TRENDING: #REO

2014 NEW JERSEY LEGISLATIVE YEAR IN REVIEW: TAKING AIM AT REO PROPERTIES

January 5, 2015

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> "Vacant properties are neighborhood eyesores that attract pests and criminal activity and drag down property values. Municipalities will now be able to take action against creditors who create nuisance situations for neighborhoods and municipalities by failing to maintain vacant properties that are set for foreclosure."

Assembly Speaker Vincent Prieto (D, 32nd Leg. Dist.) (New Bill Would Levy Fines Against Creditors Who Fail To Maintain Vacant Homes, The Trentonian, Aug. 22, 2014, http://www.trentonian.com/government-and-politics/20140822/new-bill-would-levy-fines-against-creditors-who-fail-to-maintain-vacant-homes).

Indeed, real estate owned properties, commonly referred to in the residential mortgage default industry as "REO properties," have been the topic of scrutiny in New Jersey since the housing crisis. According to a report issued by the Housing Community Development Network of New Jersey, the State currently has one of the highest shares of mortgages in foreclosure in the nation. Correspondingly, the Mortgage Bankers Association estimates that 8.12% of all mortgaged homes in New Jersey were in the process of foreclosure during only the first three months of 2014. As a result, New Jersey municipalities have considered ideas to curb blight reportedly caused by vacant homes in foreclosure.[1]

2014: A Legislative Trend Against REO Properties and Out-Of-State Creditors

In 2014, the New Jersey Legislature stepped in by introducing legislation directed at and against vacant homes in foreclosure and creditors, both in-State and out-of-State, regardless of whether the creditors ever take "ownership" of the subject properties. Some legislation remains in legislative committees, but other legislation has been signed into law by Governor Christopher J. Christie.

A. Senate Bill S1884

On March 27, 2014, New Jersey State Senator Shirley K. Turner (D, 15th Leg. Dist.) introduced Senate Bill S1884 that proposes to amend N.J.S.A. § 40:49-5, which governs penalties for violating municipal ordinances, to ***double*** the maximum penalty for "continuing flagrant violations" from $2,000 to $4,000 per violation. Section 40:49-5 now provides, in relevant part:

> The governing body may prescribe penalties for the violation of ordinances it may have authority to pass, by one or more of the following: imprisonment in the county jail or in any place provided by the municipality for the detention of prisoners, for any term not exceeding 90 days; or by a fine not exceeding $2,000; or by a period of community service not exceeding 90 days.
>
> The governing body may prescribe that for the violation of any particular ordinance at least a minimum penalty shall be imposed which shall consist of a fine which may be fixed at an amount not exceeding $100.

[1] For instance, in June 2014, the City of Newark, New Jersey approved a resolution to contract with a private investor to purchase underwater mortgages and repackage them at terms homeowners can afford. Likewise, in March 2014, the City of Irvington, New Jersey approved a resolution that brought the municipality one step closer to using eminent domain (known there as "friendly condemnations") to seize and restructure underwater mortgages.

N.J.S.A. § 49:40-5. Now, Senate Bill S1884 proposes adding:

> The governing body may prescribe that for the continuing flagrant violations of an ordinance pertaining to housing or zoning code enforcement at least a minimum penalty shall be imposed which shall consist of a fine which may be fixed at an amount not less than $10 or a maximum penalty not exceeding $4,000. The owner of the property subject to such fines shall be afforded the opportunity for a hearing prior to the imposition of fines in excess of $1,250.

On March 27, 2014, the bill was referred to the Senate Committee on Community and Urban Affairs where, as of the date of this article, it remains pending.

B. General Assembly Bill A347

Effective July 14, 2014, Assembly Bill A347 amended the New Jersey Creditor Responsibility Law, N.J.S.A. 46:10B-51, to now authorize municipalities to impose monetary penalties on in-State and out-of-State creditors for failing to remediate municipal code violations on vacant or abandoned REO properties.

Pursuant to Assembly Bill A347, New Jersey municipalities may "require a creditor who initiates a foreclosure proceeding against a residential property located in the municipality to maintain the property in accordance with State and local housing codes if the property becomes vacant during the foreclosure proceeding." A347, Statement. A347 amended N.J.S.A. § 46:10B-51, which requires a creditor serving a notice of intention to foreclose on a mortgage on residential property to also serve, within ten days after commencing the foreclosure action, that notice on the public officer or clerk of the municipality in which the property is located, which must also include the process by which a municipality is to notify the creditor of its responsibility to abate any nuisance or correct any code violation occurring on the subject property such as (1) the name and contact information for the representative of the creditor who is responsible for receiving complaints of property maintenance and code violations; (2) the street address, lot and block number of the property; (3) the full name and contact information of an individual located in New Jersey authorized to accept service on behalf of the creditor; and (4) whether the property is subject to the Fair Housing Act. N.J.S.A. § 46:10B-51(a)(1), (b).

Upon receiving notice from the municipality of a nuisance or code violation occurring on the abandoned or vacant property subject to the foreclosure action, the creditor will have thirty days to remediate the violation, or be subject to penalties ranging from community service or a fine not to exceed $2,000 to imprisonment for not more than 90 days, in addition to reimbursing any public funds spent by the municipality to abate a nuisance or correct a violation following a creditor's noncompliance. A347, Statement (citing N.J.S.A. § 40:49-5 (establishing range of discretionary penalties available)); N.J.S.A § 46:10B-51(c).

A347 was signed into law on May 15, 2014, by Governor Christie. The bill was primarily sponsored by Assembly Speaker Prieto (D, 32nd Leg. Dist.); Assembly Deputy Majority Whip Ralph Caputo (D, 28th Leg. Dist.); Assemblywoman Cleopatra Tucker (D, 28th Leg. Dist.); Assemblyman Timothy Eustace (D, 38th Leg. Dist.); and Assemblyman Benjie Wimberly (D, 35th Leg. Dist.).

C. Senate Bill S1229; General Assembly Bill A1257

The New Jersey Legislature continued to take aim at REO properties by passing legislation that allows New Jersey's 565 municipalities to adopt ordinances to impose monetary fines against creditors, such as lenders and servicers, for failing to maintain vacant and abandoned properties in foreclosure, and for out-of-State creditors failing to designate in-State representatives responsible for those properties. According to State Senator Ronald L. Rice, a primary sponsor of the Senate version of the legislation, out-of-state creditors are primarily to blame:

> "This is a long-time thing we've been trying to get through[.] It's been a problem throughout the state, particularly with foreclosed properties. A lot of them are out-of-state banks, and they don't take care of the properties."

Sen. Ronald L. Rice (D, 28th Leg. Dist.) (Joe Tyrrell, New Law Clears Way To Force Cleanups of Derelict Properties, Sept. 3, 2014, shttp://www.njspotlight.com/stories/14/09/02/new-law-clears-way-to-force-cleanups-of-derelict-properties/). In mid-August 2014, Governor Christie signed the legislation into law.

The law again amends the New Jersey Creditor Responsibility Law, which requires a creditor filing a foreclosure case to notify the municipality that a summons and complaint has been filed against the subject property within ten days after serving the summons and complaint and identify a representative responsible for receiving complaints about code violations and property maintenance. N.J.S.A. § 46:10B-51(a)(1). Perhaps to eliminate any doubt whether that requirement applies to out-of-State creditors, the law expressly requires out-of-State creditors to designate an in-State representative to be responsible for the care, maintenance, and up-keep of the property and to receive notices of violation in the notice sent to the municipal clerk within ten (10) days after serving the summons and complaint.

The law also declares that a notice of a violation under such municipal ordinances shall constitute proof that the property is "vacant and abandoned" for purposes of expeditious foreclosures under the Summary Action to Foreclose Mortgages, N.J.S.A. § 2A:50-73.

If an out-of-State creditor simply fails to appoint an in-State representative, the law allows municipalities to impose a fine of ***$2,500 for each day*** of the violation. A violation begins after the expiration of the ten-day notice period between filing a foreclosure complaint and notifying the municipal clerk of the foreclosure. In addition, municipalities may fine creditors, both in- and out-of-state, up to ***$1,500 per day*** for the substantive violation.

What Does This Mean For Creditors And REO Properties Going Forward?

It should be noted at the outset that, within weeks of Assembly Bill A1257 and Senate Bill S1229 becoming law, New Jersey municipalities scurried to pass ordinances contemplated by the new law. The first municipality, the City of Newark, is New Jersey's largest city and, according to some studies, ranks along with two other New Jersey inner-cities, Elizabeth and Paterson, within the top ten cities in the United States hit hardest by the housing crisis. In addition to Newark, several municipalities, including but not limited to Allamuchy, Branchburg, Elk, West Orange, Raritan, Colts Neck, Mannington, Little Egg Harbor, Voorhees, Highlands, Berkeley, Berlin, Lincoln Park, High Bridge, Woodbine, Evesham,[2] and most recently, Brick[3] and Cranford on or about November 21, 2014, and November 27, 2014, respectively, to name but a few, have adopted ordinances in the three-plus months since the legislation became law.

Creditors should therefore familiarize themselves with the notice and maintenance responsibilities imposed by the new laws, which have the potential of imposing exponentially higher costs and expenses beyond the municipal taxes and assessments that lenders and servicers already pay as a result of defaulting borrowers. Although it is near impossible to routinely monitor REO properties, creditors should consider taking steps to actively monitor them to determine if they remain compliant with municipal housing codes and to determine if they are vacant and abandoned. Also, creditors should consider implementing a process pursuant to which they can address notices of nuisances and code violations occurring on REO properties. Finally, creditors should consider expeditiously closing and transferring title to REO properties to third-party purchasers when those opportunities arise.

Despite the new laws, creditors are not without meritorious defenses to code violations. In addition to lack of notice of the code violation, lack of proper service of the code violation, and the creditor did not "own" the property at the time

[2] Municipalities in other states have followed New Jersey's lead. For instance, the City of Coatsville, Pennsylvania amended its property maintenance ordinance to include penalties on abandoned properties owned by banks. Coatsville followed Evesham Township, a municipality in southern New Jersey near Pennsylvania.

[3] "Township officials estimate that some 500 properties have been abandoned in all neighborhoods in Brick, of which less than half are the result of Superstorm Sandy." Judy Smestad-Nunn, Brick's Foreclosure Ordinance, The Brick Times, Nov. 21, 2014, http://micromediapubs.com/bricks-foreclosure-ordinance/.

the code violation was issued (property sold out of REO and title vested in the third-party purchaser before the violation was issued), some defenses may also include the REO property was not vacant or abandoned at the time the code violation was issued. Indeed, the creditor's maintenance responsibilities are triggered only when the owner vacates or abandons the property after foreclosure is commenced. Moreover, out-of-state creditors should conduct due diligence on property preservation entities before contracting with them. Too many times, we have litigated property preservation violations in New Jersey and New York in the tens-of-thousands of dollars as a result of property preservation entities failing to perform their contractual duties, either in a timely manner or at all. In that regard, when contracting with property preservation entities, out-of-state creditors should include an indemnification and hold-harmless clause in the operative agreement.

Please contact us with any questions regarding the legislation summarized above or any other issues related to REO including property preservation, evictions and closings.

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