

## Legislative Changes Affect Vacant and Abandoned Properties and Permit Homeowners to Postpone Foreclosure Sales

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Another legislative session has come to a close. Although overshadowed by budget disputes, budget cuts and unallotments, there were a few changes to laws affecting foreclosure of mortgage and association liens and vacant properties. Most changes affect the mechanics of the foreclosure procedures, but a few changes were clearly aimed at addressing the growing number of foreclosures and the problems related to vacant properties.

### Homeowners May Now Postpone Sheriff's Sales

Previously, a sheriff's sale could be postponed by the foreclosing creditor only. However, a homeowner now has the right to request that a sheriff's foreclosure sale be postponed for up to five (5) months from the originally-scheduled date of the sale. In order to postpone the sale, the homeowner need only complete and record an affidavit, and provide a copy of the recorded affidavit to the sheriff and to the foreclosing creditor. The creditor is not required to publish any notice of postponement or even to modify its published Notice of Sale. In exchange for the right to postpone the sale, however, the homeowner agrees that the redemption period following sale after such postponement is reduced to five weeks. As a result, the foreclosure process is not unduly extended by

any such postponement.

A homeowner may request a postponement only once, even if there are foreclosure proceedings commenced again after reinstatement during the postponement, and the postponement option is available only on homesteaded residential properties (one to four dwellings). Postponing the sheriff's sale gives a homeowner more time to reinstate the loan by paying the amount in default (the back payments), as opposed to being forced to pay the entire loan balance off during the redemption period. While the amount necessary to reinstate an association account prior to sheriff's sale is not significantly different from the amount necessary to redeem after the sale, that is not the case for mortgage foreclosures, so it is likely that the postponement option will be utilized most effectively for mortgage foreclosures, although it is available for association lien foreclosures as well.

Such postponements may prove to be a boon for associations governed by the Minnesota Common Interest Ownership Act (MCIOA), so long as the foreclosure sale still takes place after the postponement. MCIOA allows the association to retain a "superlien" for assessments accruing during the six months prior to the date on which the redemption period expires, so whether the redemption period is five weeks or six months, the association is entitled to collect six months' assessments from the foreclosing lender. Further, the lender takes full title in just five weeks after the sheriff's sale, meaning the association has a new "dues paying" member (the lender) on the books sooner.

If the delinquent homeowner is able to reinstate the

mortgage during the period of postponement, that homeowner retains ownership and possession of the home. If the homeowner is also delinquent on his or her association assessments, the association may then be in a position to pursue collection of those unpaid assessments more aggressively.

Only time will tell how many homeowners take advantage of the opportunity to postpone sheriff's sales.

### Cities Gain Right to Secure Vacant Buildings

Effective August 1, 2009, if a city building becomes vacant and is deemed hazardous because it has not been secured, and the building could be made safe by securing it, the city may order the building be secured. The city now has the authority to send written notice to the owner and the holder of a sheriff's certificate of sale (the foreclosing lender, in most cases) and any neighborhood association in which the building is located that has requested notice, advising the owner and holder of the sheriff's certificate of the certificate holder's duty to enter and protect the property from waste and trespass, and further advising the owner and certificate holder that, if the property is not secured, the city may do so, and the costs associated with securing the property may be

assessed against the property. "Neighborhood association" is defined broadly, and includes "an organization recognized by the city as representing a neighborhood within the city." Homeowners associations would certainly fall within this definition. Associations are encouraged to notify city officials of the association's desire to be notified of vacant buildings in the community. While many associations are usually aware of vacant homes in the association, requesting formal notice from the city ensures that the association is "in the loop" regarding those properties.

### Lenders Now Have Obligation to Secure Vacant Buildings

Previously, foreclosing lenders had the right, but not the obligation, to enter foreclosed properties to secure them and protect them from waste and trespass. As of August 1, 2009, however, if a property is vacant or unoccupied and the holder of the sheriff's certificate has knowledge of facts that support a court's determination that the property has been abandoned, the certificate holder has a duty and obligation to enter the property, make reasonable inspections, change the locks on the doors, install locks on windows, and ensure that all locks are functioning properly. Facts supporting a determination of abandonment would include, for example, boarded windows or doors; smashed or continuously unlocked doors; accumulation of trash or rubbish; police calls related to vandalism or other illegal activities at the property; termination of gas, electric or water service to the property; or deterioration of the property's condition below minimum standards for

public safety and sanitation for the community. Such certificate holders may (but are not obligated to) board windows, doors and other openings, install alarm systems, or otherwise prevent or minimize damage to the property from the elements, from vandalism, trespass or other illegal activity. The costs related to securing the property may be added to the balance due or the costs allowable on redemption.

### Cities Have Right to Reduce Redemption Period for Abandoned Properties

As many associations know, the typical six-month redemption period following a foreclosure sale can be reduced to five weeks if the property has been abandoned. Evidence of abandonment would include those facts noted above (boarded windows, smashed doors, etc.). The right to request such a reduction was previously limited to the foreclosing party (usually, the first mortgage holder). Such lenders often opted not to seek an order reducing the redemption period because of the cost and time involved. Court calendars are clogged, and it may be a month or more before a lender's counsel could secure a hearing date on the matter. As such, particularly if the order is sought after the sheriff's sale, the ultimate reduction in the redemption period may amount to only two or three months.

The foreclosure statutes have now been modified to allow cities to make a motion to a court to request a reduction in the redemption period. If this right is exercised by cities, it should allow cities to minimize the time that abandoned properties are owned by the homeowner that has abandoned the property, and allow

lenders to market and sell the properties more quickly.

While these new statutory provisions will not necessarily solve the problems associated with vacant properties, they do impose a higher duty upon foreclosing lenders to monitor their properties and to take steps to protect them from trespass and the elements. It is also hoped that the changes will shorten the time periods that a property is vacant and shorten the time period a foreclosing lender (or association) must wait to market and sell an abandoned property.

If you are aware of a vacant property in your community, you may wish to notify city officials so that the city can also monitor the property and the foreclosing lender's efforts to monitor and protect the properties, and so that the city can consider whether it is in the city's best interest to seek an order reducing the redemption period to five weeks.

If you are interested in advice and guidance regarding foreclosed properties in your association, we can help. If your association has questions concerning foreclosed, vacant or abandoned properties in your community, you can contact the author, Nancy T. Polomis, Esq., [npolomis@hjlawfirm.com](mailto:npolomis@hjlawfirm.com).

## Court of Appeals Upholds FCC Ban on Exclusive Contracts

Jennifer C. Toohey, Esq.

In October 2007 the Federal Communications Commission ("FCC") banned the use of exclusivity clauses for the provision of cable companies to multiple dwelling units ("MDUs") or other real estate developments. The FCC's ban applies to apartment buildings, condominium buildings, cooperatives, and other centrally managed residential real estate developments, including gated communities and townhouse associations. In 2007 the FCC estimated that 30% of Americans lived in MDUs.

The National Cable & Television Association ("NCTA") appealed the FCC's order. The NCTA asserted that the FCC exceeded its authority in regulating exclusive deals, that the FCC had not justified the change in policy, and that the FCC had not considered the consequences of applying the decision retroactively to existing contracts. On May 26, 2009, the United States Court of Appeals for the District of Columbia upheld the FCC's order that banned the use of exclusivity clauses. This decision does not change the status quo; therefore, all cable operators must continue to cease entering into and enforcing contracts that violate the FCC's 2007 order.

The Court of Appeals determined that the FCC was "well within the bounds" to institute the ban. By enacting this ban in 2007 the FCC sought to bolster greater competition in the market for delivery of multichannel video programming.

The FCC's ban increased choice and competition for consumers residing in MDUs and other real estate developments. The FCC determined that existing exclusivity agreements were unfair competition. The FCC asserted that, "Exclusivity clauses deny MDU residents the benefits of increased competition, including lower prices and the availability of more channels and more diverse content."

The ruling should be considered a "win" for consumers living in MDUs and other real estate developments who will be able to reap the benefits of video competition. This ruling is also considered to be a victory for other telecommunications companies like AT&T and Verizon which have been attempting to get into the video business to compete with cable companies for viewership. Without the FCC's ban it would be possible for cable companies to restrict the programming that is received by subscribers and consumers.

Other related issues to be decided by the FCC:

- Can cable companies refuse to provide competitors with access to regional sports programming?
- The Court's decision does not address other forms of agreements between property owners and programming distributors. For example, should the FCC regulate exclusive marketing agreements between cable companies and MDUs?

If your Association has a contract with a cable company or is contemplating entering into an agreement with a cable company, you may want to have your attorney review it.

Stay tuned for additional updates. 



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### APPOINTMENTS

Erik F. Hansen has been reappointed to the Minnesota Supreme Court Advisory Committee on the Rules of Civil Appellate Procedure for a three year term. Barton C. Gernander has been reappointed to the MSBA Court Rules and Administration Committee.

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