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 Real Estate Finance and Investing

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Update Regarding the Chicago City Council Vacant Property Registration and Maintenance Ordinance

An amendment to the ordinance addressing mortgagee and securitization trustee liability for vacant properties in Chicago (replacing the more onerous provisions of the ordinance that were passed by the Chicago City Council on July 28, 2011)¹ recently became effective by unanimous vote of the Chicago City Council. In response to concerns raised by the servicing community, the amendments remove mortgagees, their assignees and agents from the definition of "owner" for the purposes of Section 13-12-125 (the provision setting forth the registration and maintenance standards for owners of vacant property). While mortgagee obligations have been removed from Section 13-12-125, the amendments set up a separate set of standards for compliance with registration and maintenance requirements for mortgagees of residential properties under Sections 13-12-126, -127 and -128 of the Municipal Code of Chicago. The amendments do not contain any registration or maintenance requirements for mortgages of commercial properties. This DechertOnPoint will provide a brief overview of the recently enacted requirements.

Registration and Maintenance Obligations

Section 13-12-126 provides that mortgagees² must (i) register vacant³ residential buildings

"Mortgagee" is defined in Section 13-12-126(e)(3) as "(A) the holder of an indebtedness subject to their mortgage with the Chicago Department of Buildings every six months so long as any such building is vacant and (ii) designate an authorized agent (with an office in Cook County, Illinois) for service of process with respect to violations concerning the registered buildings. Additionally, mortgagees would be required to maintain the vacant residential building in a manner to ensure they are secure and limit potential health and safety issues.⁴

or obligee of a non-monetary obligation secured by a mortgage or any person designated or authorized to act on behalf of such holder[,] (B) any person claiming through a mortgagee as successor and (C) any person identified as such in a recorded document which has not been released, assigned, or superseded of record." *Mun. Code of Chicago §13-12-126, available at* http://chicago.legistar.com/LegislationDetail.as px?ID=986507&GUID=4F651E52-334B-41EB-88CE-177766FE044B&Options=Advanced &Search=.

- ³ "Vacant" is defined in Section 13-12-126(e)(5) as any property "with a complete structure containing one or more dwelling units or an incomplete structure if the real estate is zoned for residential development, where the structure is empty or otherwise uninhabited by persons and the structure or lot is in need of maintenance, repair or securing" and with respect to which one or more of several enumerated conditions exist. *Id*.
- ⁴ For example, some of the required maintenance activities under Section 13-12-126 include securing the registered building doors and windows, clearing or removing snow, maintaining structural safety of stairs leading to the main entrance of a registered building and keeping the exterior of the property free from vermin and rodents. *Id.*



¹ For a description of the July 2011 ordinance, see our *DechertOnPoint* entitled "<u>City Councils Im-</u> <u>pose Greater Liability on Mortgagees and Securitization Trustees.</u>"

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Furthermore, the mortgagee is required to post a sign on each registered building indicating the name and contact information for the mortgagee, its authorized agent for service of process and the person it has designated as responsible for day-to-day supervision and management of the registered building. Lastly, Section 13-12-127 imposes a duty on mortgagees to cause their residential properties to be inspected on a monthly basis in order to make a determination as to whether any of the residential properties subject to their mortgage are vacant.

Affirmative Defenses

The ordinance generally would require mortgagees to comply with its requirements by the later of (i) 30 days after the building becomes vacant and unregistered and (ii) 60 days after the occurrence of a default.⁵ As mentioned in our prior *DechertOnPoint*, in recognition of some of issues that are faced by mortgagees with respect to control over properties subject to their mortgage, the ordinance sets out several affirmative defenses against non-compliance due to a mortgagee's inability to take any action with respect to a property in certain enumerated cases, such as (i) the existence of bankruptcy proceedings in which an automatic stay is in place; (ii) a receiver was appointed; (iii) foreclosure proceedings have commenced in which the mortgagor has asserted (by motion or pleading) defenses or claims against the mortgagee; (iv) the related mortgage was not in default; and (v) the mortgagee was not the owner of record of the first mortgage lien on the property at the time of the violation.⁶

Other Local Ordinances

Several other city councils (such as the San Diego, California, ⁷ Malden, Massachusetts and Las Vegas, Nevada

⁷ Abandoned Properties Ordinance, available at <u>http://docs.sandiego.gov/councilcomm_agendas_attach/201</u> <u>1/LUH_110427_7b.pdf</u>; see also <u>http://docs.sandiego.gov/councilcomm_agendas_attach/201</u> <u>1/LUH_110427_7d.pdf</u>. (As currently proposed, the San Dicity councils) have begun to discuss and review similar legislation to regulate issues surrounding the maintenance of vacant properties. Most notably, the Las Vegas city council is set to take a vote on an ordinance⁸ this week that would require a lender to inspect properties that are pending or in actual default to verify their vacancy status and to register and maintain any properties (including commercial and/or residential properties) it determines to be vacant. Violations of the proposed Las Vegas ordinance could lead to a fine of a maximum of \$1,000 and/or six months incarceration.

Conclusion

While several of the maintenance obligations in the previous iteration of the Chicago ordinance remain unchanged, the affirmative defenses incorporated into the amendments should make a significant difference with respect to the potential liability that was previously faced by mortgagees and securitization trustees. Additionally, it is becoming increasingly clear that vacant properties are a growing source of concern for municipalities. As such, we may see a trend toward regulation imposing heavier maintenance obligations on lenders in the near future.

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ego ordinance would require compliance by responsible persons. The Responsible person for commercial or residential property is determined by a city manager or director.)

⁸ Las Vegas City Council Bill No. 2011-39, available at <u>http://www.safeguardproperties.com/News_and_Events/All_Client_Alerts/2011/11/~/media/Proposed112211.ashx.</u>

⁵ "Default" is defined in Section 13-12-126(e)(1) as follows: "with respect to a residential building containing four or fewer dwelling units, when the mortgagor is 60 days past due on the mortgagor's obligation to make a scheduled payment under a mortgage or a mortgage note. With respect to all other residential buildings, "default" shall mean when the mortgagor is 90 days past due on the mortgagor's obligation to make a scheduled payment under a mortgage or a mortgage note." *Id.*

⁶ Id.

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