



## Chicago Amends Vacant Building Ordinance Burdens on Mortgagees to Increase

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For years mortgage lenders and servicers have faced housing court complaints in which cities like Chicago complain that mortgaged properties are unsafe or in need of maintenance or repair to comply with city building codes. In some cases the properties are held as Real Estate Owned (REO) and the lender, as the property owner, is rightly responsible for the property. But in other cases, the property may have been abandoned by its owner or the subject of a foreclosure proceeding. In those cases, the lender is not yet in possession of the property and risks being sued by homeowners if the lender takes steps to secure a property before a foreclosure is complete.

In the past, the City of Chicago recognized the dilemma lenders face. While the City would name mortgagees as defendants in housing court cases, the City did not attempt to impose liability upon lenders if they were not yet in possession of the property. This was a reasonable approach. Obviously, if a lender is not entitled to come onto the property to perform any maintenance or repair, there is nothing the lender can do to address the City's complaint. Typically the Corporation Counsel would take the view that the lender needed to be on notice of the City's action, as the lender's rights could be affected, but the City's attorney would not expect the lender to be responsible for violations occurring on a property the lender did not control.

All of that changed on July 28, 2011, when the Chicago City Council amended the City's Vacant Building Ordinance. Among other things, the amendment modified the definition of the term "owner" to now include a mortgagee who holds a mortgage on the property. The definition also sweeps in servicers, saying that an "owner" is not just the owner of a mortgage, but also "any person designated or authorized to act on behalf of such holder." Chicago, IL, Mun. Code § 13-12-125(g).

As "owners," mortgagees and servicers now have substantial responsibility. The Vacant Building Ordinance imposes a number of obligations upon "owners" of vacant buildings, including the duty to register the buildings with the City and pay a registration fee, enclose and secure the building, post a sign with the name of the "owner" and the "owner's" authorized agent, insure the building, maintain a surety bond posted with the City and, of course, maintain the building and ensure that it complies with the City Building Code. In addition, the "owner" must post a "watchman" on duty between 4:00 p.m. and 8:00 a.m. everyday, unless the City believes the building is sufficiently



secure that no “watchman” is required. If the City deems a vacant building unsafe or dangerous, the “owner” can be fined \$200 - \$1,000 per day until the building is repaired or demolished. If the building is deemed a “public nuisance,” the fines can reach \$5,000 per day.

The amendment adds a bounty to encourage private citizens to report vacant buildings in their neighborhoods. Any citizen who reports a verifiable violation of the Vacant Building Ordinance is entitled to a “finder’s fee” of 5 percent of the total fees and fines assessed upon the “owner.”

For lenders and servicers, these amendments impose significant new obligations that did not previously exist. At a minimum, lenders will now need to inspect properties more frequently to ascertain whether they are vacant or occupied. Obviously it is not always apparent whether a property is vacant or occupied. Once the lender concludes the property is vacant, it then faces the problem of how to comply with the requirements of the Vacant Building Ordinance prior to completing a foreclosure or obtaining an order entitling it to possession.

Consumer advocates seem to want to have their cake and eat it too. The non-judicial foreclosure system in many states is under attack by advocates who claim borrowers are not receiving sufficient due process during a foreclosure. Yet in places like Chicago, where judicial foreclosures typically take a year and a half to complete, advocates complain that foreclosures are not being completed quickly enough, leaving vacant properties in a sort of limbo where the existing owner has abandoned the property but the mortgage lender has not yet taken title or obtained possession.

The solution offered by the City is to simply place the burden of securing and maintaining vacant buildings on the mortgage industry — a popular target of politicians in the present environment. By offering a bounty to citizens who report vacant buildings, the politicians increase their returns even more. But the City’s attempted solution is no solution — if the lenders and servicers lack the legal right to secure and maintain properties, they cannot comply with the ordinance. In effect, the City is simply passing the cost of maintaining and securing these properties along to mortgage lenders, who are essentially being told that this is now a cost of doing business in Chicago.

How the newly amended ordinance will be applied and enforced remains to be seen. The ordinance will likely face a constitutional challenge by lenders and servicers, who have been placed in the position of being held accountable for something they have no control over. Moreover, the ordinance may have the unintended consequence of hurting consumers by driving lenders out of the Chicago marketplace, as recognized by Moody’s Investors Service in a statement about the amendment issued on August 1, 2011.

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