

TRANSFORMING FORECLOSED PROPERTIES INTO COMMUNITY ASSETS

Framing the Solutions: Opportunities for Intervention

Frank S. Alexander
Emory Law School

The sudden and dramatic rise in the volume of foreclosed residential properties presents a range of challenges not encountered in decades. Lenders and servicers have not been and are not equipped to maintain and manage such volumes. The market is not prepared to absorb this dramatic increase in supply. Neighborhoods are not able to bear the weight of vacancies approaching thirty or forty percent. Local governments are not equipped to confront the twin burdens of vandalism and lost property taxes from declining values.

These challenges, however, are also opportunities. During the post-default and pre-foreclosure period there is a need to be able to proactively identify the lender or servicer with full authority to renegotiate the debt and explore alternatives to foreclosure. There are opportunities to mitigate the adverse impact on tenants of rental property foreclosures. “Short sales” may be an optimum result in certain cases, but only when the debt to value ratio is clear and the parties resolve deficiency liability. Once foreclosure has been completed the paramount need is to identify as quickly as possible the holder of title to the REO and any agent with authority and responsibility for the property. Vacant properties are liabilities for all parties – for the former lender, for the neighborhood, for the local government. Opportunities are presented for “reoccupancy” of the property immediately by former owners or new tenants under short term lease at rental rates equal to hard cost disbursements. For unoccupied properties local governments will move rapidly to enforce code violations and impose liens.

One viable solution is for portions of the REO inventory to be acquired by or on behalf of local governments and conveyed either directly to not-for-profit entities or to a public land bank authority. A land bank authority usually will possess property management capacities and have clear public purpose responsibilities for the subsequent disposition of property, such as neighborhood stabilization or affordable housing.

The following slides present an overview of the opportunities for intervention in converting foreclosed properties into community assets. Appendix A is an example of a recently approved statute addressing the need to identify properly the foreclosing lender. Appendix B is an example of a land banking policy easily adaptable to converting the foreclosed REO into assets for the community.

Transforming Foreclosed Properties into Community Assets

Framing the Solutions: Opportunities for Intervention

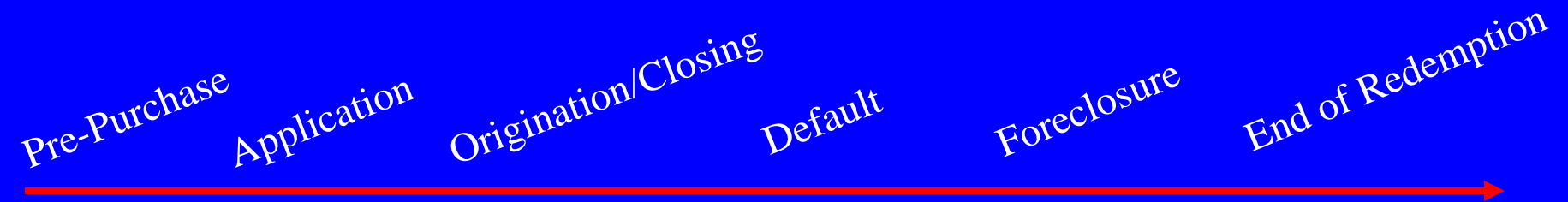
Frank S. Alexander
Professor of Law, Emory University

NYU Furman Center for Real Estate
and Urban Policy
May 2, 2008

© Frank S. Alexander, 2008

Transforming Foreclosed Properties

The Life of a Distressed Mortgage



Assumptions & Focus

- Pre-default topics are addressed separately
- Residential Properties
- Work-outs and loan modifications are not viable
- There has been, or will be, a transfer of ownership
- “Foreclosure” is foreclosure of senior debt, not junior debt
- MR Bankruptcy is addressed separately

Goal: How to keep foreclosure REO from being a liability, and making it into an asset.

Transforming Foreclosed Properties

Post-Default to Pre-foreclosure Strategies

Default

Foreclosure

Challenges:

Identification of ME (MERS, PSAs, Servicers, Counsel)

Impact on tenants

Debt equals or exceeds FMV

Opportunities:

Identify Party with Legal Authority in Notice and Advertisement (Ga. Sen. Bill 531)

F-Sales subject to short-term current leases

“Short” Sales (lender reducing debt to FMV) and Deeds in Lieu, but limit to no equity contexts and address deficiency liability

Transforming Foreclosed Properties

Post-Foreclosure and End of Redemption

Foreclosure

End of Redemption

Challenges:

Identifying F-Sale Purchaser

Impact on former owners

Property Maintenance and Code Enforcement

Large scale vacancies

Opportunities:

Require, by statute, all F-Sale Deeds to be filed of record within 30 days of sale

Seek short term leases at 3x monthly escrow

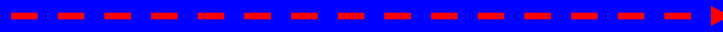
Immediate code enforcement actions; possibility of vacant property registration ordinance, or creation of public “foreclosure assessments”

Track F-Sales by zip code (9 digit) with focus on high concentration neighborhoods

Transforming Foreclosed Properties

REO Conversions to Community Assets

Foreclosure
End of Redemption



Community Assets

Challenges:

Finding Identity of REO holder or agent

Inventory Triage

Negotiating short term leases and management agreements

Negotiating acquisitions by Gov. agencies & NGOs

Opportunities:

Seek to have all MEs identify REO agent with management and disposition authority

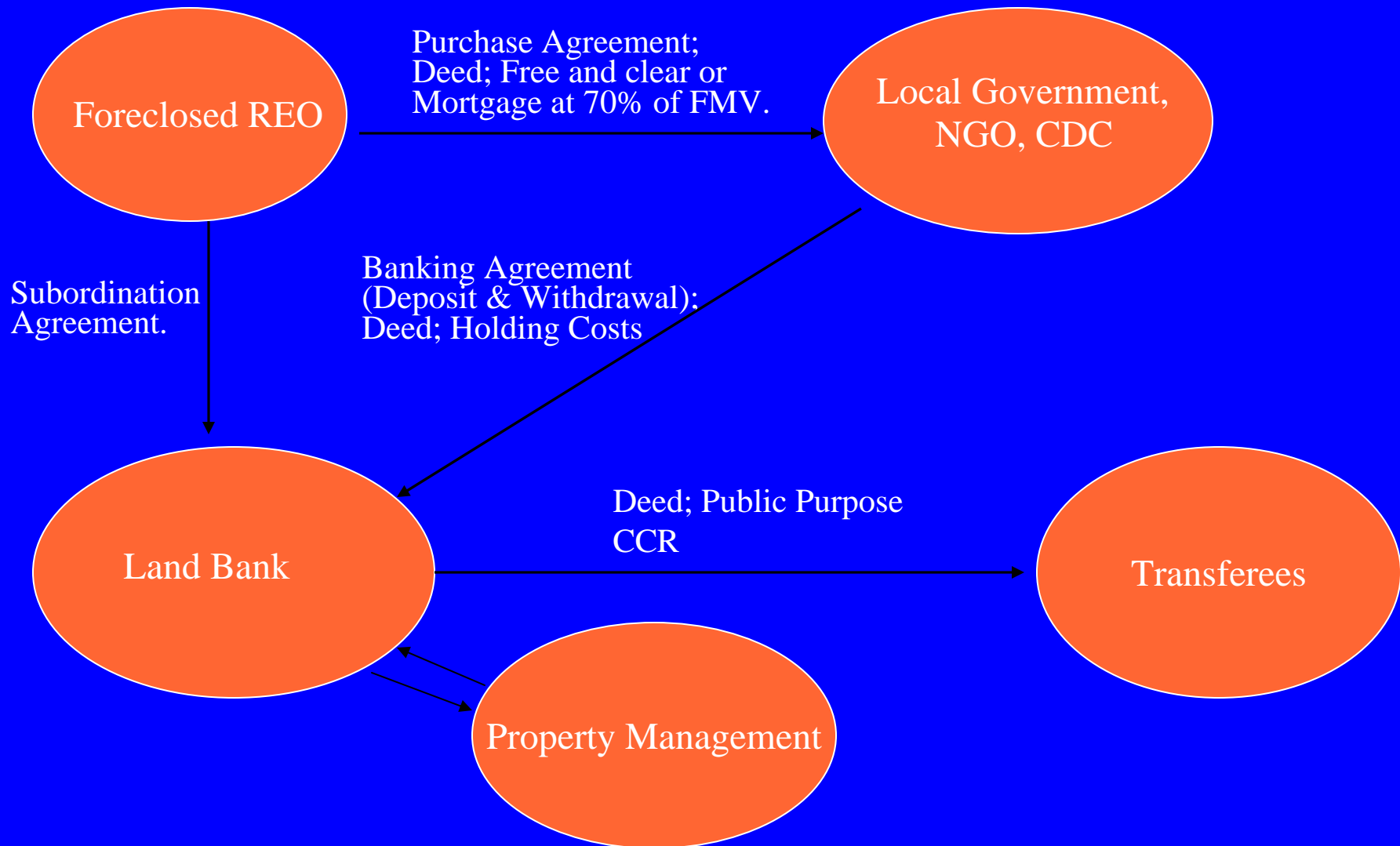
Segregate by condition; availability for occupancy; geographic concentration

Immediate goal of occupancy; cash flow only to cover management, utilities, taxes, ins.

Create acquisition program (HR 5818) at > 90% current FMV, adjusted for public liens; place into NGO/CDC rental management or resale program.

Transforming Foreclosed Properties

Land Banking Conversion to Community Assets



APPENDIX A

Georgia General Assembly

Senate Bill 531

**As Passed and Sent to Governor on April 21, 2008
(Provisions in bold reflect primary substantive changes)**

AN ACT

To amend Article 7 of Chapter 14 of Title 44 of the Official Code of Georgia Annotated, relating to foreclosure on mortgages, conveyances to secure debt, and liens, so as to require a foreclosure to be conducted by the current owner or holder of the mortgage, as reflected by public records; to provide for the identity of the secured creditor to be included in the advertisement and in court records; to change the requirement for mailing or delivery of notice to debtor for sales made under the power of sale in a mortgage, security deed, or other lien contract; to provide for the content of such notice; to provide for related matters; to provide an effective date; to repeal conflicting laws; and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

SECTION 1.

Article 7 of Chapter 14 of Title 44 of the Official Code of Georgia Annotated, relating to foreclosure on mortgages, conveyances to secure debt, and liens, is amended by revising Code Section 44-14-162, relating to manner of advertisement and conduct necessary for validity for sales made on foreclosures under power of sale, as follows:

"44-14-162.

(a) No sale of real estate under powers contained in mortgages, deeds, or other lien contracts shall be valid unless the sale shall be advertised and conducted at the time and place and in the usual manner of the sheriff's sales in the county in which such real estate or a part thereof is located and unless notice of the sale shall have been given as required by Code Section 44-14-162.2. If the advertisement contains the street address, city, and ZIP Code of the property, such information shall be clearly set out in bold type. In addition to any other matter required to be included in the advertisement of the sale, if the property encumbered by the mortgage, security deed, or lien contract has been transferred or conveyed by the original debtor to a new owner and an assumption by the new owner of the debt secured by said mortgage, security deed, or lien contract has been approved in writing by the secured creditor, then the advertisement should also include a recital of the fact of such transfer or conveyance and the name of the new owner, as long as information regarding any such assumption is readily discernable by the foreclosing creditor. Failure to include such a recital in the advertisement, however, shall not invalidate an otherwise valid foreclosure sale.

(b) The security instrument or assignment thereof vesting the secured creditor with title to the security instrument shall be filed prior to the time of sale in the office of the clerk of the superior court of the county in which the real property is located."

SECTION 2.

Said article is further amended by revising Code Section 44-14-162.2, relating to sales made under the power of sale, mailing or delivery of notice to debtor, and procedure, as follows:

"44-14-162.2.

(a) Notice of the initiation of proceedings to exercise a power of sale in a mortgage, security deed, or other lien contract shall be given to the debtor by the secured creditor no later than 30 days before the date of the proposed foreclosure. **Such notice shall be in writing, shall include the name, address, and telephone number of the individual or entity who shall have full authority to negotiate, amend, and modify all terms of the mortgage with the debtor,** and shall be sent by registered or certified mail or statutory overnight delivery, return receipt requested, to the property address or to such other address as the debtor may designate by written notice to the secured creditor. The notice required by this Code section shall be deemed given on the official postmark day or day on which it is received for delivery by a commercial delivery firm. Nothing in this subsection shall be construed to require a secured creditor to negotiate, amend, or modify the terms of a mortgage instrument.

(b) The notice required by subsection (a) of this Code section shall be given by mailing or delivering to the debtor a copy of the notice of sale to be submitted to the publisher."

SECTION 3.

This Act shall become effective upon its approval by the Governor or upon its becoming law without such approval.

SECTION 4.

All laws and parts of laws in conflict with this Act are repealed.

APPENDIX B

[The following policy was adopted by the Board of Directors of the Fulton County/City of Atlanta Land Bank Authority on December 4, 2007/12/4/07. For further information contact Ms. Audrey Akpan, Executive Director, 34 Peachtree St NW # 1900, Atlanta, GA 30303, 404 525-9336.]

Fulton County/City of Atlanta Land Bank Authority

Policies and Procedures for Land Banking

These policies and procedures for a land banking program of the Fulton County/City of Atlanta Land Bank Authority have been adopted by the Board of Directors of the LBA in accordance with and pursuant to the laws of the State of Georgia, O.C.G.A. § 48-4-60, et. seq. (the “LBA Statute”) and the Interlocal Agreement dated as of January 9, 1994.

As set forth in these policies and procedures, the land banking program consists of transactions in which a grantor transfers real property to the LBA and the property is held by the LBA pending a transfer back to the original grantor, to a grantee identified in a banking agreement, or to a third party selected by the LBA.

The goals of this land banking program include but are not limited to the acquisition of real property for or on behalf of a governmental entity or a not-for-profit corporation in order to:

- (a) Permit advance acquisition of potential development sites in anticipation of rapidly rising land prices;
- (b) Facilitate pre-development planning, financing, and structuring;
- (c) Minimize or eliminate violations of housing and building codes and public nuisances on properties to be developed for affordable housing; and
- (d) Hold parcels of land for future strategic governmental purposes such as affordable housing and open spaces and greenways.

The LBA is not required to enter into a Banking Agreement with any person or entity, and at all times retains full discretion and authority to decline to enter into a Banking Agreement. These policies and procedures are applicable only to real property of the LBA which is acquired by the LBA in accordance with an executed Banking Agreement and are not otherwise applicable to real property acquired by the LBA pursuant to any other agreements or procedures.

Section 1. Definitions. As used in these policies and procedures the following terms shall have the definitions set forth:

- (a) "Banking Agreement" shall mean a written agreement between a Grantor and the LBA which identifies the property, the length of the banking term, the potential Grantee or Grantees, the range of permissible uses of the Property following transfer by the LBA, the permitted encumbrances on the Property, the rights and duties of the parties, the responsibility of the Grantor for the Holding Costs, the possible advance funding of Holding Costs, the forms of the instruments of conveyance and such other matters as appropriate.
- (b) "Grantor" shall mean the party that transfers or causes to be transferred to the LBA a tract of Property pursuant to a Banking Agreement. An eligible Grantor shall be an entity described in Section 3.
- (c) "Grantee" shall mean the party or parties identified in a Banking Agreement as the party to whom the property is to be transferred from the LBA. An eligible "Grantee" shall be an entity described in Section 3.
- (d) "Holding Costs" shall mean any and all costs, expenses, and expenditures incurred by the LBA, whether as direct disbursements, as pro rata costs, or as administrative costs, that are attributable to the ownership and maintenance of a tract of Property. The LBA shall maintain records of the monthly Holding Costs for each Property.
- (e) "Property" shall mean the real property and improvements (if any) located thereon identified in a Banking Agreement and transferred to the LBA pursuant to a Banking Agreement, together with all right, title and interest in appurtenances, benefits and easements related thereto.

Section 2. Eligible Property. Property which is eligible for Banking Agreement must either be (a) unimproved real property or (b) real property with newly constructed unoccupied single family residences. At any given point in time no more than twenty (20) percent of the parcels of Property being held by the LBA pursuant to Banking Agreements can be newly constructed unoccupied single family residences.

In the event that a tract of Property contains improvements which are to be demolished or removed, such Property may qualify as eligible Property for a Banking Agreement so long as adequate and sufficient funds are placed in escrow at the time of the Banking Agreement closing so as to assure that all improvements will be demolished and removed within sixty (60) days of closing.

Property that is ineligible for a Banking Agreement includes all other forms of improved real property, all real property which is occupied, and all real property that has been identified by the United States Environmental Protection Agency or the Environmental Protection Division of the State of Georgia as containing hazardous substances and materials.

Section 3. Eligible Grantors and Grantees. Parties eligible to be a Grantor or a Grantee are governmental entities and not-for-profit corporations defined as tax-exempt entities under Section 501(c)(3) of the Internal Revenue Code. A limited partnership

entity is eligible to be a Grantor or a Grantee so long as a governmental entity or not-for-profit corporation has a controlling interest in such entity.

Section 4. Title. Unless and except to the extent expressly authorized in a Banking Agreement, Property transferred to the LBA pursuant to a Banking Agreement shall be fee simple title free and clear of all liens and encumbrances. A policy of title insurance must be issued in favor of the LBA as the insured party at the closing pursuant to the Banking Agreement containing such exceptions on Schedule B-1 as are approved by the LBA.

- (a) Governmental liens for water and sewer, and governmental liens for nuisance abatement activities or code enforcement activities may exist as a matter of record title at the time of such closing if and only if such liens are expressly acceptable to the LBA and are subject to waiver or discharge by the governmental entity holding such liens without cost to the LBA.
- (b) A deed to secure debt or security deed may encumber Property at the time of the transfer to the LBA provided that the obligations secured by such security instrument do not require monthly or periodic payment of sums by the LBA to the mortgagee. Under no circumstances will the LBA have direct liability to a mortgagee pursuant to a security instrument. It is anticipated that each Banking Agreement that contemplates the transfer of Property to the LBA encumbered by a security instrument will require a separate written agreement between the mortgagee and the LBA which provides, among other things, that (1) the mortgagee expressly consents to the transfer to the LBA, (2) the mortgagee expressly subordinates its interests to covenants, conditions and restrictions as may be required by the LBA, and (3) prior to the exercise of mortgagee rights under the security instrument the mortgagee will request on behalf of the Grantor the reconveyance of the Property to the Grantor and pay to the LBA the Holding Costs attributable to the Property.
- (c) At the time of closing pursuant to a Banking Agreement all ad valorem taxes which are due and payable on the Property must be paid in full. An exception to this requirement of no outstanding ad valorem tax liens may be granted (i) when the Grantor is acquiring the Property from a third party and immediately conveying the Property to the LBA pursuant to a Banking Agreement and (ii) the acquisition of the Property by the Grantor from the third party otherwise complies with the Reasonable Equity Policy of the LBA.

Section 5. Length of Banking Term. A Banking Agreement may permit a maximum banking term of thirty-six (36) months for transactions in which the Grantor is a not-for-profit entity, and sixty (60) months for transactions in which the Grantor is a governmental entity.

Section 6. Transfer at Request of Grantor. A Banking Agreement shall authorize a Grantor to request a transfer of the Property by the LBA to a Grantee at any time within the banking term.

- (a) A conveyance by the LBA to the Grantee identified pursuant to a Banking Agreement shall occur within thirty (30) days of receipt of a written request for a transfer.
- (b) As a condition precedent to the transfer by the LBA, the full amount of Holding Costs incurred by the LBA attributable to the Property shall be paid to the LBA. The LBA shall provide to the Grantor in accordance with Section 9 a statement of the Holding Costs attributable to the Property.
- (c) At the time of the transfer by the LBA to the Grantee the LBA shall impose such restrictions and conditions on the use and development of the property in accordance with Section 10 hereof and the applicable Banking Agreement.
- (d) Conveyance by the LBA to a Grantee shall be by quitclaim deed.

Section 7. Transfer at Request of LBA. At any time and at all times during the term of a Banking Agreement the LBA shall have the right, in its sole discretion, to request in writing that the Grantor or its designee accept a transfer of the Property from the LBA.

- (a) A transfer by the LBA pursuant to this Section 7 shall be subject to the same terms and conditions as set forth in Section 6.
- (b) In the event that the Grantor (or its designee) is unwilling or unable to accept a transfer of the Property from the LBA, and reimburse the LBA in full for the Holding Costs, then and in that event the LBA shall have the right to terminate in writing the Banking Agreement and the Property shall become an asset of the LBA and subject to use, control and disposition by the LBA in its sole discretion subject only to the provisions of the LBA Statute and the Interlocal Agreement.

Section 8. Banking Agreement Closing. Within a time period specified in a fully executed Banking Agreement a closing of the transfer of the Property to the LBA shall occur. At such closing the fully executed instrument of conveyance and other closing documents shall be delivered by the appropriate party to the appropriate parties. The appropriate documents shall be immediately recorded, and a title insurance policy shall be issued. All costs of closing shall be borne by the Grantor.

Section 9. Holding Costs. Holding Costs shall be paid as a condition precedent to a transfer of Property from the LBA. Either the Grantor or the Grantee can request in writing at any time a statement of the Holding Costs, which statement will be provided by the LBA within fifteen (15) business days of receipt of the request. The LBA shall also have the right to request in writing that the Grantor or Grantee reimburse on written demand the LBA for Holding Costs. In the event that the LBA is not timely reimbursed for its Holding Costs in response to its written request for reimbursement the LBA may request a transfer pursuant to Section 7.

Section 10. Public Purpose Restrictions. All Property held by the LBA and transferred by the LBA pursuant to a Banking Agreement shall be subject to covenants and

conditions providing that the Property is to be used for the following goals: (a) the production or rehabilitation of housing for persons with low incomes, (b) the production or rehabilitation of housing for persons with low or moderate incomes, (c) community improvements, or (d) other public purposes. Each Banking Agreement will specify the range of permissible uses and the manner in which such use restriction is secured. Such restrictions and conditions may be imposed either in the form of contractual obligations, deed covenants, rights of reacquisition, or any combination thereof.

Section 11. Delegation of Authority to Executive Director. The Executive Director, in conjunction with an officer of the Board of Directors, shall have full power and authority to enter into and execute Banking Agreements having form and content consistent with the LBA Statute, the Interlocal Agreement, and these policies and procedures. The Executive Director shall summarize for the Board of Directors on a regular basis the nature and number of Banking Agreements, the aggregate Holding Costs, and all transfers to and from the LBA pursuant to Banking Agreements. Any provision of any Banking Agreement not consistent with these policies and procedures shall require the express approval of the Board of Directors.