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Banking Client ALERT



NJ Law Requires Creditors to Notify Municipal Officials Regarding Commercial Property Foreclosures

Legislation (A2877) just signed by the Governor will now require a creditor to notify municipal officials regarding its foreclosure of commercial properties, maintain the exterior of the commercial properties and register commercial properties under an ordinance creating a property registration program in the municipality. P.L. 2021, c. (chapter law citation pending).

Although the underlying legislation has been introduced in some form since 2014, it was substantially amended in the final hours of the two-year legislative session in the last Senate Budget and Appropriations Committee on January 6, 2022 to include expanded language applicable to commercial properties. The amended legislation, the new description of which "[c]oncerns municipal property registration ordinances to address risk of blight," was quickly passed by both houses of the Legislature in the last legislative voting sessions on January 10, 2022, and was sent to the Governor's desk for action. Ordinarily, the State Constitution provides a 45-day period within which the Governor can review and take action on legislation that gets to his desk. However, since the New Jersey Legislature was at the end of its two-year session, the Constitution only provides a 7-day period for such review. The Governor signed the measure on January 18, 2022.

The law took effect immediately upon signature, except that municipalities that have existing ordinances that address property registration programs are required to amend their ordinances to the extent necessary to make them consistent with this act by August 1,

2022. Many municipalities in New Jersey have adopted property registration ordinances, including cities like Newark, East Orange, Atlantic City, Jersey City and East Rutherford and smaller towns like Metuchen, Absecon and Laurel Springs, often using the authority of the 2003 Abandoned Properties Rehabilitation Act, N.J.S.A 55:19-78 et seq., which applies to all properties.

The latest legislative changes were largely prompted by an entity who lost a court challenge in Atlantic County in August 2021 that held that the ordinances dealing with vacant and abandoned properties were unconstitutional, "arbitrary, capricious and unreasonable" and that the definition of a vacant or abandoned property in the ordinances is "overly broad." **McCormick 106 L.L.C. v. Cmty. Champions Corp.**, No. ATL-L-2311-18, 2021 N.J. Super. (Super. Ct. Aug. 16, 2021) (appeal pending). In that case, Assignment Judge Julio Mendez of the Atlantic County Superior Court granted summary judgment against a private entity hired by three towns in Atlantic County to impose fees since it lacked the statutory authority as a private company to collect and manage public funds and impose fees on property owners that "exceed the bounds of reasonableness." The Court also noted that it was "alarmed by the excessive fee structure," calling it a "revenue scheme" and concluded that the company wrongly misrepresented unpaid registration fees as liens on the property. The Court stated that:

"[t]he overly broad definition of [vacant and abandoned property] VAP, in the Court's view, is directed at increasing revenue rather than solving issues related to vacant and abandoned homes. Even worse in the Court's opinion, the ordinances may have the effect of punishing homeowners with unreasonably high fees, irrespective of the fact that these property owners are still maintaining their property, paying off their mortgage, and these ordinances pose an additional undue hardship for no rational basis."

One of the Court's admonitions is telling: "The Court has great concerns that this ultra-broad definition of vacant and abandoned homes, which is triggered upon a mere default, is targeting financially vulnerable homeowners, is driven towards increasing municipal revenue, and is not reasonably addressing issues related to [vacant and abandoned properties] VAPs." See also Charles Toutant, "Judge Renounces Towns' 'Zombie House' Regulations as a Money Grab", *New Jersey Law Journal* (August 17, 2021).

Section 1 of the new law contains the following legislative findings and declarations evidencing the Legislature's intent:

a. Although New Jersey has made great strides in addressing previous foreclosure crises, foreclosure continues to be an issue confronting residents and municipalities;

b. Properties in foreclosure proceedings can involve properties that are vacant and abandoned or have an increased risk of becoming vacant and abandoned during the foreclosure proceeding;

c. Vacant and abandoned properties in foreclosure create a greater risk of blight and can create a wide range of problems for the communities in which they are located. These problems can include fostering criminal activity, creating public health problems, depressing neighboring property values and reducing revenues for municipalities, and otherwise diminishing the quality of life for residents and business operators in those areas;

d. Because of the increased risk of blight created by properties in foreclosure, it is important that municipalities possess tools to identify such properties, monitor their status, and mitigate the risk that they become vacant and abandoned and, if vacant and abandoned, lead to blight. The costs of identifying, monitoring, and mitigating such risks can adversely impact a municipality's finances;

e. The State has enacted statutes intended to assist municipalities in addressing such risks, including requiring that municipalities receive notice of the initiation of a foreclosure action in court in connection with residential properties and authorizing a public officer in a municipality to take certain action against properties that have been abandoned for more than six months;

f. Although these State laws provide municipalities with certain tools to address blight and the risk of blight, the laws do not apply to all properties, enable municipalities to create a comprehensive way to identify, monitor, and address the risk of blight on all such properties within their jurisdictions, or address the costs to municipalities to do so;

g. A number of municipalities have adopted ordinances on an ad hoc basis to create property registration programs to identify, monitor, and address the risk of blight on residential and commercial properties within their jurisdictions; and

h. The Legislature finds such property registration programs provide a valuable tool to municipalities in confronting the risk of blight created by properties on which foreclosure proceedings have been initiated and such properties that become vacant and abandoned. The Legislature finds that it is in the State's interest for municipalities that operate such programs to do so with certain uniformity as part of the State's overall statutory scheme addressing the risk of blight.

Under the new law, a municipality is authorized to contract with and set the compensation of a private entity to assist in the implementation and administration of the property registration program. Section 3d. The municipality can delegate the private entity to identify properties subject to the registration requirements, maintain and update property registrations, communicate with creditors, invoice, and collect payment from the creditors for residential and commercial properties, and monitor compliance.

A municipality can impose an annual fee on the creditor for the property registration not to exceed \$500 per property in foreclosure and not to exceed \$2000 if the property is vacant

and abandoned. Section 3d. The same high penalty of \$2500 per day can be imposed on an out-of-state creditor for failing to appoint an in-state representative. Section 3g. Other creditors found by a court to be in violation of other aspects of the ordinance could be subject to a fine of \$1,500 for each day of the violation.

The new law essentially copied and pasted the identical provisions in an existing statute, N.J.S.A. 46:10B-51, which governs the registration and maintenance for residential properties in foreclosure. If this area of the law has been uncertain, that is evident by the fact that the original 2008 statute has been amended four times since its original enactment. The key language applying to commercial properties is found in section 2 of the new law. Creditors filing a summons and complaint in an action to foreclose will now be required to register residential and commercial properties and update the property registration program of any changes in contact information of a creditor's representative or if the registered property becomes vacant and abandoned. Section 2. The property maintenance requirements that have existed for residential properties are now extended to commercial properties in foreclosure if the property is vacant and abandoned. This responsibility is for the care, maintenance, security, and upkeep of the exterior of the residential or commercial property if the property is vacant and abandoned at any time while the property is registered with the property registration program. This includes any requirements to secure the property against unauthorized entry, post a sign affixed to the inside of the property and visible to the public indicating the name, address, and telephone number of the creditor or an out-of-state creditor's in-state representative or agent for the purpose of receiving service of process, or acquire and otherwise maintain liability insurance by procuring a vacancy policy, covering any damage to any person or any property caused by any physical condition of the property.

This new law requires creditors to file notice with the municipality regarding a commercial property in foreclosure within 10 days after serving a summons and complaint in a foreclosure action on a commercial property, including the contact information for the representative of the creditor responsible for receiving complaints of property maintenance and code violations and the full name and contact information for any person or entity retained by the creditor or a representative of the creditor to be responsible for any care, maintenance, security or upkeep of the commercial property. If the creditor is out-of-state, the notice is required to specify an in-state representative responsible for the care, maintenance, security, and upkeep of the exterior of the commercial property if it becomes vacant and abandoned.

A municipality is authorized to notify the creditor that it has the responsibility to abate any nuisance or correct a municipal code violation, or strict penalties can be imposed by the municipality against the creditor standing in the shoes of the property owner. A municipality can also use public funds to abate a nuisance or correct a violation on a property if the creditor fails to do so and impose a lien pursuant to N.J.S.A.55:19-100 -- a provision in the Abandoned Properties Rehabilitation Act.

In addition, within 30 days, the creditor that has initiated a foreclosure proceeding on a commercial property is required to provide the municipality with a listing of all commercial properties in the municipality for which the creditor has foreclosure actions pending. Section 2a.

Lastly, the new law repealed a 2014 statute, N.J.S.A. 40:48-2.12s, which governed municipal ordinances that required property registration requirements and provisions regarding the care, maintenance, security and upkeep of the exterior of vacant and abandoned residential properties on which a summons and complaint in an action to foreclose has been filed. According to the committee statement, this provision was repealed "and replace[d] it with a new section to enhance clarity." Essentially, it was replaced so the

identical registration and maintenance language could be applied to both residential and commercial properties. Under the language in the new law, a municipality can impose property registration fees on creditors.

Lenders and creditors should be aware that some municipalities have taken enforcement actions on the per diem penalties. In fact, we are aware of an instance where a foreclosing lender had to pay a six figure penalty for its failure to register a residential foreclosure property.

If you have any questions about the issues discussed in this article, please contact the author below.



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