreclosure.

b. The notice of sale shall also be mailed by first-class mail, at least twenty (20) days prior to the date of sale, to each party entitled to notice of the hearing whose address is known to the Commercial Lender and in addition shall also be mailed by first-class mail to any party desiring a copy of the notice of sale who has notified in writing the Lender of their desire. Such notice shall contain the information required by § 2, describing the notice of sale.

42 M.P.T.L. ch.5 § 3

§ 3. Satisfaction of Debt Prior to Sale; Report of Sale

a. A foreclosure is terminated if, before the time fixed for a sale, payment is made or tendered by the Borrower of all accelerated obligations including the entire principal, interest and penalties secured by the Mortgage including costs and expenses permitted under the Mortgage and incurred with respect to the proceeding. Borrower shall have no equitable right of redemption.

b. The Person who conducts the foreclosure sale, shall, within seven (7) days after the date of the sale, file a report of sale with the Court.

c. The report shall be signed by the Person authorized to hold the sale, or by his agent or attorney, and shall include:

1. The authority under which the Person making the sale acted;
2. The name of the Borrower;
3. The name of the Lender;
4. The date, time and place of the sale;
5. A description of the property sold, sufficient to identify it, and, if sold in parts, a description of each part so sold;
6. The name or names of the Person or Persons to whom the property was sold;
7. The price at which the property, or each part thereof, was sold, and that such price was the highest qualified bid;
8. The name of the Person making the report; and
9. The date of the report.

d. The Court shall schedule a hearing within ten (10) days after receipt of the report to approve or disapprove such sale, approve the deed or other instrument of conveyance or assignment to the buyer and issue such other orders as the Commercial Lender may request. The Court shall sign the deed

or other instrument of conveyance or assignment as the transferor. The only grounds for disapproving a sale shall be the failure of the Commercial Lender to comply with the provisions of Title 42 of the M.P.T.L or the gross inadequacy of the bid. Once the Court approves the sale, the prevailing buyer at the foreclosure sale shall take title to the Leasehold Interest free and clear of any liens recorded by any lienholder after the Mortgage was recorded so long as such lienholder (i) received notice of the Foreclosure Proceeding in accordance with 42 M.P.T.L. ch. 4 § 4, or (ii) recorded its lien after the lis pendens was recorded in the Tribal Clerk's Office in accordance with 42 M.P.T.L. ch. 4 § 4. The buyer shall also take title to the Leasehold Interest free and clear of any assignment approval right or purchase option of the Tribe.

42 M.P.T.L. ch. 5 § 4

§ 4. Orders for Possession

a. Orders for possession of property sold pursuant to this chapter in favor of the purchaser and against any party or parties in possession at the time application for possession is made, may be issued by the Court when:

1. The property has been sold as provided herein;
2. The sale has been consummated, and the purchase price has been paid;
3. The purchaser has acquired the applicable interest and is entitled to possession of the property sold;
4. The Court has certified the sale pursuant to ch.5 §3; and
5. Application for possession is made by petition to the Court by the Commercial Lender, the purchaser of the property, or their authorized representative.

b. An order for possession issued pursuant to this section shall be directed to the Mashantucket Pequot Police Department and shall authorize officers of that department to remove all Occupants and their personal property from the premises and to put the purchaser in possession.

1. The Tribal Police shall, at least forty-eight (48) hours prior to the date and time specified in the Order of Possession, use reasonable efforts to locate and notify the Occupant of the date and time such possession is to be relinquished.
2. The order shall be served upon each Occupant as provided in the order.

42 M.P.T.L. ch.5 § 5

§ 5. Failure of Bidder to Make Cash Deposit or to Comply with Bid; Resale

a. If the terms of the sale of property require the highest bidder to make a cash or other deposit at the sale, and he fails to make the required deposit, the Person holding the sale shall at the same time and place again offer the property for sale.

b. When the highest bidder at a sale fails to comply with the terms of the sale, the Court may, upon motion, enter an order authorizing a resale of the property. The procedure for such resale shall be the same as is provided by this chapter in the case of an original sale of property except that the

sections addressing the notice of hearing, the hearing, and appeal do not apply to the resale.

c. A defaulting bidder at any sale is bound by his bid, and in case a resale is had because of the bidder's default, the bidder shall remain liable to the extent that the final sale price is less than his bid plus all the costs of the resale. Any deposit or compliance bond made by the defaulting bidder shall secure payment of the amount, if any, for which the defaulting bidder remains liable under this section.

d. Nothing in this section deprives any person of any other remedy against the defaulting bidder.

42 M.P.T.L. ch.5 § 6

§ 6. Disposition of Proceeds of a Sale

a. The Court shall order that the Person making the sale apply the proceeds of any sale in the following order:

1. Costs and expenses of the sale and a reasonable auctioneer's fee if such expense has been incurred and approved by the Court;
2. The obligations secured by the Mortgage.

b. Any surplus remaining after the application of the proceeds of the sale as set out in subsection (a) shall be paid to the Person or Persons entitled thereto, if the Person who made the sale knows who is entitled thereto. Otherwise, the surplus shall be paid to the Court.

c. The Court shall order any such funds paid to the party or parties entitled thereto.

42 M.P.T.L. ch.5 § 7

§ 7. Special Proceeding to Determine Ownership of Surplus

A special proceeding may be instituted in the Court by any Person claiming any money, or part thereof, paid into to the Court under Section 9, to determine who is entitled thereto.

42 M.P.T.L. ch.5 § 8

§ 8. Proceeds Do Not Satisfy the Debt

If the proceeds of the sale are not sufficient to pay in full the amount secured by the Mortgage including allowable expenses, the deficiency shall be determined, and the Court shall render judgment against any party liable to pay the deficiency. The deficiency shall be calculated as the difference between the indebtedness and foreclosure sale proceeds of the property.

42 M.P.T.L. ch.5 § 9

§ 9. Self-Help Possession

a. A Commercial Lender holding a Mortgage may enter into possession and assume the Borrower's interest in the Lease without instituting a foreclosure action if:

1. The Mortgage permits such action; and
2. The Borrower is in default and such default has continued for no less than ten (10) days after written notice thereof; and
3. The Commercial Lender is able to assume possession without a breach of peace occurring; and
4. The Premises have not been open for business for a period of at least ten (10) days prior to entry.

b. A Commercial Lender is permitted to demand that tenants or subtenants pay all rents directly to the Commercial Lender pursuant to an Assignment of Leases and Rents, and tenants or subtenants must comply with the demand or be subject to an eviction proceeding commenced by the Commercial Lender against the tenant or subtenant in the Court.

42 M.P.T.L. ch.5 § 10

§ 10. Appointment and Powers of a Temporary Receiver

a. Upon motion of a Commercial Lender, a temporary receiver of rents and the Leasehold Interest may be appointed at any time upon the terms set forth in Mortgage, Related Mortgage Documents or Assignment of Leases and Rents or upon a showing of cause. If permitted under the Mortgage, Related Mortgage Documents or Assignment of Leases and Rents, the receiver may be appointed ex parte without notice to Lessor without regard to (i) any defenses to a Lease default of Lessor, (ii) the value of the Leasehold Interest, or (iii) the solvency or insolvency of any Person liable for payments under the Lease.

b. The receiver may be any person requested by the Commercial Lender and approved by the Court.

c. The receiver may be authorized to take and hold the Leasehold Interests and all rents, manage the property subject to the Leasehold Interest and pay expenses of the Leasehold Interest. The receiver may also be granted authority to perform other duties requested by the Commercial Lender and approved by the Court, provided that the receiver shall not manage any property where such management would violate federal law.

d. No bond shall be posted by the receiver absent a provision in the Mortgage, Related Mortgage Documents or Assignment of Leases and Rents.

e. The receivership shall terminate upon the closing and transfer of title through a foreclosure sale unless otherwise ordered by the Court.

42 M.P.T.L. ch.6 § 1

§ 1 Effectiveness

This Commercial Foreclosure law takes effect as of the date of enactment.