

New York "Zombie Property" Rules Go Live

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As we reported in our June 2016 edition *HC Insights*, New York has adopted sweeping changes to its Real Property and Procedures Law that address, among other things, the inspection, securing, and maintaining of vacant and abandoned residential real property. The New York Department of Financial Services has now also finalized regulations to implement these requirements. Both the statutory revisions and the regulation became effective on December 20, 2016.

The core of the new rules require that steps be taken to minimize the community impact caused by "vacant and abandoned" properties. As defined in the statute and regulation, a residential property is considered "vacant and abandoned" if:

- At three consecutive inspections of the property by the mortgagee or its agent that no occupant was present in the property and there was no evidence indicative of anyone residing there and the property was generally not being maintained;
- A court or state or local government entity has determined (after due notice is given to the borrower at the property address or other known addresses) that the property is vacant or abandoned; or
- Each borrower and owner has issued his/her own sworn, written statement expressing his/her intent to vacate and abandon the property and an inspection shows no evidence of occupancy.

The inspections should be conducted within 90 days of the borrower's delinquency and every 25 to 35 days thereafter. They are of the exterior portions of the property only, and should be conducted at different times of the day. Either the mortgagee or its servicing agent is responsible for conducting the inspections. Property should not be considered vacant and abandoned if it is in the midst of construction, is a seasonal property, has been damaged by a natural disaster, or is the subject of a probate, action to quiet title, or other similar proceeding of which the mortgagee or servicing agent is aware.

Once a property has been determined to be vacant and abandoned, affirmative steps must be taken to secure and maintain it. First, within 7 business days of determining that the property is vacant or abandoned, a notice must be posted that is reasonably visible to the borrower, property owner, or occupant. The notice should include the toll-free

number (or similar contact information) of the party servicing the mortgage. Once posted, monitoring must occur to see if the notice remains posted as long as its duty to maintain the property applies.

If the posted notice is not responded to or persists for 7 consecutive calendar days without contact from the borrower, property owner or occupant in a manner indicating that the property is not vacant or abandoned, the servicer then becomes responsible for taking steps to secure the property, with the aim of minimizing potential damage. These steps include changing no more than one door lock, securing or replacing / boarding up broken doors and windows, securing parts of the property that might be considered an attractive nuisance (such as a swimming pool or outbuildings), taking reasonable steps to ensure that vents, fans and pipes are not discharging harmful materials directly on abutting or adjacent properties, maintaining and/or winterizing heating systems and other utilities to the property to prevent floods and/or water leaks, and taking certain steps to remove or remediate significant health and safety issues (for example: measures to prevent mold growth).

There are limits on the steps that can be taken to secure and maintain the property, however. For one, while the mortgagee or servicer is securing the property as described above, the personal property of the borrower that is inside the home is not to be removed unless the property poses a significant health and/or safety issue. The activities described above should also cease upon the occurrence of certain events (for example: if the mortgagee or servicer has received threats of violence, if the borrower has filed for bankruptcy, if a homeowner's association or cooperative has denied access to the property, the property is sold, or if the servicer has released the lien on the collateral property).

In addition to these limits, there is also a more general exception from the rules for banks and credit unions that (a) originate and service their own mortgage loans (or a portion thereof) and (b) have less than 0.3% of the total loans in the state which they own or service (as of year-end two calendar years prior). If this volume threshold is met the requirements do not apply. If the volume during the period in question is between 0.3% and 0.5% the vacant property security and maintenance requirements are prospective only. To assist in the calculation process, the Department of Financial Services will publish in mid-November of each year the total number of mortgage loans made as of year-end two years prior.

Coupled with the requirements to secure and maintain the property, mortgagees or their servicers are also responsible for reporting to the Department of Financial Services. Among other things, the reporting must include information regarding the transaction (the name of the mortgagee and/or servicer responsible for the property's maintenance, as well as if a foreclosure proceeding has been commenced on the subject property), the address of the property, and the name and last known address of the mortgagor. These reports must be made within 21 business days of when the mortgagee or servicer learns (or should have learned) that the property is vacant and abandoned. In addition to this ad hoc reporting, there are additional quarterly reporting requirements for mortgage loans that are delinquent for 90 days or more.

Administration of these requirements will generally be handled at the state and not the municipal level. However, while municipalities are generally prohibited from enacting duties with regard to vacant properties that are inconsistent with the state statute, they are permitted to seek enforcement of the state rules in court. Whether this option will be used by municipalities in an effort to leapfrog state level enforcement in an effort to combat blight properties remains to be seen.

Parties that make and hold or service mortgage loans on properties located in New York should familiarize themselves with these requirements. They represent the back-end of the regulatory processes developed in recent years to deal with the fall out of the "Great Recession" and its impact on the housing market. The industry will now wait and see if other jurisdictions will follow-suit with these centralized requirements or remain stuck with a patchwork quilt of municipal ordinances dealing with these issues.

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