

More About that Chicago Vacant Buildings Ordinance

By Laurie Nelson

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In August I wrote about an amendment to a Chicago vacant buildings ordinance that I thought (and I was one of many) was crazy, despite being sympathetic to the plight resulting from the city's blight. The City of Chicago subsequently passed a less onerous, yet still problematic, vacant buildings ordinance effective as of November 19, 2011.

In a nutshell, the ordinance requires mortgagees to pay registration fees for vacant residential properties, requires monthly inspections of mortgaged properties to determine vacancy status and imposes maintenance requirements on mortgagees, as if such mortgagees were property owners, even when such mortgagees do not own the property because they have not yet foreclosed on the related mortgage loan and therefore have not obtained title to the related property. Fines and penalties of up to \$1000 per day could be imposed for failure to comply with the ordinance.

On December 12, the Federal Housing Finance Agency (FHFA), on its own behalf and as conservator of Fannie Mae and Freddie Mac (the GSEs), filed a complaint against the City of Chicago seeking a declaratory judgment and to enjoin enforcement of the ordinance against the GSEs and the FHFA, as conservator.

The FHFA's argument is that the ordinance violates and is preempted by federal law because the ordinance subjects the GSEs (in their capacity as mortgagees by succession or assignment) and the FHFA (which succeeded to the GSEs' rights with respect to their assets) to the regulation and supervision of the Chicago Department of Buildings, and because the ordinance incorporates a taxing feature to be applied to servicers of mortgage loans on behalf of the GSEs. The complaint further alleges that the ordinance violates the FHFA's statutory immunity from penalties and fines, in its capacity as conservator.

The complaint discusses the imposition on mortgagees of a duty to accurately assess the status of a property, despite the fact that such mortgagees incur potential legal exposure if a vacancy notice is erroneously posted, or if repairs commence or a property is secured that is not actually vacant. The complaint states that as a practical matter, the conservator and the GSEs would have only limited ability to assess the occupancy of certain properties, and such effort would inevitably result in incorrect results and potential liability for mistakenly declaring an occupied property vacant.

The complaint states that as of October 2011, Fannie Mae owns approximately 156,000 loans that are secured by properties located in Chicago and that Freddie Mac owns approximately 102,000 loans that are secured by such properties, and each uses approximately 200 servicers in connection with those loans. You can see how practically speaking this could get very complicated and cumbersome for the GSEs. Examples in the complaint of how the ordinance overrides the GSEs' (and their servicers') discretion as regulated entities under FHFA supervision is the requirement that steel plating be used over windows, which is allegedly much more expensive than the construction materials ordinarily used by the GSEs and their servicers, and the imposition of more burdensome lawn care practices than those ordinarily utilized by the GSEs and their servicers.

In response to a December 8 [FHFA directive to Fannie and Freddie](#), the GSEs have issued notices to servicers discussing procedures the loan servicers will need to take going forward with respect to the ordinance including making payments to the City of Chicago under protest; tracking and reporting payments made to the City of Chicago, including payments, expenditures or other costs incurred in compliance with the ordinance to repair, maintain or secure properties that have not been foreclosed upon that would not have been incurred absent the ordinance and preparing proposed pricing changes for future mortgage originations or refinances that occur within the City of Chicago to reflect the higher costs associated and anticipated with the ordinance.

Speaking of higher costs... the complaint notes that U.S. taxpayers are funding the GSEs' losses, and such losses will be exacerbated if the GSEs are required to submit to the ordinance's registration fees and other obligations.

In its letter to the GSEs, the FHFA states that it will be examining whether other jurisdictions impose similar requirements in violation of federal law that should be addressed in the same manner. Although, as pointed out in a recent [Wall Street Journal article](#), the FHFA's lawsuit against the City of Chicago may prevent similar ordinances from being imposed in other cities.