

# Springfield, Massachusetts Enacts Strict Anti-foreclosure Ordinances

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New ordinances drastically affecting foreclosures and vacant and/or foreclosing properties in Springfield, Massachusetts became effective September 13, 2011. The two ordinances require pre-foreclosure mediation and regulate the maintenance of vacant and/or foreclosing residential properties. The ordinances will be added as amendments to Title 7 of the Code of the City of Springfield, Massachusetts by adding a revised Chapter 7.50 entitled “Regulating the Maintenance of Vacant and/or Foreclosing Residential Properties and Foreclosures of Owner Occupied Residential Properties” (the “Vacant Property Ordinance”) and new Chapter 7.60 entitled “Facilitating Mediation of Mortgage Foreclosures of Owner Occupied Residential Properties” (the “Foreclosure Mediation Ordinance”). The Foreclosure Mediation Ordinance is the first of its kind in Massachusetts and is similar to ordinances enacted in the Rhode Island Cities of Cranston, Providence and Warwick. Both Springfield ordinances impose additional burdens upon lenders and their servicers, as well as fines in the amount of \$300 per day for non-compliance with any provisions of the ordinances. \$10,000 bonds are now required for vacant and/or foreclosing properties. Both ordinances were approved unanimously by the City Council and signed by Mayor Domenic J. Sarno.

Chapter 7.50 Section 7.50.010 states that the Vacant Property Ordinance was enacted “to provide for the promotion of the health, safety and welfare of the public, protect and preserve the quiet enjoyment of occupants, abutters and neighborhoods, and minimize hazards to public safety personnel inspecting or entering unsecured and un-maintained vacant properties.” Section 7.50.030 requires that any owner of vacant and/or foreclosing property shall notify the

building commissioner and the fire commissioner of the status of the vacant property including the length of time the property has been vacant, the estimated time the property will remain vacant, and the nature of the contents of the property. Foreclosing is defined to include delivering the mortgagee's notice of intention to foreclose to borrowers pursuant to Mass. Gen. Laws c. 244 §17B. These notices of intention are sent 90 or 150 days prior to actual foreclosure commencement. The ordinance defines an owner to include a mortgagee as well as a trustee for mortgage backed securities that has initiated the foreclosure process or a person or entity having recorded a complaint to foreclose with the Registry of Deeds.

Lenders, along with their servicers, are now faced with the difficulty of determining when a property is, in fact, vacant. Furthermore, the responsibility is placed upon the owner/lender very early in the foreclosure process before legal title is obtained. Actions in the form of trespass and conversion of personal property can result if the property is incorrectly determined to be vacant. Additional maintenance obligations include the posting of "No Trespassing" signs on the property, the winterizing of the property, the removal of hazardous materials, compliance with all state and local codes concerning maintenance, removal of trash and debris and ensuring that the property is structurally sound. The Vacant Property Ordinance is specific to the form and placement of "No Trespassing" signs. The fire commissioner may require the filing of space utilization floor plans with its office and the office of the building commissioner.

At the discretion of the building commissioner the owner must secure all window and door openings to prevent unauthorized entry in accordance with the United States Fire Administration, National Arson Initiative Board Up Procedures or provide twenty-four (24) hour on-site security personnel. If the vacant property is located within a complex of buildings owned by a single owner, twenty-four (24) hour on-site security shall be provided within the property or within the complex

where the property is located. Adequate securing and maintenance of a property should prohibit the need for on-site security; however, the building commissioner has the authority to make the final determination.

The Vacant Property Ordinance requires the owner to place a bond in the amount of at least \$10,000 per property to secure and maintain the property during its vacancy, and to remunerate the City for any expenses incurred in inspecting, securing, marking or making such property safe. The City is allowed to retain a portion of the bond as an administrative fee to fund an account for expenses incurred in inspecting, securing and marking the property and other owned properties that are not in compliance with this section.

An owner shall receive a certificate of building closure from the building commissioner upon satisfactory compliance with the provisions of this section. The certificate is only valid for the time period indicated on it and the certificate is subject to continued compliance with the provisions of this section. The building commissioner once again has authority to arbitrarily set the time period covered by the certificate. The owner of a vacant and/or foreclosing property shall be liable to the city for expenses incurred in securing and maintaining the property if the owner fails to obtain a certificate of building closure. If the owner fails to reimburse the city within seven (7) days of notice of the expenses incurred, the city can draw upon the bond paid for by the owner. If no bond is available, the building commissioner shall record the notice of claim in the Hampden County Registry of Deeds establishing a lien. The Vacant Property Ordinance is silent as to the reasonableness of fees charged by the building commissioner if the city is left with the responsibility of securing and maintaining the property.

Chapter 7.60 Section 7.60.030 of the Foreclosure Mediation Ordinance provides for mandatory pre-foreclosure “mediation conferences”. The intent is to permit residential homeowners, where possible, to retain their homes and permit

lenders to complete the foreclosure process when homeowners are unable to retain them. The ordinance applies to any owner-occupied 1-to-4 family residential property located in Springfield (including condominiums or co-ops). The mortgagee/creditor must provide the City with a copy of all “right to cure notices” (sent to the mortgagor pursuant to Mass. Gen. Laws c. 244 §35A) within ten (10) days of receipt by the Commissioner of the Division of Banks. The City shall notify the mortgagor and the mortgagee/creditor of their rights and responsibilities under the ordinance. The term “mortgagee/creditor” is used in some cases in the place of the term “mortgagee” in the ordinance. The term “creditor” is defined to include entities such as Mortgage Electronic Registrations Systems Inc., Federal National Mortgage Association, Federal Home Loan Mortgage Corporation, a trust, a nominee holder and assignee.

The City will refer the matter for mediation to an approved mediation program manager. The mediator assigned will be responsible for scheduling the mediation within the required time frames. Prior to the conference the City shall assign a city-approved loan counselor to the mortgagor. The City has not yet made available a list of approved loan counselors and mediation program managers.

The intent of the ordinance is for the mediation conference to commence within forty-five (45) days of the mortgagor receiving the right to cure notice as provided in Mass. Gen. Laws, c. 244 §35A (g) and (h). The mediation requirements must be completed within ninety (90) days from the date that the mortgagor received the right to cure notice. The mediation period can be extended for good cause by mutual agreement of the parties, but under no circumstances may the time period be extended beyond the end of the right to cure period. If the mortgagee fails to comply with mediation it faces a fine of \$300 for every day of non-compliance. This could result in fines of up to \$45,000 (\$300 per day x 150 days) if the mortgagee does not participate in mediation by the end of the right to

cure period. It is also noted that none of these fines can be charged to the borrower either directly or indirectly.

Unlike similar ordinances in Rhode Island allowing a mortgagee to appear at a conference telephonically, the mortgagee must be physically present unless the telephonic appearance is mutually agreed to by the mortgagor and mortgagee. Nor does the Foreclosure Mediation Ordinance grant exempt status to a mortgagee under certain conditions such as being locally headquartered in Massachusetts and servicing its own mortgages.

The mortgagor must provide certain financial and employment information to the mediation program manager. The mortgagee must bring and make available the mortgage, note, all assignments, as well as a detailed accounting of the outstanding balance, costs and fees. The ordinance is silent as to whether originals are necessary or copies will suffice. The requirement to provide assignments may be a result of the recent rulings in the *U.S. Bank Nat. Ass'n v. Ibanez*, 941 N.E.2d 40, 458 Mass. 637 (2011) case. It will be up to the mediation program manager to determine whether or not the parties can come to an agreement, and a "good faith effort" to reach an agreement is required. In the event that an agreement cannot be reached, the mediation program manager must provide the mortgagee with a certificate indicating that the mediation requirements were satisfied. In the event the mortgagor fails to respond to or otherwise cooperate with the mediation program manager's attempts to schedule the conference, after two attempts, the mediation requirements will be deemed met. Although not required by the ordinance it is recommended that the compliance certificate be recorded with the foreclosure deed.

The City is allowed to charge a reasonable and appropriate registration fee for the services of administering the mediation program established by the ordinance. A mortgagor's portion of the fee shall not exceed fifteen (15%)

percent of the total cost of the mediation. At this time the registration fee has not been established. Unresolved issues also include whether or not foreclosures that were commenced prior to the enactment of the ordinance will need to comply with the mediation requirements of the ordinance.