LEGISLATIVE UPDATE

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NYCOM Analysis of Newly Enacted Zombie Property and Foreclosure Prevention Law

One of the most significant reforms passed during the 2016 New York State Legislative session was included in Chapter 73 of the Laws of 2016.[1] Signed into law on June 23, 2016, this omnibus legislation includes substantial changes to New York's Real Property Actions and Proceedings Law (RPAPL) that are intended to address zombie properties, a major cause of the distressed, vacant, and abandoned properties that blight New York's cities and villages. Zombie properties are mortgage-delinquent properties that have been abandoned by the owner but which languish for years in a state of disrepair and neglect until the mortgagee completes the foreclosure process.

The zombie property provisions were included as Part Q of Chapter 73. Although the zombie property legislation does not have an official title, it is commonly being referred to as New York's 2016 Zombie Property and Foreclosure Prevention Legislation (hereinafter referred to as "the Act").

The Act becomes effective December 20, 2016,[2] and has four main components:

1. It requires certain mortgagees to inspect properties that are 90 days mortgage-delinquent and to secure and maintain properties that are found to be vacant and abandoned;
2. It requires certain mortgagees to register vacant and abandoned properties with a State-maintained property registry;
3. It allows mortgagees to complete mortgage foreclosure via an expedited process when the property is vacant and abandoned; and
4. It enhances many of the consumer protections that were enacted to protect homeowners after the subprime mortgage market collapse in 2008.

Although amendments may need to be made to the Act to address vague or ambiguous provisions or gaps in the regulations, this law is a major step forward in the fight to combat blight. The following article provides a detailed explanation of the law's inspection and maintenance requirements as well as the state-administered abandoned property registry. A brief overview of the expedited foreclosure process and consumer protection provisions is also provided.

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[1] The legislation (A.10741(Farrell)/S.8159(Flanagan)) was introduced in the Assembly and the Senate on June 17, 2016 and, after a Message of Necessity was issued, passed the same day.

[2] Part Q of Chapter 73 of the Laws of 2016 becomes effective 180 days after it is enacted. Because Chapter 73 was signed into law on June 23, 2016, the effective date is December 20, 2016.

Requirement for Mortgagees to Inspect, Secure, and Maintain Vacant and Abandoned Properties

Overview of RPAPL § 1308

The Act adds Section 1308 to the Real Property Actions and Proceedings Law (RPAPL). Section 1308 requires loan servicers to inspect, secure, and maintain mortgage-delinquent properties that have become vacant and abandoned.

Section 1308 only applies to vacant and abandoned one- to four-family residential real property. Additionally, the duty to inspect, secure, and maintain vacant and abandoned property under Section 1308 applies only to first lien mortgage holders. Although not defined in State law, the first lien mortgage holder generally refers to the individual or entity in the first or priority position to benefit from a mortgage foreclosure.

Additionally, small lenders are excluded from Section 1308's requirements. Specifically, for each calendar year, Section 1308 does not apply to state- or federally-chartered banks, savings banks, savings and loan associations, or credit unions that:

1. originate, own, service, *and* maintain their mortgages or a portion thereof; *and*
2. originate, own, service, or maintain less than 0.3 percent of the total loans in the state for the calendar year ending two years prior to the current calendar year.

For medium-sized lenders, Section 1308 only applies prospectively.[3] Medium-sized lenders are state- or federally-chartered banks, savings banks, savings and loan associations, or credit unions which originate, own, service, and maintain between 0.3 percent and 0.5 percent of the total loans in the State for the calendar year two years prior to the current calendar year.

It is anticipated that questions and determinations regarding whether specific lenders will be subject to Section 1308 will be handled by the State's Department of Financial Services.

Mortgagee's Duty to Inspect and Determine the Occupancy Status of Mortgage-Delinquent Properties

Within 90 days of a borrower's delinquency, servicers authorized to accept payment of a loan must inspect the subject property's exterior to determine its occupancy status. After this initial inspection and throughout a loan's delinquency, the servicer must conduct exterior inspections of the property every 25 to 35 days.[4]

If, after inspecting a mortgage-delinquent residential property, the servicer (a) has a reasonable basis to believe the property is vacant and abandoned, as defined in RPAPL § 1309, and (b) is not otherwise restricted from accessing the property, then the servicer must secure and maintain the property pursuant to RPAPL § 1308(3), (4), (5), (6), & (7).[5]

Within seven business days of determining that a property is vacant and abandoned, the servicer must (a) post a reasonably visible notice (containing the servicer's toll free number or similar contact information) on an easily accessible part of the property, (b) monitor the property for any change in occupancy or contact with

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[3] Although not defined in the law, "prospectively" is believed to mean that the duty to inspect, secure, and maintain property will only apply to property that becomes mortgage delinquent after the law's effective date.

[4] RPAPL § 1308(1).

[5] RPAPL § 1308(2).

the borrower, property owner, or occupant, *and* (c) monitor the property to ensure that the notice remains posted so long as the duty to maintain the property applies.[6]

For the purposes of Section 1308, residential real property[7] is defined, pursuant to RPAPL § 1309(2)[8], as vacant and abandoned if:

1. After inspecting the property three times[9], at each inspection
   (a) There was no occupant present and no evidence of occupancy at the property as evidenced by
      (i) overgrown or dead vegetation;
      (ii) the accumulation of newspapers, circulars, flyers or mail;
      (iii) past due utility notices, disconnected utilities, or utilities not in use;
      (iv) the accumulation of trash, refuse, or other debris;
      (v) the absence of window coverings such as curtains, blinds, or shutters;
      (vi) one or more boarded, missing or broken windows;
      (vii) the property being open to casual entry or trespass; or
      (viii) the property having a building or structure that is or appears structurally unsound or has any other condition that presents a potential hazard or danger to the safety of persons; ***and***
   (b) The residential real property is not being maintained in a manner consistent with the standards set forth in New York Property Maintenance Code §§ 301, 302[10], 304.1, 304.3, 304.7, 304.10, 304.12, 304.13, 304.15, 304.16, 307.1 and 308.1;[11] ***or***
2. A court or other appropriate state or local governmental entity[12] has formally determined, following due notice to the borrower at the property address and any other known addresses, that the residential real property is vacant and abandoned; ***or***
3. The property owner and each borrower have separately issued sworn written statements expressing their intent to vacate and abandon the property and an inspection of the property shows no evidence of occupancy to indicate that any persons are residing there.

Residential real property *may not* be deemed vacant and abandoned if:

1. An unoccupied building on the property is diligently[13] being constructed, renovated, or rehabilitated to completion;
2. A building on the property is occupied on a seasonal basis and is secure;

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6 RPAPL § 1308(3).

7 RPAPL § 1305(a) defines "residential real property" as "real property located in this state improved by any building or structure that is or may be used, in whole or in part, as the home or residence of one or more persons, and shall include any building or structure used for both residential and commercial purposes."

8 Note that RPAPL § 1309(2) requires plaintiffs in mortgage foreclosure proceedings seeking to take advantage of the expedited foreclosure process to prove, by a preponderance of the evidence, that the property is abandoned. A court order finding that the property is abandoned is not required to trigger the servicer's maintenance obligations.

9 Each inspection must be conducted 25 to 35 days apart and at different times of the day.

10 Excluding §§ 302.2, 302.6, 302.8.

11 The Property Maintenance Code can be accessed online at: http://codes.iccsafe.org/app/book/toc/2015/I-Codes/NY/2015_IPMC_HTML/index.html.

12 The law does not define what constitutes "other appropriate state or local governmental entity."

13 This term is not defined.

3. Any buildings on the property are secure *and* the property is the subject of a probate action, action to quiet title, or other ownership dispute of which the servicer has actual notice;
4. A natural disaster damaged a building on the property and one or more owners intend to repair and reoccupy the property; or
5. A building on the property is occupied by the mortgagor, a relative of the mortgagor, or a tenant lawfully in possession.[14]

Mortgagee's Duty to Secure Vacant and Abandoned Mortgage-Delinquent Properties

Pursuant to RPAPL § 1308(4), if no one responds to the posted notice within seven *calendar* days thereby indicating that the property is *not* vacant or abandoned, or if an emergent property condition arises which could reasonably damage, destroy or harm the property, the servicer must:

1. In cases where the property contains two or more points of ingress or egress, replace no more than one door lock to provide subsequent access to the property;
2. Secure, replace, or board up broken doors and windows;
3. Secure any part of the property that may be deemed an attractive nuisance including, but not limited to, a water feature that could create a drowning risk, refrigerator or freezer units, outbuildings, wells or septic tanks;
4. Take reasonable measures to ensure that pipes, ducts, conductors, fans and blowers do not discharge harmful gases, steam, vapor, hot air, grease, smoke, odors or other gaseous or particulate waste directly upon abutting or adjacent public or private property or that of another tenant;
5. Winterize the applicable plumbing and heating systems, if appropriate;
6. Provide basic utilities including, but not limited to, water, electricity, natural gas, propane and sewer service, as appropriate and when allowed by the local utility provider, that are needed for the operation of sump pumps or dehumidifiers, or when there are jointly-owned or shared utilities with adjoining properties or units, except for turning off water service to prevent flooding or water leaks in the property, or when other utility service could reasonably create a hazard to the property or an unauthorized occupant or person entering the property;
7. Remove and remediate any significant health and safety issues, including outstanding code violations;
8. Take reasonable measures to prevent the growth of harmful mold;
9. *Respond to government inquiries regarding property condition, subject to restrictions regarding financial privacy* [emphasis added]; and
10. Ensure that the notice required to be posted pursuant to RPAPL § 1308(3) remains posted on an easily accessible part of the property that would be reasonably visible to the borrower, property owner, or occupant so long as the duty to maintain applies.

Servicers may never remove personal property from the property unless:

1. The personal property poses a significant health and safety issue; or
2. There is an uncontested order to do so by a governmental entity.[15]

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[14] RPAPL § 1309(2)(d).

[15] RPAPL § 1308(5).

Mortgagee's Duty to Maintain Vacant and Abandoned Mortgage-Delinquent Properties

Pursuant to RPAPL § 1308(6), a servicer who has determined that a property is vacant and abandoned must take reasonable and necessary actions to maintain the property until the earlier of the following events:

1. An occupant of the property asserts their right to occupy the property, or the servicer or its agents have received threats of violence;
2. The borrower files for bankruptcy;
3. A court orders the servicer to stop maintaining the property;
4. A homeowners' association or cooperative prevents the servicer from gaining access to or maintaining the property;
5. The property is sold or transferred to a new owner;
6. The servicer or investor releases the lien on the property; or
7. The mortgage note is assigned, transferred or sold to another servicer.

Reasonable and necessary actions to maintain the property include, but are not limited to:

1. Ensuring that the property remains secure as required by RPAPL § 1308(4); and
2. Maintaining property pursuant to the standards set forth in New York Property Maintenance Code §§ 301, 302,[16] 304.1, 11 304.3, 304.7, 304.10, 304.12, 304.13, 304.15, 304.16, 307.1, and 308.1, to the extent that the mortgage servicer or its agents are able to obtain necessary or required permits or approvals.[17]

The Property Maintenance Code can be accessed online from the New York State Department of State's Division of Code Enforcement and Administration website at http://codes.iccsafe.org/app/book/toc/2015/I-Codes/NY/2015_IPMC_HTML/index.html.

Enforcement of Mortgagee Property Maintenance Obligations

Violations of RPAPL § 1308's mandate to inspect, secure, and maintain mortgage-delinquent property may be heard before a hearing officer or a court of competent jurisdiction. If a hearing officer or court determines that, based on the preponderance of the evidence, a mortgagee or agent of a mortgagee has failed to inspect, secure, and maintain a mortgage-delinquent property as required by RPAPL § 1308, the hearing officer or the court may impose a civil penalty of up to $500 per property for each day the violation persists.

The State's Superintendent of Financial Services may enforce RPAPL § 1308, after giving seven days' notice to the lender, assignee, or mortgage loan servicer of the violation.

Additionally, any municipality may, after giving seven days' notice to the lender, assignee, or mortgage loan servicer, also seek to have RPAPL § 1308's requirements to inspect, secure, and maintain any residential property located within its jurisdiction enforced in any court of competent jurisdiction. Any civil penalty imposed as the result of an action brought by a municipality pursuant to RPAPL § 1308(8)(a) is retained by the municipality.[18]

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[16] Excluding §§ 302.2, 302.6 and 302.8.

[17] RPAPL § 1308(7).

[18] RPAPL § 1308(8)(c).

Local Government Authority to Abate Nuisance Conditions Preserved

Notwithstanding the authority to enforce the provisions of RPAPL § 1308, a municipality may enter onto and maintain any mortgage-delinquent residential property in order to address a threat to public health, safety, or welfare. Municipalities must notify any lender, assignee, or mortgage loan servicer of such action as soon as practicable. Any municipality which remediates a residential real property pursuant to RPAPL § 1308(8)(c) may maintain a cause of action in any court of competent jurisdiction against the lender, assignee, or mortgage loan servicer to recover costs the municipality incurs as a result of maintaining the property. The municipality must notify the Department of Financial Services in writing at least ten days prior to bringing such an action. A municipality's failure to notify the Department of Financial Services, however, may not be asserted as a defense by a lender, assignee, or mortgage loan servicer.

Department of Financial Services Rulemaking

The Department of Financial Services is authorized to adopt such rules and regulations to implement, administer, operate, and enforce RPAPL § 1308.

RPAPL § 1308's Effect on Agreements Between the Department of Financial Services and Exempt Mortgagees

Pursuant to RPAPL § 1308(11), any agreement between any state- or federally-chartered banks, savings banks, savings and loan associations, credit unions, or servicers for which RPAPL § 1308 provisions do *not* apply and the Department of Financial Services that is associated with the maintenance and repair of vacant and abandoned property remains in full force and effect for as long as the terms and conditions of the agreement remain in effect.

Preemption of Local Regulations

Pursuant to RPAPL § 1308(13), local governments may not (1) impose a duty to maintain vacant and abandoned properties in a manner inconsistent with the provisions of RPAPL § 1308, or (2) establish or impose a penalty or other monetary obligation *with respect to* a state- or federally-chartered bank, savings bank, savings and loan association or credit union that originates, owns, services or maintains a mortgage related to such property. However, this preemption does not affect the ability of local governments to abate nuisance or dangerous conditions or to recover the cost of doing so from lenders, assignees, or servicers.

Moreover, local governments may not require any state- or federally-chartered bank, savings bank, savings and loan association, or credit union that originates, owns, services, or maintains a mortgage that is not subject to RPAPL § 1308 to maintain a vacant or abandoned property.

NOTE: The preemption provisions found in RPAPL § 1308 do NOT preempt local governments from imposing property maintenance requirements and administering property maintenance programs in general against property owners or other individuals or entities in control of a property, including bank-owned properties (as opposed to properties in which banks have only a mortgage interest).

The State's Vacant and Abandoned Property Registry

Overview

The second major component of New York's 2016 Zombie Property and Foreclosure Prevention Legislation is a vacant property registry. Specifically, the Real Property Actions and Proceedings Law is amended to add Section 1310 which charges the State's Department of Financial Services with maintaining a statewide vacant and abandoned property electronic registry.

Although information provided to the Department of Financial Services for the registry is deemed and treated as confidential, the Superintendent of Financial Services may, at his/her discretion, release the information if it

is in the best interest of the public. Any such released information must continue to be treated confidentially by the parties receiving the information.

Additionally, the Department of Financial Services must provide any county, city, town, or village official, upon written request, access to registry information specific to property located in the official's jurisdiction.

Mortgagee Reporting Requirement

Within 21 days of learning[19] that a property is vacant and abandoned, a lender, assignee, or mortgage loan servicer must report to the Department of Financial Services the following information:

1. The current name, address, and contact information for the lender, assignee or mortgage loan servicer responsible for maintaining the vacant property;
2. Whether a foreclosure action has been filed for the property in question, and, if so, the date on which the foreclosure action was commenced; and
3. The last known address and contact information for the mortgagor(s) of record.

Additionally, the lender, assignee, or mortgage loan servicer must update the registry within 30 days of learning of a material change to any of the information contained in initial submission to the registry.

The Department of Financial Services may adopt rules and regulations necessary to administer and operate the registry, including but not limited to rules and regulations governing registry access and specifying the manner and frequency of registration and the information that must be provided.

The Vacant and Abandoned Property Toll-Free Hotline

The law requires the Department of Financial Services to establish and maintain a toll-free hotline to which people may report hazards, blight or other concerns related to vacant and abandoned property. On June 28, 2016, the Department of Financial Services announced its toll-free hotline number, 800-342-3736. In addition, reports may be made online at www.dfs.ny.gov.

Local Vacant and Abandoned Property Registry Preemption

Pursuant to RPAPL § 1310(5), local governments may not (1) impose a duty to register vacant and abandoned property, locally with the municipality in addition to the State registry, or (2) establish or impose a penalty or other monetary obligation related to registering vacant and abandoned properties *with respect to* a state- or federally-chartered bank, savings bank, savings and loan association or credit union that originates, owns, services or maintains a mortgage related to such property.

NOTE: The preemption provisions found in RPAPL § 1310 do NOT preempt local governments from imposing vacant property registry requirements on property owners, including bank-owned properties (as opposed to properties in which banks have only a mortgage interest).

The Expedited Mortgage Foreclosure Process for Vacant and Abandoned Properties

The third major component of the 2016 Zombie Property Legislation is the establishment of an expedited foreclosure procedure for property that is vacant and has been abandoned by the owner. Specifically, the law adds a new Section 1309 to the RPAPL, which authorizes plaintiffs in any foreclosure proceeding (e.g., a mortgagee) to apply, by notice of motion or order to show cause, for a judgment of foreclosure and sale on the grounds that the property is vacant and abandoned. The court must make a written finding as soon as

[19] Or within 21 days of when the lender, assignee or mortgage loan servicer should have learned.

practicable as to whether the plaintiff has proven that the property to be foreclosed upon is vacant and abandoned. If the court determines that the property is vacant and abandoned, it must set forth:

1. The evidence relied upon in finding the property vacant and abandoned;
2. The evidence showing that the plaintiff is the owner and holder of the subject mortgage and note, or has been delegated the authority to institute a mortgage foreclosure action by the owner of same; and
3. The sums due and owing upon the subject mortgage and note after a review of the detailed and itemized account of each fee, each cost, and a calculation of interest accrued.

The court may not enter a judgment pursuant to Section 1309 if

1. The mortgagor or any other defendant has filed an answer, appearance, other written objection that is not withdrawn, or has otherwise demonstrated an intention to contest the foreclosure action; or
2. The court does not find that the mortgaged property is vacant and abandoned.

In addition, the 2016 Zombie Property Legislation amends RPAPL § 1351 to require plaintiffs in mortgage foreclosure proceedings to sell the property within 90 days of the date of the judgment. Moreover, RPAPL § 1353 is amended to provide that if a plaintiff in a mortgage foreclosure proceeding purchases the property, then the plaintiff-purchaser must place the property on the market for sale or other occupancy within 180 days, or within 90 days of completing repairs, renovation, or rehabilitation of the property. A court may grant an extension for good cause.

Additional Protections for Homeowners Delinquent on Mortgage Payments and In Foreclosure

This legislation also provides additional protections for homeowners as part of the mandatory settlement conference in residential foreclosure actions, including the creation of a new “Consumer Bill of Rights” and supplemental notice requirements informing property owners of their rights, including their right to remain in their homes until the completion of the foreclosure process. Additional information regarding the 2016 Zombie Property and Foreclosure Prevention Legislation’s expedited foreclosure process and the consumer protections for homeowner provisions may be found on the Empire Justice Center’s website at www.empirejustice.org.