

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Walter A. Kendzior, Jr. :  
Petitioner :  
:  
v. : No. 2782 C.D. 2010  
: Submitted: May 20, 2011  
Pennsylvania Housing Finance Agency, :  
Respondent :

BEFORE: HONORABLE DAN PELLEGRINI, Judge  
HONORABLE ROBERT SIMPSON, Judge  
HONORABLE JOHNNY J. BUTLER, Judge

**OPINION NOT REPORTED**

**MEMORANDUM OPINION  
BY JUDGE SIMPSON**

**FILED: July 20, 2011**

In this appeal, Walter A. Kendzior, Jr. (Homeowner), representing himself, petitions for review from an order of the Pennsylvania Housing Finance Agency (Agency) that denied his application for emergency mortgage assistance under the act known as the Homeowner's Emergency Mortgage Assistance Loan Program (HEMAP or Act 91).<sup>1</sup> The Agency denied Homeowner's loan application after finding no reasonable prospect of Homeowner resuming full mortgage payments within 36 months of the date of the mortgage delinquency. Homeowner essentially contends the Agency erred in failing to consider expected royalties from a gas/oil drilling lease and a mortgage modification plan. For the reasons that follow, we affirm.

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<sup>1</sup> Act of December 3, 1959, P.L. 1688, and added by the Act of December 23, 1983, P.L. 385, as amended, 35 P.S. §§1680.401c-1680.410c. The purpose of Act 91 is "to establish a program which will through emergency mortgage payments prevent widespread mortgage foreclosures ... which result from default caused by circumstances beyond a homeowner's control." Crawl v. Pa. Hous. Fin. Agency, 511 A.2d 924, 927 (Pa. Cmwlth. 1986).

## **Background**

In 2002, Homeowner and his wife purchased a 20-acre residential property located at RR3, Box 266, Towanda, Bradford County. In July 2005, they refinanced and obtained a 30-year mortgage loan from Wells Fargo in the principal amount of \$270,000 with a monthly payment of \$2,092.21 (First Mortgage).

They also had second and third mortgages with Peoples State Bank of Wyalusing (Peoples). Ultimately, in June 2010, Peoples consolidated these loans into a single 15-year mortgage loan with a principal amount of \$75,200 with a monthly payment of \$666.41 (Second Mortgage).

In April 2009, Homeowner's wife died. At the time of her death, she received approximately \$1,800 per month from Social Security and two pensions. Homeowner also received Social Security and pension benefits.

A month after his wife's death, Homeowner sought help from Wells Fargo regarding payment of the First Mortgage. Wells Fargo placed Homeowner in the federal Home Affordable Modification Program (HAMP)<sup>2</sup> for a three-month trial. Homeowner completed the trial period. Thereafter, Wells Fargo put him back on regular First Mortgage payments.

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<sup>2</sup> The Home Affordable Modification Program was created pursuant to the Emergency Economic Stabilization Act, 12 U.S.C. §5201. The program is designed to assist homeowners who defaulted on their mortgages or are in imminent risk of default, by reducing monthly payments to sustainable levels. See Williams v. Geithner, Civil No. 09-1959 ADM/JJG, 2009 WL 3757380 (D. Minn. 2009) (memorandum opinion).

However, after February 2010, Homeowner stopped making payments on the First Mortgage.<sup>3</sup> In May 2010, Wells Fargo sent Homeowner a default notice. In June 2010, Homeowner applied for an emergency mortgage assistance loan under Act 91.

In August 2010, the Agency denied Homeowner's application for a HEMAP loan. See Certified Record (C.R.) at Item 44 (Denial Notice). The Agency provided the following reason:

1. No reasonable prospect of applicant resuming full mortgage payments within thirty-six (36) months from the date of the mortgage delinquency and paying the mortgage(s) by maturity based on: Applicant's income is insufficient to maintain mortgage. Total monthly expenses: \$3,815.62. Income: \$2727.

Id.

Homeowner filed an administrative appeal, and a hearing followed. At the hearing, Homeowner testified he owed \$18,000 in back payments on the First Mortgage. Notes of Testimony (N.T.), 10/19/10, at 12. He also stated he did not get a loan modification. Id. at 18.

Rather, Homeowner planned to resume paying the First Mortgage with expected royalties from a gas/oil drilling lease. In October 2008, Chesapeake Appalachia, L.L.C. (Chesapeake) paid Homeowner approximately \$50,000 for a lease to drill for natural gas and oil on his property. See N.T. at 21-22.

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<sup>3</sup> Homeowner continued to make timely payments on the Second Mortgage.

Homeowner testified Chesapeake planned to put in a well within the next year and a half. Id. at 18. Chesapeake also planned to put a second well on the property. Id.

Homeowner also submitted an appraisal report estimating the monthly and yearly royalties from the planned wells. See Supplemental Reproduced Record (S.R.R.) at 49-50. The report estimated royalties of \$2,021.85 per month for one well. Id. at 49. For two wells, the amount would double. Id. at 50. However, the report also stated Chesapeake would determine when and where to drill. Id. Further, the report noted any well can be a dry hole. Id.

Following the hearing, the hearing examiner issued a decision affirming the initial denial of Homeowner's request for a HEMAP loan. See S.R.R. at 44-48. The hearing examiner calculated Homeowner's monthly housing expenses as follows:

[First Mortgage]	\$2,091.21
[Second Mortgage]	\$666.41
Average Utilities	\$300.00

Id. at 46. The hearing examiner calculated Homeowner's revised monthly living expenses to be \$698.00. This resulted in overall monthly expenses of \$3,756.62. Id.

Also, the hearing examiner calculated Homeowner's monthly income as follows:

Social Security	\$1,298.00
Pension	\$937.00.

Pension	\$492.00.
Total	\$2,727.00.

Id. at 45.

Regarding the gas/oil drilling lease, the hearing examiner observed that Chesapeake does not guarantee when or if it will drill on his property. Id. at 47. At the time of the hearing, Chesapeake had not commenced drilling operations on Homeowner's property. Id. The hearing examiner thus determined any income from the planned wells remains speculative until it is received. Id.

Therefore, given Homeowner's net monthly income, the hearing examiner determined it did not appear likely that Homeowner would be able to fully resume and maintain his monthly mortgage within 36 months of delinquency and pay the mortgage in full by maturity. Consequently, Homeowner failed to meet the eligibility requirements for a HEMAP loan in Section 404-C(a)(5) of Act 91, 35 P.S. §1680.404c(a)(5).

Homeowner petitions for review.<sup>4</sup>

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<sup>4</sup> Our review of the Agency's denial of an application for a HEMAP loan is limited to determining whether substantial evidence supports the Agency's findings of fact or whether the Agency committed an error or law or violated the applicant's constitutional rights. Fish v. Pa. Hous. Fin. Agency, 931 A.2d 764 (Pa. Cmwlth. 2007).

## **Issues**

In his petition for review and brief, Homeowner raises two issues. He contends the Agency failed to understand the appraisal report and failed to consider his mortgage modification plan from Wells Fargo.

## **Discussion**

### **Appraisal Report**

First, Homeowner asserts the Agency misunderstood the appraisal report and lacked a clear understanding of what Chesapeake is doing in Bradford County. Although Homeowner fails to develop this argument beyond this statement, we interpret Homeowner's argument as being that Chesapeake will drill a producing well on his property and he will be able to resume full payments on the First Mortgage within 36 months.

To qualify for a HEMAP loan, a homeowner must demonstrate he meets the eligibility criteria in Act 91. Coyne v. Pa. Hous. Fin. Agency, 826 A.2d 925 (Pa. Cmwlth. 2003); Crawl v. Pa. Hous. Fin. Agency, 511 A.2d 924 (Pa. Cmwlth. 1986). Section 404-C(a) of Act 91 (eligibility for assistance) pertinently provides:

- (a) No assistance may be made with respect to a mortgage or mortgagor under this article unless all of the following are established:

\* \* \*

- (5) The agency has determined that there is a reasonable prospect that the mortgagor will be able to resume full mortgage payments within twenty-four (24) months after the beginning of the period for which assistance

payments are provided under this article and pay the mortgage or mortgages in full by its maturity date or by a later date agreed to by the mortgagee or mortgagees for completing mortgage payments.

35 P.S. §1680.404c(a)(5). Section 405-C(f.1) of Act 91 extends the 24-month limit on mortgage assistance to 36 months, where as here, Pennsylvania's unemployment rate exceeds 6.5% at the time of the homeowner's HEMAP loan application. 35 P.S. §1680.405(c)(f.1).

The Agency's interpretation of Act 91 is entitled to great weight and may only be overturned if such construction is clearly erroneous. Horton v. Pa. Hous. Fin. Agency, 511 A.2d 917 (Pa. Cmwlth. 1986). Where the Agency bases its determination that there is no reasonable prospect that a mortgagor will be able to resume monthly mortgage payments on a finding that his asserted income is too speculative, we will not find error or an abuse of discretion. R.M. v. Pa. Hous. Fin. Agency, 740 A.2d 302 (Pa. Cmwlth. 1999); see also Cullins v. Pa. Hous. Fin. Agency, 623 A.2d 951 (Pa. Cmwlth. 1993) (the Agency is bound to evaluate eligibility on the basis of the applicant's actual income history; speculative income may not be considered).

Here, the hearing examiner found that Chesapeake paid Homeowner \$52,300 for the right to drill for gas and oil, but it did not guarantee when, where, or if a well will be drilled. S.R.R. at 47. At the time of the hearing, two years after execution of the lease, Chesapeake had not started drilling on the property. Id.

These findings are supported by the record. Homeowner testified Chesapeake did not guarantee when they would drill a well. See N.T. at 18-21, 27-29. The hearing examiner asked Homeowner for a letter from Chesapeake stating it will drill within a year and a half. Id. at 19-20. Homeowner replied that Chesapeake would not give him one. Id. The hearing examiner remarked that he encountered similar situations in other hearings where gas/oil drillers paid for a lease but did not drill. Id. at 27.

In addition, the appraisal report reflected that Chesapeake controlled where or when wells will be drilled. S.R.R. at 50. The report also noted any well can be a dry hole. Id.

Given these circumstances, we find no error or abuse of discretion in the hearing examiner's determination that any possible income from future gas/oil royalties must remain speculative until received. R.M.; Cullins. The Agency cannot base its loan decisions on speculative income. Id.

### **HAMP Modification Plan**

Second, Homeowner asserts the Agency failed to consider his “loan home affordable modification plan” from Wells Fargo. Homeowner’s Br. at 8. Homeowner literally fails to develop this argument beyond this statement. He does not cite any modification plan in the record. In addition, Homeowner does not indicate in his petition for review or brief when he obtained a mortgage modification.

Further, it does not appear from Homeowner's testimony that Wells Fargo granted him mortgage modification at the time of the appeal hearing. Homeowner testified, "Alright, I didn't get the loan modification yet what can I do." N.T. at 18. He later stated he is waiting to see "[i]f this home affordable comes through." *Id.* at 26.

Also, our review of the record indicates only that Homeowner applied for a HAMP modification. See C.R., Item No. 8 (Making Home Affordable Program); Item No. 10 (Fax Sheet/Cover Sheet for HAMP). However, there is no mortgage modification in the record. Only items that are part of the certified record may be considered on appeal. Kochan v. Dep't of Transp., Bureau of Driver Licensing, 768 A.2d 1186 (Pa. Cmwlth. 2001). This Court will not consider averments of facts in a party's brief that are not part of the record. City of Phila. v. Workers' Compensation Appeal Board (Ford-Tilghman), 996 A.2d 569 (Pa. Cmwlth. 2010), appeal denied, \_\_\_ Pa. \_\_\_, \_\_\_ A.3d \_\_\_ (2011) (196 EAL 2010). Because there is no mortgage modification plan in the record, we reject Homeowner's argument that the Agency failed to consider it. Kochan.

### Conclusion

We discern no error in the Agency's denial of Homeowner's request for a HEMAP loan. At the time of the appeal hearing, Homeowner's two mortgage payments alone exceeded his monthly income. In addition, Homeowner presented no evidence that Chesapeake would drill on his property by a certain date. Consequently, the Agency did not err in reasoning that any possible income from future gas/oil royalties must remain speculative until received. R.M.; Cullins.

Accordingly, we affirm the hearing examiner's decision and order.

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ROBERT SIMPSON, Judge

Judge Leavitt did not participate in the decision in this case.

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**O R D E R**

**AND NOW**, this 20<sup>th</sup> day of July, 2011, the order of the Pennsylvania Housing Finance Agency is **AFFIRMED**.

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ROBERT SIMPSON, Judge